



Policy Proposition

Recommendations for an Artist's Resale Right in Canada

Updated: October 2015

Table of Contents

Section	Page Number
Executive Summary	3
Issue	4
Recommendations	4
Rationale	4
Proposed Approach and Options	5
Considerations	12
Due Diligence	15
Annex 1: Strategic Communications	16
Annex 2: Countries that Operate an Artist's Resale Right	19
Annex 3: Comparison of the Implementation of the ARR in other Countries	20
Annex 4: Frequently Asked Questions about the Artist's Resale Right	23
Annex 5: The Canadian Art Market	29
Annex 6: Copyright Management and the ARR	31
Annex 7: Case Studies	33
Annex 8: Draft Legislative Language	36

EXECUTIVE SUMMARY: The Artist's Resale Right

Instituting the Artist's Resale Right would allow visual artists to share in the profits being made from their work and align Canada with our trading partners.

- The Artist's Resale Right would give artists 5% when their work is resold.
 - The full value of an artwork often isn't realized on the initial sale. It is common for visual art to appreciate in value over time, as the reputation of the artist grows.
 - For example, Inuit artist, Kenojuak Ashevak, sold her piece *Enchanted Owl* in 1960 for \$24. It was later resold for \$58,650. Ashevak got nothing from the resale.
- Once established in Canada, artists would be able to benefit from reciprocal arrangements with other countries where the Artist's Resale Right exists.
 - At least 93 countries world-wide have legislated the Artist's Resale Right, including Australia, the United Kingdom and Ireland.
- Canada's Indigenous artists in particular are losing out on the tremendous profits being made on their work in the secondary market.
 - Many artists living in isolated northern communities live in impoverished conditions, while their work dramatically increases in value.
- The income potential of visual artists is much smaller than artists in other disciplines as they do not generally produce multiples.
 - Half of visual artists in Canada earn less than \$18,000 per year.
 - Even Governor General Award winning artists find it difficult if not impossible to make a living from their art. Some have incomes that fall significantly below the national average and others work full time jobs to subsidize their practice.
- The adoption of the Artist's Resale Right requires no ongoing costs for government.
 - The Artist's Resale Right is a royalty system that would not require ongoing financial support from the Canadian government. The ARR is not a tax, but a copyright royalty. It is not collected or paid by government.

POLICY RECOMMENDATIONS

ISSUE

Instituting the Artist's Resale Right would allow visual artists to share in the profits being made from their work, and align Canada with our trade partners.

RECOMMENDATIONS

It is recommended that:

- Artists receive 5% from the public sale of their work in the secondary market.

Proposed course of action:

- That the Minister of Canadian Heritage present the Artist's Resale Right as an addition to the *Copyright Act*.

RATIONALE

The Artist's Resale Right (ARR), also known as *droit de suite*, entitles visual artists to share in the ongoing commercial success of their work by entitling them to a percentage of the sale price each time their work is resold through an auction house or commercial gallery.

The full value of an artwork often isn't realized on the initial sale. It is common for visual art to appreciate in value over time. If an artwork is resold in the secondary market, Canadian artists do not currently benefit financially from further sales of that work, even though its increased value is usually based on the experience and reputation of the artist.

For example, acclaimed Inuit artist, Kenojuak Ashevak, sold her piece *Enchanted Owl* in 1960 for \$24. It was later resold by Waddington's auction house in 2001 for \$58,650. Ashevak received no profits from the auction sale.

An implication of the ARR is that it offers significant income potential for Canadian visual artists, who often rely on many sources of income to make a living, including sales, exhibition fees, and other projects or forms of employment. The establishment of this new right will allow artists to achieve a more sustainable living income based on the value of their own work, in a way that is not reliant on public funding availability.

The ARR was first legislated in France in 1920. This initiative was subsequently widely adopted, and as many as 93 countries world-wide have endorsed the ARR.

How the Artist's Resale Right benefits Canadian visual artists

The ARR is of particular importance to Canadian visual artists because the average income of an artist is low, and their income potential is even lower than that of artists from other disciplines. In 2010, the average earnings of a visual artist were \$24,672, approximately half of the typical Canadian worker (\$48,100).¹ The median, or typical, income earned by visual artists was \$17,383, representing a 46% earnings gap with the median income in the overall labour force. The average earnings of a visual artist were lower than the average earnings of artists of all disciplines (\$32,770). This may be because visual artists generally do not produce multiples. They are usually the creators of a singular, original object. The ARR was designed to correct this inherent inequity in copyright, as it applies to visual artists.

By comparison, writers and performing artists have the ability to disseminate mass quantities of their copyright materials through books, CD, DVDs, etc. They are able to receive royalty payments for as long as copies of their work sells, and as their fame grows. The ARR puts artists on a level playing field with writers and composers, who have higher average earnings than visual artists. Visual artists have the ability to collect royalties from reproductions of their work, but as indicated in a recent study, ARR payments can be more significant for visual artists than other forms of authors' rights, including reproductions. For example, in Italy, visual artists received ten times the amount of royalties for ARR than other reproduction rights in 2014.²

The ARR increases the ability for artists to earn a living from their work for as long as it remains popular, and validates their role in its ongoing commercial success. Even modest royalties can make a difference to an artist's ability to survive and continue to make art. The artist is an important contributor to their work's value, and without the artist, the artwork would not exist.

PROPOSED APPROACH AND OPTIONS

Incorporation of the Artist's Resale Right into the Canadian *Copyright Act*

The associations that represent visual artists in Canada and Quebec, the Canadian Artists' Representation (CARFAC) and le Regroupement des artistes en arts visuels du Québec (RAAV), are recommending that an ARR be added to the *Canadian Copyright Act*. The *Copyright Act* is the preferred route for this legislation due to several important factors:

- The proposed term of the ARR is the same as copyright protection.

¹ Hill Strategies. *A Statistical Profile of Artists in Canada, Based on the 2010 Census*. (Canada Council for the Arts, Department of Canadian Heritage, and Ontario Arts Council, 2012).

² Sam Ricketson, *Proposed international treaty on droit de suite/resale royalty right for visual artists*, presented to CISAC in Geneva, June 2014, p 47.



The Enchanted Owl

Kenojuak Ashevak

Cape Dorset, Nunavut

Original selling price: \$24

Resold in November 2001 for \$58,650

What the artist would have received if Canada had an ARR of 5%: \$2,933



The Earth Returns to Life

Tony Urquhart

Colborne, Ontario

Original selling price: \$250

Resold in November 2009 for \$7,500

What the artist would have received if Canada had an ARR of 5%: \$375

- The works that are to be covered by the ARR include those works listed in the visual art works identified by the *Canadian Copyright Act*.
- The eligibility of artists and their heirs are determined in the same manner as set out in the *Copyright Act*.

The ARR is also well placed within copyright legislation because it relates to an artist's moral rights, as it recognizes an artist's continuing relationship with his or her work. The right to receive the ARR is derived from the right of attribution of authorship, as it connects the creator with the work after the physical work is sold.

By adding the ARR to Canada's *Copyright Act*, we are consistent with most other international copyright laws. While some countries chose to create a new stand-alone Act, at least 22 members of the European Union have included it through their copyright and intellectual property laws. This allows for comparative studies on the implementation of the legislation and its impact to be undertaken with ease. Canada is able to consult with other nations who have adopted the ARR regarding issues of drafting and implementation, and studies of its effectiveness have recently been conducted.

Eligibility of beneficiaries and works

As it is intended that the ARR be incorporated into the *Canadian Copyright Act*, it is suggested that the eligible original artistic works for remuneration be those defined by the Act, including paintings, drawings, photographs, engravings, sculptures, works of artistic craftsmanship, and compilations of artistic works.³ For the purposes of ARR, it is recommended that maps, charts, plans, and architectural works be excluded, but may include collage, print, lithograph, tapestry, ceramic, or glassware, as is the norm in other countries. The ARR could be extended to other forms of works with artistic merit as determined necessarily by those drafting the legislation.

In adherence to the *droit de suite* clause of the Berne Convention⁴, all artists and their estates would be eligible for compensation inasmuch as it is provided for in Canadian legislation. It is proposed that amendments to the *Canadian Copyright Act* make the ARR available to every artist who is a Canadian citizen or permanent resident, whose work is protected under the Act. The ARR should also be available to citizens or permanent residents of other countries where the ARR is legislated, if their work is sold in Canada and meets all eligibility criteria. In addition, the ARR should be available to the estates of artists whose works are sold within the usual copyright limitation period: in Canada, an artist's rights extend to 50 years after their death.⁵ Estates are included in all ARR legislation of which CARFAC is aware.

