



Status of the Artist: An Overview

This report will look at Status of the Artists acts and alternative models from across Canada and the globe as a discussion piece for the Cultural Policy Renewal panel for New Brunswick and for the Minister's standing committee on the Status of the Artist. The information in this document is a synthesis of relevant information drawn from the documents cited at the end of this paper. The information is not original and is only meant synthesize information for the Cultural Policy Review committee to streamline the process by culling the main points of relevance for the committee's consideration.

In New Brunswick's 2002 Cultural Policy the second goal cited was "to encourage excellence in the work of artists and cultural professionals and to uphold the principle of freedom of expression"; strategies outlined to underpin this goal included "developing strategies to help artists receive fair and reasonable compensation for their creative work and for the intellectual property rights vested therein."¹ Since the income of artists tends to be lower than average and since a high proportion of artists are self-employed and their incomes can fluctuate dramatically from year to year, developing a Status of the Artist Act that would extend collective bargaining rights is one way to address income and other working conditions issues. It would also allow the province to offer New Brunswick artists protections against vulnerabilities the new Bill C-11 has introduced.

To craft a Status of the Artist Act for the province of New Brunswick, the Department of Culture, Tourism and Healthy Living should establish a time-limited process where parties with a direct interest in any mandatory collective bargaining regime are invited to meet with the appropriate representatives to work towards consensus.

Status of the Artist is a term describing a category of legislation and programs intended to improve the circumstances of professional artists. There are strong opinions both for and against mandatory collective bargaining legislation.² The diverse needs and requirements of different sectors must be taken into consideration when moving forward on a Status of the Artist Act for New Brunswick. There are also successes, failures and limitations to the two most robust legislations found nationally: the status of the artist legislation at the federal level and in the province of Québec.

In looking at the various models, the following issues of importance should be kept in mind:

- To what extent will the bargaining rights make a difference?
- What are the implications of bargaining rights for the self-employed status of professional artists?
- What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?
- Is it possible to find a bargaining model that will achieve a broad acceptance in the artistic community?
- How will the model affect engagers of artists, who often find themselves in a precarious economic situation?
- How will the bargaining model influence the generally collegial relationships that exist in the sector?

¹ Cultural Policy of New Brunswick <http://www.gnb.ca/0007/policy/pdf/e-report.pdf> (pg. 14)

² The Status of Status: A Neil Craig Associates Report Commissioned by the Canadian Conference of the Arts http://ccarts.ca/wp-content/uploads/2011/09/statusofstatus_neilcraig_120407.pdf (pg. 2)

- What is the cost of the bargaining model?
- To what extent will the model improve support for individual contracts?
- What might be the unintended impact of bargaining rights on individual artists?
- How will Bill C-11 impact artists?³

To understand the issues that have an impact on the social and economic circumstances of professional artists, it is important to look briefly at the atypical way that artists do their work. The work of artists has certain defining characteristics and each artist will combine a few or many depending on the nature of their art. While some of the individual characteristics are shared by other professions, taken as a whole for all artists they create a pattern of work very different from most others in the labour force.⁴

- Most become an artist because of their love of the art form. A person must first of all love to dance, paint, write, sing, act or play a musical instrument, and they often do so for many years before becoming a professional.
- They can spend a substantial amount of time preparing to earn income, in training, rehearsal, study, research or in creating a finished product.
- They sometimes work for a number of engagers simultaneously, or for none at all. They may sell nothing for long periods and then suddenly a great deal.
- They often have to train and rehearse even when they are working, either as an artist or outside their art.
- Experience and skills are no guarantees of marketplace success. The creative element of the work is difficult to define and perhaps impossible to teach.
- Many professional artists must supplement their income with revenue generated from part-time work outside their area of professional expertise, in order to survive economically. For some, this may come to represent the bulk of their income.
- Because of the creative nature of the work, they often have an ongoing economic interest in their completed work, either through copyright law or contracts, and they can receive income from it long after the work is finished.⁵

There is a distinction between creative artists (such as authors, visual artists, composers and designers) and interpretive artists (such as actors, dancers and musicians) since the artists in these categories generally have different working relationships and are engaged in different ways for purposes of earning artistic income. Creative artists are more likely to work on their own to create their art and will often do so without a pre-existing contract. The works will be sold after