³ *Copyright Act*. R.S., c. C-30, s. 2.

⁴ *Berne Convention for the Protection of Literary and Artistic Works*, Article 14ter (1).

⁵ *Copyright Act*. R.S., c. C-30, s. 7.

The *droit de suite* was legislated in France as a response to the outrage caused when the sale of Jean-Francoise Millet's painting "The Angelus" sold for a huge profit for the seller, while Millet's widow and children lived in poverty after his untimely death. While our primary concern for the ARR rests with living Canadian artists, there are many costs involved in maintaining an artist's estate. In the United Kingdom, it has been argued that: "works of art often need to be stored, preserved and restored, and ARR royalties provide an income to estates to allow them to do this. This essential work helps secure the UK's cultural legacy, benefits museums and gallery exhibition programmes and supports the UK's position as a key destination for cultural tourism."⁶ Furthermore, artists are typically self-employed workers that do not receive social benefits such as Employment Insurance, Canada Pension Plan, workplace pensions, or life insurance policies that employees may receive. The National Association of Visual Arts in Australia reports that artworks are one of the few items of value that an artist can leave to their heirs, and that artists are relieved knowing they can continue to provide for their family after they are gone.⁷

CARFAC and RAAV strongly advocate that the right be inalienable, meaning non-transferable or waivable, on the basis that it protects artists from being persuaded to assign, waive, or sell the right under overt or subtle forms of duress. Artists are almost always in a weak bargaining position and are frequently pressured not to exercise their rights. It is often argued that they will gain other kinds of career benefits instead of monetary compensation. By making the right inalienable, we can ensure that artists who have assigned their copyrights to another party will retain the ability to claim royalties on future sales. Furthermore, there are few countries with an ARR that we are aware of that do not require it to be an inalienable right. In Australia, where the ARR is not inalienable, it has been reported that 54 out of the 56 artists that have not collected royalties have done so because the work was sold at a charity auction. We are open to making exceptions for charitable organizations, but would prefer if the artist was able to claim their royalty and donate money back to the charity in exchange for a tax receipt.

Proposed Rates and Terms

- It is recommended that artists whose works sell for \$1,000 CAD or more are eligible for the Artist's Resale Right.

This is consistent with what has been accepted in Australia and the state of California. In some European Union states the threshold is €3,000 but it has been argued that many more artists have work selling between €1,000 and €3,000. It is sometimes claimed that only a few wealthy artists benefit from the ARR, which is why we recommend a lower eligibility

⁶ Design and Artists Copyright Society, "Artist's Resale Right", Briefing note, 2015.

⁷ National Association of Visual Arts, "NAVA's Response to the Review of the Artists' Resale Royalty Scheme" 2013.

threshold. It will benefit a greater number of people, and a \$50 royalty on a \$1,000 sale is valuable to the artist while also being reasonable for administration purposes.

- The fee recommended to be paid to the artist is 5% of the gross sale prior to taxation.

For example, if a piece of art sold at a gallery for \$4,500, the artist or their heirs would be entitled to \$225. We propose a rate of 5% because it concurs with several other ARR royalty rates worldwide⁸, and it provides reasonable returns to artists without placing an undue burden on the seller or purchaser. While the EU states have all adopted a rate based on a sliding scale related to sale price, most countries previously had a flat rate of 5% and were forced to compromise with the sliding scale in order to get compliance from all member states. We feel that a flat rate is preferable, given that the Canadian art market rarely sees high sale prices of the sort found in the UK and America, and this differentiation is an unnecessary administrative burden.

- Like most countries, we recommend that the royalty be jointly payable by the seller and art market professional (AMP)

Buyers already pay a substantial buyer's premium at auction. An AMP is an auction house, art dealer, or a person otherwise involved in the business of dealing in artworks. The AMP may split the fee with the seller, or absorb the cost. It is recommended that the AMP be responsible for reporting sales and issuing payments. Similarly, in Australia, the seller and AMP are jointly responsible for paying the royalty but only the seller is required to report sales. The Australian Copyright Agency has recommended that the Australian law be amended so that copyright collecting societies have the legislative power to inspect sales records if required, to ensure compliance without having to pursue the matter in court. We would be interested in similar measures for Canada. We also recommend that sufficient fines or penalties be put into place for non-compliance by AMPs that have not paid the required royalties.

Administration and Collection

- It is proposed that the administration of the ARR in Canada be handled through mandatory collective management, and that reporting enforcement measures be put in place.

⁸ At present, we confirm that Armenia, Australia, Azerbaijan, Brazil, California, Chile, the Philippines, and Senegal all have royalties of 5%, and many EU countries have chosen 5% as the rate for works sold up to €50,000. The US proposed a 5% royalty in their federal bill, presented in 2015.



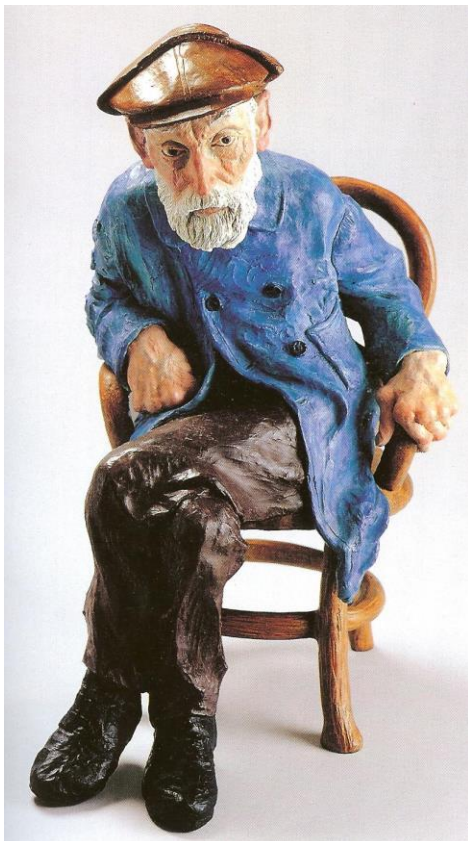
Ouvri

Marcel Barbeau

Montreal, Quebec

Resold in May 2008 for \$86,250

What the artist would have received if Canada had an ARR of 5%: \$4,125



Auguste

Joe Fafard

Lumsden, Saskatchewan

Original selling price: \$16,000

Resold in 2009 for \$55,575

What the artist would have received if Canada had an ARR of 5%: \$2,779

In many countries where the ARR is in place, it is required by law that an artist collects the ARR through a copyright collecting society, and that AMPs report on all sales through that society.

The facilitation of the program through collective management would allow for cost efficiency and effectiveness in the process. It is easier to maintain a registered database of artists and AMPs if such a system is in place, and it is more efficient for dealers to report sales and turnover to collecting societies rather than individual artists.

There are currently two copyright collectives in Canada, and it is recommended that these collectives administer the ARR on behalf of their respective memberships, with unaffiliated artists receiving payments from one central collective society. This is how it works elsewhere, such as the UK. The Canadian Artists Representation Copyright Collective Inc. (CARCC) is well situated to distribute payments to their members, and we recommend that they also administer the ARR for all artists unaffiliated with a collective. CARCC currently has a database of Canadian artist members and administers the negotiation and payment of fees to artists resulting from exhibitions, reprography, and other copyright related use of their works. CARCC maintains bilingual offices in Ottawa and Montreal, and has the most number of Canadian visual artists as members. They remain the only non-profit copyright collective in Canada that is run by visual artists, for visual artists. They would work with other collectives to ensure that all eligible Canadian artists will receive royalties. Further proposals for collective management of ARR payments can be found in Annex 6.

- Once an ARR is established in Canada, artists would be able to benefit from reciprocal arrangements with other countries where the ARR exists, and where that artist's work may be resold.

CARCC is a member of CISAC, the International Confederation of Societies of Authors and Composers. CISAC is a long established network of collecting agencies in over 30 countries world-wide, many of which collect the ARR relating to sales made in their country. CARFAC and RAAV propose it is time for Canada to legislate the ARR in order to strengthen its merit within the international community, and to generate greater income potential for Canada's visual artists.

International Reciprocity

In September 2001, the European Parliament and the Council of Europe issued a directive requiring all member states to legislate the ARR fully by 2012. Australia implemented an Act in 2009, and in North America, California has had the ARR since 1977. Efforts to enact a federal bill in the United States, as well as China and Switzerland, are currently underway. A full list of the 93 countries that have adopted the Artist's Resale Right can be found in Annex 2.

The Artist's Resale Right strengthens our relationships with international trade partners, and there is now a strong push for the international expansion of the ARR. It was part of the agenda in Canada's negotiations with Europe for the Comprehensive and Economic Trade Agreement (CETA), and may come up in the Trans-Pacific Partnership (TPP) negotiations. According to a recent study, nearly half of the Berne Convention signatories have implemented the ARR, which puts artists in those countries at an advantage compared to those that have not legislated it.⁹ Canada has only ratified the 1928 version of Berne, but the North American Free Trade Agreement and the Agreement on Trade-Related Aspects of Intellectual Property Rights essentially bind it to the Paris Act of 1971, where the ARR was introduced as an optional provision under Article 14 *ter*. The Ricketson study includes draft proposals for an international treaty on ARR. In July 2015, CISAC – the International Confederation of Societies of Authors and Composers, organized an event during World Intellectual Property Organization's Standing Committee on Copyright meetings, where this study was discussed. It was recommended that a new international treaty be discussed at the WIPO committee's next meeting at the end of 2015.

The ARR provides a valuable income source for artists. In the UK, it was reported in 2014 that "nearly £41 million in ARR royalties [have been paid] to over 3,700 artists and estates since 2006", and that £9.6 million was paid to over 1,500 artists and estates in 2013 alone.¹⁰ They also reported that living artists received 57% of the royalties in 2014, representing £3.1 million. In Australia, more than \$3.5 million AUD has been paid to over 1,070 artists and estates since 2010. Over 60% of Australian royalties have been paid to living artists, and over 65% of recipients are Indigenous or Torres Strait Islander artists, who have received 40% of the total royalties paid.¹¹ The development of an ARR in Canada will put Canadian artists on a more equal footing with artists in other countries with an established Artist's Resale Right.

CONSIDERATIONS

Key Perspectives:

Indigenous Artists

While all Canadian artists have the potential to benefit from an ARR, Canada's Indigenous artists would potentially have the most to gain.

⁹ Sam Ricketson, *Proposed international treaty on droit de suite/resale royalty right for visual artists*, presented to CISAC in Geneva, June 2015, p 19.

¹⁰ Design and Artists Copyright Society, "Artist's Resale Right", Briefing note, 2015.

¹¹ Copyright Agency, "Resale Royalty" <http://www.resaleroyalty.org.au>. Accessed August 31, 2015.

- Indigenous artists have established themselves in the international art market as a unique identity and brand, yet they are losing out on the tremendous profits being made on their work in the secondary market.
- Many artists, particularly those living in isolated northern communities, live in impoverished conditions, while their work dramatically increases in value.
 - This same situation motivated the Australian government to implement the ARR, after the late Clifford Possum Tjapaltjarri's painting, *Warlugulong*, sold for \$2.4 million in 2007, thirty years after the artist sold the work to the Commonwealth Bank for a mere \$1,200. The artist and his estate received nothing from the second sale.

The visual art market is a particularly significant economic driver in Nunavut.

- In 2010, an economic impact study of Nunavut arts and crafts estimated that \$52 million is spent per year on Inuit art from Nunavut, not including wholesale sales.
 - A large portion of those transactions were in the resale market.¹²
- The Government of Nunavut is supportive of the Artist's Resale Right.
 - Premier Taptuna presented and endorsed it May 2012 when he was Minister of Economic Development and Transportation. Further, the community of Rankin Inlet formally added its support in April 2014.

Canada's Indigenous artists are supportive of bringing the ARR to Canada.

- As award winning artist, Daphne Odjig says, "This is a wonderful way for artists to benefit from their hard work and dedication to, in many cases, their life's work. In my case it was not until later in life that I have achieved a semblance of success, and at 92 years of age and surviving on a small pension and returns on dwindling investments it would definitely have been helpful to have had a small stream of extra income."

Senior Artists

Established senior artists would also receive the benefit of an ARR.

- Research from the Canadian Senior Artist Resource Network shows that senior visual artists (over 65) have median arts earnings of about \$5,000, which is the lowest of any artistic discipline,¹³ and that 32% of elder artists are at a high financial risk¹⁴.

¹² Government of Nunavut, Department of Economic Development & Transportation. "Economic Impact Study: Nunavut Arts and Crafts", June 2010.

¹³ Joysanne Sidimus and Kelly Hill, *Senior Artists in Canada*. (Senior Artist Research Project: February 2010). P.59.

¹⁴ Hill Strategies. *At Risk Senior Artists*. (Senior Artist Research Project, February 2010), P.2



Primary Fruit

Mary Pratt

St. John's, Newfoundland

Sold: November 2010

Price: \$30,000

What the artist would have received if Canada had an ARR of 5%: \$1,500



Byzantium Sign #5

Ron Bloore

Toronto, Ontario

Sold: May 2006

Price: \$55,200

What the artist would have received if
Canada had an ARR of 5%: \$2760

- An initiative such as the ARR would provide a substantial benefit to Canada's senior artists, in particular. It is often taken for granted that artists thrive once they become
- established, but CARFAC has found that even Governor General Award winning artists find it difficult, if not impossible, to make a living from their art.

The implementation of an ARR in Canada would provide greater financial independence for our senior artists, many of whom are in need.

- Renowned Canadian artist Mary Pratt sold a painting in 1966 for a mere \$40, which is now valued at \$20,000. As an established senior artist with growing health concerns, she now struggles to find the energy to produce enough work to maintain a decent living, and without an ARR, she is unable to benefit from the drastically increased value of her early work.
- Officer of the Order of Canada, artist Marcel Barbeau, gave an artwork to a friend in 1956 which was later resold by his heir for \$86,000. "I did not receive one cent from this sale," Barbeau says, "Others are getting rich on my works, while my situation remains very insecure at 85 years of age."

DUE DILIGENCE

The Artist's Resale Right is a royalty system that would not require ongoing financial support from the Canadian government. The ARR is not a tax, but a copyright royalty. It is not collected or paid by government.

There may be some start-up costs for collecting societies to administer the ARR, but we do not anticipate the necessity of public funds in order to move forward. We acknowledge that the Australian government provided funding to help establish the collecting mechanism. We believe that the Canadian situation is more like that in Ireland where in the early years the collective operated on a lean budget with one part-time staff member.

Annex 1: Strategic Communications

1. Communications Objectives and Considerations

- The objective of the communications plan is to demonstrate the government's commitment to the cultural and creative industries through support for artists.
- The initiative fits into the government's agenda in the areas of cultural and creative industries, jobs and innovation as well as fighting poverty.

2. Analysis of Public Environment

- Since 2009, several media outlets have covered the lack of compensation for artists in the secondary market.
 - These include the *Globe and Mail*, the *Toronto Star*, the *Vancouver Sun*, the *Ottawa Citizen*, Global Television, CBC radio and television (including the programs *Q*, *The National* and *Metro Morning*), the *Economist*, *le Devoir*, TVA, *Canadian Art*, the *Georgia Straight* and others.
 - A full media report is available on request.
- The Government of Nunavut is supportive of the Artist's Resale Right.
 - Premier Taptuna presented and endorsed the ARR May 2012 when he was Minister of Economic Development and Transportation.
 - The community of Rankin Inlet formally added its support in April 2014.
- The associations that represent artists in Canada and Quebec, CARFAC and RAAV, have been calling for the adoption of an Artist's Resale Right for several years.
- Several other arts organizations have endorsed the ARR.
 - These include: la Fédération culturelle canadienne-française; the Canadian Arts Presenting Association; the Canadian Dance Assembly; The Alliance of Canadian Cinema, Television and Radio Artists; The Canadian Federation of Musicians; The Canadian League of Composers; The Creators Copyright Coalition; Access Copyright; The Nunavut Arts and Crafts Association; Illustration Québec; DAMIC – a Quebec coalition of artists and copyright collectives; The Royal Canadian Academy of Arts; The Canadian Crafts Federation; The Artist-Run Centres and Collectives Conference; The Aboriginal Curatorial Collective; and l'Association des groupes en arts visuels francophones.
- The Art Dealers' Association of Canada have expressed concerns that the ARR may be an administrative burden or have a negative impact on the Canadian art market.

- Evidence from countries that have the ARR suggests this is not the case. CARFAC has consulted with art dealers and have addressed most of their concerns.
- Canadian auction houses have similarly expressed concerns, but have indicated that if the ARR were legislated, they would comply with its terms.
- Some high profile Canadian art collectors have provided vocal support for the ARR.

3. Anticipated Reaction

- CARFAC and RAAV could support the government's announcement by sending a release to our members and media contacts, including a statement from our Presidents and prominent artists in our network.
- The Art Dealers' Association of Canada may express their concerns publicly.
 - For detailed responses to the questions art dealers have raised in the past, see our FAQ (below).

4. Storyline and Core Messages

- The Artist's Resale Right has no ongoing costs for the government.
- The Artist's Resale Right would give artists 5% when their work is resold.
 - The full value of an artwork often isn't realized on the initial sale. It is common for visual art to appreciate in value over time, as the reputation of the artist grows.
 - For example, Inuit artist, Kenojuak Ashevak, sold her piece *Enchanted Owl* in 1960 for \$24. It was later resold at auction for \$58,650. Ashevak did not received a penny from the resale.
- Canada's Indigenous artists in particular are losing out on the tremendous profits being made on their work in the secondary market.
- The income potential of visual artists is much smaller than artists in other disciplines as they do not generally produce multiples.
 - Half of visual artists in Canada earn less than \$18,000/year.
 - Even Governor General Award winning artists find it difficult if not impossible to make a living from their art. Some have incomes that fall significantly below the national average and others work full time jobs to subsidize their practice.

5. Announcement Strategy

- The announcement of the ARR bill would be made by the Minister of Canadian Heritage.

- The ideal time to make an announcement is during auction season which happens every year in the spring and fall.
- CARFAC and RAAV would offer support to the government and the Minister's office including:
 - Making their presidents and Executive Directors available for media interviews and other events;
 - A release to the media in support of the government's announcement;
 - Messages to artists and visual arts stakeholders congratulating the government and explaining the benefits of the change;
 - Posts with information on their websites for artists and the public to enable them to understand the implications of the ARR;
 - Providing community representative contacts for regional events about the ARR;
 - Arranging speaking and photo opportunities for government representatives.
- Several prominent Canadian artists with work in the resale market could provide statements and/or be available for interviews. Those who have already publicly supported the Artist's Resale Right include:
 - Daphne Odjig, Governor General Award winner, Order of Canada (Kelowna, BC)
 - Joe Fafard, Officer of the Order of Canada (Lumsden, SK)
 - David Blackwood, artist, Order of Canada (Port Hope, ON/ Wesleyville, NL)
 - Tony Urquhart, Governor General Award winner (Colborne, ON)
 - Rita Letendre, Governor General Award winner, Order of Canada (Toronto, ON)
 - Michael Snow, Governor General Award winner, Companion of the Order of Canada (Toronto, ON)
 - Claude Tousignant, Governor General Award winner, Officer of the Order of Canada (Montreal, QC)
 - Marcel Barbeau, Officer of the Order of Canada (Montreal, QC)
 - Christopher Pratt, Companion of the Order of Canada (Mount Carmel, NL)

Annex 2: Countries that operate an Artist's Resale Right

Members of the European Union = 28

Austria	Belgium	Bulgaria	Croatia
Cyprus	Czech Republic	Denmark	Estonia
Finland	France	Germany	Greece
Hungary	Ireland	Italy	Latvia
Lithuania	Luxembourg	Malta	The Netherlands
Poland	Portugal	Romania	Slovakia
Slovenia	Spain	Sweden	United Kingdom

Countries outside the European Union = 65

Albania	Algeria	Armenia	Australia
Azerbaijan	Belarus	Benin	Bolivia
Bosnia & Herzegovina	Brazil	Burkina Faso	Cameroon
Chad	Chile	Columbia	Comoros
Congo	Costa Rica	Djibouti	Dominican Republic
Ecuador	El Salvador	Gabon	Georgia
Guatemala	Guinea	The Holy See	Honduras
Iceland	India	Iraq	Ivory Coast
Kazakhstan	Kyrgyzstan	Laos	Liechtenstein
Macedonia (FYROM)	Madagascar	Mali	Mauritius
Mexico	Moldova	Monaco	Mongolia
Montenegro	Morocco	Nicaragua	Nigeria
Norway	Panama	Paraguay	Peru
Philippines	Russian Federation	Rwanda	Senegal
Serbia	Togo	Tunisia	Turkey
Ukraine	United States (CA)	Uruguay	Uzbekistan
Venezuela			

Sources:

Office of the Register of Copyright, *Resale Royalties: An Updated Analysis*, Washington, December 2013 ('USCO 2013 Report'), p 17.

CISAC, EVA and GESAC, *What is the Artists Resale Right*, Paris and Brussels, 2014, p 5 (New Zealand has been excluded from their list as they have not adopted legislation).

Sam Ricketson, *Proposed international treaty on droit de suite/resale royalty right for visual artists*, presented to CISAC in Geneva, June 2014, p 231.

Annex 3: Comparison of the implementation of the ARR in other countries

Europe

The implementation of Article 14ter, the *droit de suite*, of the Berne Convention has been mandated within a European Union Directive. The 2001 Directive proposed methods for implementing the *droit de suite* which would result in a harmonized effect among member states ensuring that all member states complied by putting some form of *droit de suite* into their legislation by January 1, 2006. Applicable fees are paid to the artists according to a scale range from 0.25% to 4% or 5%, based on sales price, to a maximum of €12,500. The minimum threshold sale price is €1,000. The Directive also requires that the member states continually update the European Union of their progress and the laws effect.

Examples of how the ARR works in European countries:

France is the birthplace of *droit de suite*, where it has been in place since 1920. The law was put into place through the *Intellectual Property Code*, and royalties are collected through ADAGP (Association for the Defence of Graphic and Plastic Arts). In 2001, the law was subject to some change in order to conform to the uniformity requirements of the EU Directive. In France, artists are eligible for ARR if they are citizens, or have lived in France for at least five years. The *droit de suite* applies to any sale of an artwork valued over €750. Art Market Professionals may choose to pay royalties quarterly or yearly, and ADAGP pays beneficiaries within 30 days of receipt of payment. In 2013, €12,443,901 was collected from the 24,293 eligible transactions involving 1,938 artists – 45% of whom were still living.

The ARR was put into place in the United Kingdom in 2006, and was extended to include estates in 2012. In the UK, it was reported in 2014 that “nearly £41 million in ARR royalties [have been paid] to over 3,700 artists and estates since 2006”, and that £9.6 million was paid to over 1,500 artists and estates in 2013.³⁵ The distribution of the ARR to artists is administered primarily by the Design & Artists' Copyright Society (DACS). DACS charges a 15% administrative fee on all royalties collected. Research undertaken on behalf of DACS and the UK Copyright Office indicated that the implementation of the ARR has not had a negative impact on the art market, despite initial fears from the art trade. The 2015 Art Market Report published by the European Fine Art Foundation found that Britain increased its global market share by 17% between 2013 and 2014, and was valued at €11.2 billion. There have been some recent criticisms that not all art market professionals (AMPs) are complying with the ARR in the UK, so in 2014 DACS targeted those that they believed were not declaring eligible sales, and over £100,000 in previously undeclared royalties were collected within six months.

³⁵ Design and Artists Copyright Society, “Artist’s Resale Right”, Briefing note, 2015.

In Denmark, the ARR was introduced to the Danish Copyright Act in 1990. COPY-DAN was appointed by the Ministry of Culture to administer the right, and they charge an administrative fee of 15%. ARR royalties are reported on and paid on a quarterly basis. Living artists as well as estates are entitled to collect the right, and most sales qualify for the 5% royalty. In 1998, approximately 2,507 Danish works were eligible for ARR collection, at a value of €8.3 million. Germany introduced the ARR in 1965, with further amendments made to the *Law on Copyright and Neighbouring Rights* in 2006, following the EU directive. VG Bild-Kunst is the German collecting society, which charges a 12% administration fee. The collective pays royalties to eligible artists and estates once a year. In 2014, 1,400 German artists and estates were paid €7.2 million.

Australia

The *Resale Royalty Right for Visual Artists Bill* was passed by Australian Parliament in 2009 and commenced in June 2010. A work is eligible if it is sold for more than \$1,000 AUD, and royalties are 5% of the sale price, with no maximum capped fee. Between 2010 and 2015, over \$3.5 million have been paid to more than 1,070 artists. The lowest royalty paid is \$50, and the highest royalty paid so far is \$55,000, with most royalties falling between \$50 and \$500. Over 65% of those paid are Indigenous or Torres Strait Islander artists, who have received 40% of the total royalties generated. Of the top 50 artists that have received the most money, 22 of them are Indigenous or Torres Strait Islanders. Over 60% of the royalties collected have been paid to living artists. Most artists have been paid one or two royalties, with some receiving multiple payments. According to the Australian government's 2013 review of the ARR, the 50 highest volume art market professionals make up about 90% of secondary sales, and have been compliant with the law. The other 10% represent 550 commercial galleries which deal mainly in the primary market, and over half of them are compliant. The government appointed the Copyright Agency to administer the ARR, but artists may also choose to collect it independently. This has made the reporting and collection process confusing for most parties directly involved. In the 2013 review, several submissions stated that mandatory collective management would make the process of reporting and paying royalties easier. Another disadvantageous anomaly of the Australian legislation is that it applies only on resales where the seller acquires an artwork after the ARR commenced in 2009.

United States of America

Senators Tammy Baldwin and Ed Markey, and Congressman Jerrold Nadler introduced the American Royalties Too (ART) Act of 2015, on April 16, 2015. If approved, the Act would provide federal legislation of the ARR in the United States. Nadler and Baldwin had sponsored a similar bill the year before, and previous attempts have been presented since the 1980s. The ARR was supported by the US Copyright Office in 2013. The proposed Act would provide a 5% royalty on works sold for \$5,000 or more, to a maximum of \$35,000 per

transaction. In order to qualify, the work must be sold at a public auction house that has sold at least \$1 million during the previous year. Collective management of the ARR would be mandatory, and royalty payments would be made on a quarterly basis.

State of California

California is the only American state to recognize an ARR, which it has done since 1977 through the *California Resale Royalty Act*. The minimum threshold for an artwork to be eligible is \$1,000 and a 5% royalty is applied. The royalty is not payable if the sale is between art dealers. In California, the burden is on the seller to locate the artist and pay the appropriate fee. Collective management is not required, and a very low percentage of royalties is collected as artists may not always be aware that their work has sold, or what AMPs may be selling their work. If the artist cannot be located within 90 days of the sale, the fee is given to the California Arts Council. The California Arts Council then collects and distributes fees to artists within seven years of the sale. If the artist cannot be found after seven years, the money is reallocated to the California Arts Council's public art program.

The eligibility criteria of the California law was recently challenged and the Act declared unconstitutional in 2012, as a violation of the Dormant Commerce Clause by the U.S. District Court for the Central District of California. In May 2015, the US Ninth Circuit Court of Appeals upheld the ruling, but unlike the District Court, ruled that the offending clause could be removed without having to strike the entire Act. Before this ruling, in order to qualify the artist had to be a Californian resident, or the sale had to take place in California, or the seller had to be resident of California. This meant that if a collector from California also lived in New York, bought an artwork from New York, and then sold it in an auction in New York, the ARR would be payable. The courts found that this created potential for one state's laws to affect interstate commerce. The Ninth Circuit Court found that "the seller resides in California or" could be removed, in order to correct this problem. If the US had a federal law, this issue would never have gone to the courts. It is therefore recommended that Canada not pursue a provincial or territorial ARR instead of adopting federal legislation.

Annex 4: Frequently Asked Questions about the Artist's Resale Right

How much money will this mean for artists?

Most auction houses have two sales of Canadian art each year, and there are other smaller auction houses not included in this total, so it is reasonable to assume that with auction houses alone, living artists are missing out on about \$250,000 in royalties. In addition, other sources of ARR would be from online auctions, auctions that take place abroad, sales at commercial galleries, and estate sales. This is a substantial amount of money, but it should be noted that it is only 5% of the total sales. Auction houses charge a fee known as a Buyer's Premium, and in Canada those fees usually amount to 15-20% of the hammer price of each Lot, which is added to the winning bid and is payable as part of the total purchase price. Similarly, art dealers typically take 50% of the retail sales price on work that they sell.

What does this mean for individual artists? As an example, four pieces by Joe Fafard were sold in November 2011, including one piece that went for \$48,000 – more than three times what he received for it when he originally sold it in 1989. He could have received almost \$4,000 in ARR royalties. Most royalties that Canadians would receive are modestly low, by comparison to the overall hammer price, ranging generally from \$200 to \$4,000. The largest would have been \$64,350, payable to Alex Colville for a piece that broke a sales record for a living Canadian at a Canadian auction: \$1,278,000 in 2010. It is unlikely that Colville was paid that much the first time it was sold. Further, the other royalties in that same sale would have ranged from \$351 to \$4,387. While these royalties are relatively low, it is an important income source for artists, and an acknowledgement of the growing importance of their work's value.

Do all artists support the Artist's Resale Right?

Since 2010, a number of consultations with artists on the issue of the ARR have taken place across the country, and artists have been in favor of it. We have received several endorsements from artists and other artists' associations. Even artists who spoke against it in the UK have since deposited their cheques. These artists may have felt pressure from their dealers to denounce it publicly before it was put into law. It is for this reason that we recommend the right be inalienable so that artists, who are often pressured not to exercise their rights, cannot be convinced to waive it. If an artist truly does not want the payment, there is nothing to stop them from donating the money as they see fit.

If I sold my house, I don't expect to receive royalties on future sales. Why do artists deserve future payments on something they already sold?

With copyright, ownership and duration of rights are more complex than they are for most other physical objects. You do not own copyright in your house, car, etc. Artists retain

copyright even when their work is sold, unless they sign those rights over to someone else. With when it comes to visual art, the intellectual property is related to a physical object. That is what sets visual artists apart from other artists. They are usually the creators of a singular, original object. By comparison, writers and performing artists have the ability to disseminate mass quantities of their copyright-protected work through books, CDs, DVDs, etc., and are able to receive royalty payments for as long as copies of their work sells, and as their fame grows. Other artists retain the right to financial benefit from subsequent uses of their work. The ARR similarly enables artists to earn a living from their work as its success grows, and allows artists to share in its ongoing value. The artist is an important contributor to their work's value, and without the artist, the artwork would not exist.

Will the right only benefit a few wealthy heirs of deceased famous artists?

No. While the ARR was initially set up to assist destitute families of deceased artists, most countries have designed their laws to have a greater impact for as many living artists as possible. It is for this reason that we recommend a minimum threshold of \$1,000, so that more artists can benefit from the right – not just those who command high sales prices. The UK Intellectual Property Office reported in 2014 that nearly half of all artists who have been paid had work sell between €1,000 and 3,000. The \$1,000 threshold enables more artists whose work is often valued at lower prices to collect the royalty, such as photographers, illustrators and craftspeople. While we propose that estates be included, recent figures from countries such as Australia and the UK indicate that about 60% of royalties are paid to living artists. Both countries also report that most royalties are paid for lower valued work: 49% of royalties in Australia have been between \$101 and \$500, while 53% of British artists and estates paid in 2014 received less than £500. In Canada, higher sales figures often come from sales of work by deceased artists, such as the Group of Seven. However, thousands of living artists would benefit every year, as is the case elsewhere.

Will all sales be eligible for the Artist's Resale Right?

No. The right only applies to secondary sales of original works of art protected by copyright. It does not apply to first sales, or sales between private individuals. It does not apply to sales of works by artists who have been deceased for more than 50 years. It does not apply to works that sell for less than the qualifying threshold of \$1,000. It does not apply when a work by a Canadian artist is sold in a country without the ARR, or if an artist is from a country without the ARR.

Does it apply if the work is donated and then resold?

Yes. While the royalty is called the Artist's Resale Right, it is actually applied to the second transfer of ownership. This is standard practice in other countries that have the ARR. The reason for this is that a lot of artists donate works to museums or give works to friends, and when it is later sold, they receive nothing from that sale. If the work is donated or gifted to a friend, the ARR is the only opportunity for the artist to receive income from that work.

Will ARR be difficult to administer?

No. The right has been successfully administered in many countries for decades. Countries that provide successful administration models are usually those where collective management is compulsory, as it has been demonstrated to keep costs down for the art market professional, while also ensuring maximum compliance with the law. In Canada, we recommend that CARCC be the primary collecting society. CARCC has 20 years of experience administering the payment of copyright royalties to artists resulting from exhibitions, reprography, and other copyright related use of their works. They have systems in place that will enable them to successfully administer the ARR. Businesses regularly report on sales for tax purposes, and consider it a cost of doing business.

Will ARR be too costly for the art market?

In order to keep costs low, established systems can be used to administer the ARR. We recommend that art market professionals declare sales twice yearly, and royalties are similarly paid by collectives twice yearly, in order to keep costs low. Most of the administrative work would be handled by a collective. The collecting societies will carry out the work involved in locating artists, and distributing the submission requests, invoices, and payments to artists. In most countries, the cost of administering the royalty range between 10% and 20% of the royalty – an amount that is deducted from the royalty itself, not paid separately by the art market. In other countries, the cost and time commitment involved in reporting was relatively low for art market professionals. In 2014, a survey of art market professionals conducted by the UK Intellectual Property Office reported that the average time required to determine whether an ARR payment is due, and to complete the royalty submission, amounted to 25 minutes per fiscal quarter. Another study of the ARR conducted in the UK in 2008 indicated that, "the cost of administration does not appear burdensome relative to the benefit to the artists", and that half of all art market professionals spend less than £10 per transaction. (Szymanski, p. 36). A 2011 report from the European Commission said that even in those countries that have seen higher costs, the benefits to artists are much higher¹⁶.

¹⁶ Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee, Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC), December 2011.

Won't this drive the art market to places like New York, where there is no ARR?

No. This trend has never materialized in other countries which already have the right, including the UK, which has the largest art market in Europe. The royalties are too modest to remove incentives to relocate in order to avoid paying it. The cost of exporting an artwork is invariably higher than the royalty. For example, a work sold for \$5,000 would generate a royalty of \$250, at the proposed rate of 5%. The cost of packing, insuring, and shipping an artwork to a country without the ARR would likely outweigh the benefit of avoiding the royalty. Similarly, the rates of commission commonly charged to sellers and buyers by art market professionals are considerably higher, often amounting up to 20%. Art will always be sold where it's likely to get the best price. We see no real threat of the art market moving abroad, as the Canadian art market has specialized expertise, and buyers are more likely to purchase Canadian work in Canada. While the United States may be nearby, there are movements to introduce the ARR at the national level there. Similarly, China and Switzerland are also looking at adopting an ARR.

What if the work has actually decreased in value?

A collector is unlikely to put art back on the market if s/he does not have a reasonable expectation that they will make money on the sale. Sellers can insist on a minimum bid at auction, and they have the ability to set sale prices when working with a gallery. The other costs of a sale do not change depending on the outcome. The dealer or auction house charge the same commission rates regardless if it sells for more or less. The standard practice is that the royalty applies regardless of price fluctuation. An artist should be able to benefit whenever their work has sufficient market value to be resold. It can also be argued that the artist is receiving a royalty the same way that an author receives a royalty on book sales, so whether a profit has been made is irrelevant. Further, in many circumstances it may be difficult or impossible to determine what the original sales price was, particularly if the seller received it as a gift. Rates of inflation are difficult to determine over time, especially if the date of creation of the work, or sales dates are unknown.

The ARR won't help every artist. Doesn't it just benefit a privileged few?

Artworks enter the secondary market every year. Many artists are well known yet they may still struggle financially. In Canada, most royalties would range from a few hundred to a few thousand dollars, and most of those artists have several works resold throughout the year. A lot of the money logically goes to those who have a high volume of sales in the secondary market. The royalties are not split evenly among all artists – they are dictated by the market value of an artist's work. Not every artist has work in the resale market, and so not everyone will benefit from the ARR. It will only benefit those whose works resell. Similarly, not everyone will get an exhibition fee, a teaching position at a university, a grant

from an arts council, or a Governor General's award. Most artists are self-employed with income from various sources contributing to the artist's ability to earn a living and maintain an art practice.

If these artists are popular, can't they just earn money in the primary market?

When people hear that an artist's work broke an auction record, they assume that the artist made money on that sale, and that they are rich. It has also been argued that auction sales boost the artist's primary market. This does not reflect the reality of most artists. In 2006, Waddington's sold a Ron Bloore painting for \$55,200, breaking a record for the artist. While it is great news that his work increased in value, he received nothing for that sale, and his work was not selling in the primary market. This is common. Buyers want to buy work in the resale market because there is less risk involved, and they want to buy the art that made the artist famous. Even if he was doing well financially, why should that be a penalty? Artists' incomes should not be capped, and we do not believe that we should deny royalties to most artists because a few artists may be doing well financially.

Will the ARR destroy an already fragile Canadian art market?

While CARFAC is interested in working with the sector to find ways to strengthen the Canadian art market, it is not reasonable to assume that a 5% royalty will cause an industry to fail. It is similarly unlikely to cause sales to move to the black market, when other fees, such as buyer's premiums and commission rates continue to be far higher. In order to keep costs low, we will endeavour to work with established systems to administer the ARR. In 2011, the European Commission released a study on the impact of ARR on the EU. They reported that while the UK lost some market share, countries that already had ARR such as France and Germany, had a slight increase from 2008 to 2010. Other countries that adopted it at the same time as the UK saw an increase in their market share of the European market. The UK lost market share on sales of deceased artists' work, but that was long before the eligibility of estates in 2012, which suggests there are also other factors at play (ie: the global financial crisis, VAT rates, changes in global distribution of wealth, etc). According to Artprice, over the last three years, revenue from contemporary art sales in London has increased, despite the recession and introduction of ARR, and DACS estimates that it has increased by 23% per year.

The reporting process seems like an invasion of my gallery's privacy. What information needs to be submitted to the collective and the artist?

CARFAC and RAAV propose that collectives monitor secondary sales of Canadian artists' work. They will contact the art market professionals twice yearly, asking for details on sales. If certain works meet all eligibility criteria, the collectives will send an invoice on the artist's behalf. The full details of the sale will not be disclosed to the artist. The artist will be

informed if the work was sold at an auction house or gallery, and will receive the details of the work sold, ie: its title, the date it sold, and the royalty due to them. All personal information submitted to collectives in the course of an ARR enquiry will be treated as confidential. This is standard practice in other countries that have the ARR.

Annex 5: The Canadian Art Market

In 1999, the Department of Canadian Heritage commissioned a study on the size and scope of the Canadian art market, in order to determine the value of Canadian and foreign art sold within Canada over a period of three years. Between 1996 and 1999, 44% of art market professionals reported that sales of Canadian art had increased, and an additional 28% reported the sales remained at current rates.¹⁷ On average, 303 works of Canadian art were sold per venue in the period of one year, and 86% of total sales were of works by living Canadian artists.¹⁸ While the study indicated that the art market is unpredictable and did not always note an increase, CARFAC's own limited research in this area indicates that several sales records for Canadian art have been smashed dramatically since 2005.

According to the study: "The total final demand for visual art within Canada was \$478 million and \$549 million including exports. The final demand for original work by Canadian visual artists (living and deceased) was \$414 million including within Canada and \$477 million including exports...¹⁹ The total sales from all channels for visual art in 1998 were approximately \$603 million.²⁰ First sales in the primary market were approximately \$523 million and resales in the secondary market were approximately \$80 million."²¹ While the majority of Canadian art is sold through commercial galleries and dealers, we can surmise that the most important source of income for the secondary resale market will be generated from auction houses. The study also noted that within auction houses: "The majority of sales (96.7%) are resales, which are \$20 million for all visual art and \$19 million for Canadian art."²²

While the Canadian art market grows in value, it is the collectors and art market professionals that profit from its increased worth, rather than the artist. In 2006, Joyner Waddington's Canadian Fine Art Auction house sold Ron Bloore's *Byzantium Sign #5* for \$55,200, smashing the artist's previous auction record of \$4,700 and its expected sale price of \$2,000-2,500. The artist received nothing from this sale, and despite exhibitions of his contemporary work being shown around that time, he was not selling work in the primary market.

The Canadian and global art markets have changed since they were last studied in 1999. We still do not have a complete knowledge about how the sector operates, as it relates to auction houses, commercial galleries, art fairs, collectors, and artists, and the study was

¹⁷ TCI Management Consultants Limited. *Study of the Market for Canadian Visual Art* (Ottawa, Department of Canadian Heritage, August 1999). Page 28.

¹⁸ Ibid.

¹⁹ Ibid, p.5

²⁰ Ibid, p.6

²¹ Ibid, p.7

²² Ibid, p.30

conducted before technology was developed to sell work online. In the last five years, our domestic art market has changed, as Sotheby's closed its Toronto branch in favour of concentrating its efforts on larger markets, leaving Heffel and Waddington's, its two main competitors to gain a larger market share in Canada. Some commercial galleries have closed while new ones have opened, and the global financial crisis may have had an impact on sales, both domestic and abroad. While a recent assessment of the sector has not been studied, it is understood that the art market often fluctuates, and a more long-term vision needs to be taken into account. More recent data sources do exist and include, but are not limited to, the Culture Satellite Account, Statistics Canada, and art sales data through websites such as Artnet and Artprice.

Every other country that adopted the Artist's Resale Right acknowledged the problem of the opacity of their own art market, and still believed the principle was important enough to legislate it. In 2013, the United States Copyright Office released an analysis of the ARR which considered the lack of transparency in the American art market. The report indicates that there is information publicly available about auction sales, but there is often a lack of information available about buyers and sellers, as well as how visual art is valued. Less is known about work sold through galleries, which are not required to report on sales publicly, and the proportion of secondary sales that are at auction versus commercial galleries varies between each country. Similar conclusions were reported in other countries, including an analysis prepared in the UK before ARR was implemented there. The American report concluded that although there is a lack of empirical evidence about the art market, visual artists are disadvantaged in their ability to earn income from unique objects to a degree not experienced by other kinds of authors. They also recognized that concerns raised against the ARR have largely been unfounded in other countries, and will likely continue to be as it expands internationally.

Annex 6: Copyright management and the ARR

It is recommended upon implementation of the Artist's Resale Right in Canada, that copyright collectives administer the ARR on behalf of their respective memberships, with unaffiliated artists receiving payments from one central collective society. This is how it works elsewhere, such as in the UK. The Canadian Artists Representation Copyright Collective Inc. (CARCC) is well situated to distribute payments to their members, and we recommend that they also administer the ARR for all artists unaffiliated with a collective. CARCC currently has a database of Canadian artist members and administers the negotiation and payment of fees to artists resulting from exhibitions, reprography, and other copyright related use of their works. CARCC maintains bilingual offices in Ottawa and Montreal, and has the most number of Canadian visual artists as members. They remain the only non-profit copyright collective in Canada that is run by visual artists, for visual artists. CARCC is developing a national registration system to allow unaffiliated artists to collect copyright royalties through them.

SODRAC (Society for Reproduction Rights of Authors, Composers, and Publishers) is based in Montreal and would administer the ARR for their artist members. However they have fewer Canadian members, and are primarily a music-based collective. They are a less appropriate choice for national collective management of the ARR for unaffiliated artists in Canada. However, they may be well-positioned to manage foreign distributions of ARR, as they do for royalties related to other rights. SODRAC is also a member of CISAC.

It is recommended that options for collective management for artists in Nunavut be considered. It is more challenging for a collective to administer royalties for artists who live in remote northern communities, where language barriers may make payment of royalties more challenging. CARFAC is in discussion with the Nunavut Arts and Crafts Association about how collective management in this region could work, including the possibility of creating a third satellite office of CARCC in the territory.

In the Art Dealers' Association of Canada's submission to the government in 2011, it was said that we recommend CARCC administer the ARR because we own and manage it, and it is implied that we will benefit from this administration financially. This is not the case. While we share some board members in common, CARCC is completely financially independent from CARFAC and RAAV, and we do not stand to earn a penny from the adoption of the ARR. CARFAC and RAAV merely advocate for policies that allow artists to earn a more equitable income. We recommend CARCC because they have the most living Canadian visual artist members of any collective, and have experience collecting royalties. Their sister society, SODRAC, would also collect the fee for their members. For any unaffiliated artists, we ask that the government appoint CARCC to distribute their royalties, because they are larger and more national in their operations.

Collective administration of the ARR need not be complicated or expensive to undertake. In the UK, DACS (Design and Artists Copyright Society) sends out requests for information to AMPs on a quarterly basis. By law, all AMPs must respond within 90 days. Once the form is submitted to DACS, they check which sales are eligible for ARR royalties, and invoice the AMP for the appropriate amount owed to the artist. Royalties are then paid to artists within 30 days of collection, and an administrative fee is collected by DACS for this service. Similarly, in Denmark, art market professionals are obligated by law to report once a year on all sales to which the ARR applies. The report must be certified, and either COPY-DAN or Billedkunst arranges the procedures for reporting sales to their respective memberships.

In Canada, we recommend that AMPs declare sales twice yearly, and royalties are similarly paid twice yearly. The timing of information requests could compliment the two auction seasons, typically held in the spring and fall. In order to determine eligibility, collectives will need to know the date of sale, the name of the artist, the title and medium of the work, the edition number (if applicable), the year of the artist's death (if applicable), the artist's nationality (if known), and the gross sale price (excluding tax and buyer's premium). In the process of paying artists, the collecting society will inform them of the work sold and the type of sale (auction or dealer, for example), the sale price, the date of the sale, and the royalty due to them. No other information is disclosed, as privacy laws must be respected. If an artist is not a member of a collecting society, the society is responsible for determining their contact information and registering artist for payments. The society will also be responsible for issuing any appropriate tax forms resulting from the royalty payment.

Annex 7: Case Studies

Making the case for the Artist's Resale Right: the impact on Canadian artists

Rita Letendre auction sales eligible for ARR

Between 1990 and 2014 at least 111 artworks by Rita Letendre sold at auction that should have been eligible for ARR royalties. The total ARR lost amounts to \$66,225.50. The lowest royalty she should have received was \$50 and the highest royalty would have been \$8,236. The average payment would have been \$619. The highest price that her work has commanded at auction to-date was \$164,720 for "Rencontre en flammé" (1962) at Heffel Fine Art, Vancouver BC on May 17, 2011. In 2011 alone, 28 of her artworks were sold at auction. Had the ARR been in place, she would have earned \$20,861.45 in royalties that year.

ARR respects the artists that created the artwork

"I would like the work of the artist to be acknowledged," said Letendre, "The work exists because the artist created it. Without the artist there would be no artwork, and with no artwork, no market. The Artist's Resale Right is a great idea that would allow the profits to be shared with the artist. It is simply a matter of respect."

Joe Fafard auction sales eligible for ARR

Between 1994 and 2012, at least 65 artworks by Joe Fafard sold at auction that should have been eligible for ARR royalties. The total ARR lost amounts to \$42,986. The lowest royalty he should have received was \$80, and the highest royalty would have been \$4,000. The average payment would have been \$661. The highest price that his work has commanded at auction to-date was \$80,000 for "Vincent Self-Portrait Series," (1982-87) sold at Heffel Fine Art in Vancouver in 1997. In 2012 alone, eight of his artworks were sold at auction. Had the ARR been in place, he would have earned \$6,610 in royalties that year.

The ARR has potential to allow artists to share in profits and support the economy

"I am in full support of the modest proposal that artists have resale rights. It seems very little to ask when you consider that the artist, through his or her efforts over many years, is largely responsible for the increased value of their work. Many of the early works were sold at very low prices because the artist had not developed a reputation. Over many or a few years, some artists, through diligence and hard work, manage to increase the value of their market many fold. A buyer reselling a work may experience a windfall or at least a handsome profit. Sharing such a windfall with the artist who is largely responsible for this happy event with a modest 5% return to the artist seems less than generous to me, but let's start there... I also employ ten people, and I pay them every month, so any money that can come towards my company benefits not just myself but maybe nine or ten families," said Fafard.

Daphne Odjig auction sales eligible for ARR

Between 1992 and 2013, at least 61 artworks by Daphne Odjig sold at auction that should have been eligible for ARR royalties. The total ARR lost amounts to \$35,880. The lowest royalty she should have received was \$50, and the highest royalty would have been \$3,000. The average payment would have been \$588. The highest price that her work has commanded at auction to-date was \$60,000 for "Awakening of Spring" sold at Heffel Fine Art in Vancouver in 2012. In 2012 alone, 12 of her artworks were sold at auction. Had the ARR been in place, she would have earned \$7,218 in royalties that year.

The ARR provides greater financial independence for artists

The Canadian art market is growing, and visual artists are losing out on the profits being made on their work in the secondary market. Half of visual artists in Canada earn less than \$8,000 per year. Recent research shows that senior visual artists (over 65) have median arts earnings of about \$5,000, which is the lowest of any artistic discipline,²³ and that 32% of elder artists are at a high financial risk. As Odjig says: "This is a wonderful way for artists to benefit from their hard work and dedication to, in many cases, their life's work. In my case it was not until later in life that I achieved a semblance of success, and at 92 years of age and surviving on a small pension and returns on dwindling investments it would definitely have been helpful to have had a small stream of extra income."

Marcel Barbeau auction sales eligible for ARR

Between 1989 and 2013, at least 40 artworks by Marcel Barbeau sold at auction that should have been eligible for ARR royalties. The total ARR lost amounts to \$9,824. The lowest royalty he should have received would be \$50, and the highest royalty would be \$3,650. The average payment would be \$246. The highest price that his work has commanded at auction to-date was \$86,000 for "Ouvri," (1956) sold at Heffel Fine Art in Vancouver in 2008.

The ARR compensates artists as contributors to their work's value

The ARR acknowledges that an artist is an important contributor to their work's value and allows artists to share in the ongoing commercial success of their work. It provides artists with a more sustainable income based on the value of their own work. If the work is donated to an institution or gifted to a friend, the ARR is the only opportunity for the artist to receive income from that work. Barbeau agrees with this point: "One of the works I produced in 1956, which I had given to a friend was sold by his heir at auction for a little more than \$86,000. I did not receive one cent from this sale. Others are getting rich on my works, while my situation remains very insecure at 85 years of age."

²³ Joysanne Sidimus and Kelly Hill, *Senior Artists in Canada. (Senior Artist Research Project: February 2010). P.59.*

Mary Pratt auction sales eligible for ARR

Between 1996 and 2013, at least 36 artworks by Mary Pratt sold at auction that should have been eligible for ARR royalties. The total ARR lost amounts to \$21,132. The lowest royalty she should have received was \$60, and the highest royalty would have been \$2,375. The average payment would have been \$587. The highest price that her work has commanded at auction to-date was \$47,500 for "Gold Pear in Red," sold at Heffel Fine Art in 2007.

The ARR makes a difference to senior artists' ability to earn a living

The ARR would provide a substantial benefit to Canada's senior artists, in particular. It is often taken for granted that artists thrive once they become established, but CARFAC has found that even Governor General Award winning artists find it difficult, if not impossible, to make a living from their art. The implementation of an ARR in Canada would provide greater financial independence for our senior artists, many of whom are in need. As Mary Pratt describes: "I have seen my work escalate in value by quite a big percentage. A painting done in 1966 fetched \$40 and is valued now at \$20,000. As we get older it gets harder and harder to find the energy to produce enough work to maintain a decent living."

Michael Snow auction sales eligible for ARR

Between 1999 and 2012, at least 26 artworks by Michael Snow sold at auction that should have been eligible for ARR royalties. The total ARR lost amounts to \$28,888. The lowest royalty he should have received was \$53, and the highest royalty would have been \$7,500. The average payment would have been \$1,111. The highest price that his work has commanded at auction to-date was \$150,000 for "Sideways" (1962) sold at Heffel Fine Art in Toronto in 2011.

Canadian artists would benefit from sales of their work in Canada and abroad

Once established in Canada, artists would be able to benefit from secondary sales of their work in Canada, as well as from reciprocal arrangements with other countries where the ARR exists. At least 69 countries world-wide have legislated the ARR, including the entire European Union, and more recently, Australia. Between 2010 and February 2015, more than \$3 million in royalties have been paid to more than 1,000 artists in Australia, over 65% of whom are Indigenous. The lowest royalty paid in Australia so far has been \$50, while the highest amount paid was \$55,000. In 2009, Snow's piece, "Table/Chairs in Blue/Yellow" (1957) sold at Davidson Auctions in Australia. If Canada had an ARR, he could have received a royalty of \$65. Snow supports this initiative: "The idea of the Artists Resale Right is a good one. People should be sympathetic to this."

Note: These are only the auctions tracked through Artprice.com. It does not include secondary sales through dealers, works that are not sold for \$1,000 or more, works that did not sell at auction, or other unknown auction sales. It does not reflect the above artists' full secondary market value.

Annex 8: Draft Legislative Language

The Act is amended by adding the following:

Interpretation

4(1) In sections 4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8 and 4.9 “Art market professional” means:

- (a) an auctioneer; or
- (b) the owner or operator of an art gallery; or
- (c) the owner or operator of a museum; or
- (d) an art dealer; or
- (e) an antique dealer; or
- (f) a person otherwise involved in the business of dealing in artworks.

“resale right” means the right described in subsection 4.2(1);

“resale royalty” means the royalty described in subsection 4.2(3);

“sale price” means the price paid for the sale of the work by the buyer, but does not include any buyers premium or other tax payable on the sale.

Works covered

4.1(1) For the purpose of sections 4, 4.1, 4.2, 4.3, 4.5, 4.6, 4.7, 4.9 and 4.10 work means an artistic work, other than a map, chart, plan or architectural work, and includes any, collage, print, lithograph, tapestry, ceramic, or glassware.

(2) A copy of a work is not to be considered a work unless such copy is one of a limited number which has been made by the author or with his authorization.

Artist’s resale right

4.2(1) The author of a work in which copyright subsists shall have a right to a resale royalty on any sale of the work which is a resale subsequent to the first transfer of ownership by the author.

(2) The resale right in a work shall continue to subsist so long as copyright subsists in the work.

(3) The resale royalty shall be an amount equal to five percent of the sale price.

(4) There is no resale royalty right in respect of a sale price of less than \$1,000 or, if the sale price is paid in a foreign currency, the amount worked out using the exchange rate applicable at the time of the sale described in subsection (1).

(5) For the purpose of paragraph (1), first transfer of ownership includes,

a) donation or gift by the author;

b) testamentary disposition by the author or by intestate succession;

c) the disposal of the work by a trustee in bankruptcy for the purposes of realization of the author's estate.

Joint authorship

4.3(1) In the case of a work of joint authorship, the resale right shall belong to the authors as owners in common.

(2) The resale right shall be held by the joint authors in equal shares unless otherwise agreed in writing.

No assignment, inalienable

4.4(1) The resale right is unassignable and inalienable, and may not be waived.

Liability to pay resale royalty

4.5(1) Liability to pay the resale royalty arises at the time of the sale described in subsection 4.2(1).

(2) The following persons are jointly and severally liable to pay the resale royalty: (a) the seller of the work or, if there is more than one seller, all of the sellers; and (b) each person acting in the capacity of an art market professional and as agent for the seller.

Eligibility

4.6(1) The resale right conferred by subsection 4.2(1) applies only if the author was (a) at the date of the sale described in subsection 4.2(1), a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*

or

(b) a citizen, subject or permanent resident of a country that grants Canadian citizens or permanent residents within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* a substantially similar resale right as prescribed by the Act.

Collective management

4.7(1) The resale right may be exercised only through a collective society.

(2) Where the holder of the resale right has not transferred the management of his right to a collective society, the collective society which manages copyright on behalf of authors of works shall be deemed to be mandated to manage his right.

(3) Where there is more than one such collective society, the holder may choose which of them is so mandated.

(4) A holder to whom subsection (2) applies has the same rights and obligations, in respect of the management of his right, as have holders who have transferred the management of their right to the collective society concerned.

Right to pertinent information

4.8(1) The holder of the resale right has the right to obtain, on a confidential basis, all information regarding the sale described in subsection 4.2(1) in order to establish solely the amount of the resale royalty due and, if applicable, the name and address of the person responsible for making the payment.

(2) A request under subsection 4.8(1) may be made to any person listed in subsection 4.5(2).

(3) The person to whom the request under subsection 4.8(1) is addressed shall do everything within his power to transmit the information within 90 days following receipt.

(4) If the person responsible for transmitting the information required by subsection 4.8(1) does not do so within the prescribed time, the holder of the resale right may by way of an application, to be heard and determined without delay and in a summary way, apply for an order requiring the person to whom the request is made to supply the information.

Succession

4.9(1) The resale right in respect of a work passes, on the death of the author, to

(a) the person to whom the right is specifically bequeathed;

(b) where there is no specific bequest of the resale right and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or

(c) where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies intestate.

(2) Subsection (1) applies, with such modifications as the circumstances require, on the death of any person who holds the resale right.

Transitional provisions

4.10(1) (a) Liability to pay the resale royalty does not apply to sales described in subsection 4.2(1) that preceded the coming into force of this section; but (b) applies notwithstanding that the work sold was made before that coming into force.

Resale Right Remedy

34(3) In any proceeding for an infringement of the resale right of an author, the court may grant to the author or to the person who holds or manages the resale right, as the case may be, all remedies by way of damages and otherwise that are or may be conferred by law for the infringement of a right.