³ The Status of Status: A Neil Craig Associates Report Commissioned by the Canadian Conference of the Arts http://ccarts.ca/wp-content/uploads/2011/09/statusofstatus_neilcraig_120407.pdf (pg. 14)

⁴ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist <http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg.2)

⁵ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist <http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 2-3)

they have been created, although some may be created under a commission or contract. Interpretive artists are more likely to work in an ensemble and to be engaged by someone else for professional purposes. They are asked to give life and meaning to an artistic work created by others.⁶

Background⁷

The concept of the Status of the Artist was introduced in the 1970s during a process undertaken by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to research and discuss the situation of the world's artists. The 1980 *Recommendation on the Status of the Artist* concluded that process. In it, UNESCO recommends that governments enact legislation and implement policy measures to acknowledge the fundamental role which artists play in our societies, to encourage artistic expression by responding to the unique manner in which artists work and to improve the economic, social and political status of professional artists.

In addition to important issues around the right of artists to be compensated fairly for their work and to enjoy social benefits equivalent to other workers in the society, an important element of the discussion was ensuring that artists have the right to organize collectively to defend their common interests and to form trade unions and professional associations to help regulate their remuneration and working conditions.

Member States should ensure, through appropriate legislative means when necessary, that artists have the freedom and the right to establish trade unions and professional organizations of their choosing and to become members of such organizations, if they so wish, and should make it possible for organizations representing artists to participate in the formulation of cultural policies and employment policies, including the professional training of artists, and in the determination of artists conditions of work.

Canada responded to the UNESCO Recommendation by creating the Siren-Gélinas Task Force on the Status of the Artist which reported in August 1986. Among its 37 recommendations was a call for legislation to recognize organizations representing self-employed professional artists as collective bargaining agents. While the Task Force was carrying out its work, there were several issues before the federal competition authorities concerning collective bargaining agreements entered into by associations of artists. This gave impetus to the Task Force recommendation and a companion call for a moratorium on the investigation of artists' unions and guilds under the Combines Investigation Act until the necessary bargaining legislation had been adopted.

The work of the Task Force was continued by the first Advisory Committee on the Status of the Artist appointed in 1987 by the Minister of Communications (now Canadian Heritage). The following year, the Committee developed draft legislation, known as the *Canadian Artists' Code*.

⁶ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist
<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 3)

⁷ Collective Bargaining Rights for Associations and Unions of Professional Artists in Saskatchewan
<http://www.tpcs.gov.sk.ca/macsacollectivebargainingrights> (pg. 7-8)

The government responded to these developments by developing legislation which was tabled in the House of Commons in 1990. In June 1992, the federal *Status of the Artist Act* was proclaimed into law.

Part I outlines a number of principles concerning the important contribution artists make to society and the need for society to “(confer) on artists a status that reflects their primary role in developing and enhancing Canada's artistic and cultural life, and in sustaining Canada's quality of life.”

Part II, the operative provisions, creates a framework to regulate the relationship between associations, guilds and unions representing self-employed professional artists and producers operating in federal jurisdiction and establishes the Canadian Artists and Producers Professional Relations Tribunal (Tribunal) to oversee the system. It provides a process for the recognition of artists' associations and regulations which encourage collective bargaining and the conclusion of agreements to cover the engagement of professional artists. It applies to the departments, agencies and institutions of the federal government and to employers or engagers operating in federally-regulated industries, such as telecommunications, banking, airlines and broadcasting.

Five years before the federal legislation was proclaimed, the Government of Québec had enacted Canada's first legislation in this field, *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*. In 1988, the province enacted *An Act Respecting the Professional Status of Artists in the Visual Arts and Crafts and Literature and their Contracts with Promoters*. The primary purpose of both statutes is to recognize the unions, guilds and professional associations representing artists and to regulate or encourage collective bargaining between them and the producers, promoters and employers who engage artists in work that takes place under provincial jurisdiction. The Commission de reconnaissance des associations d'artistes et des associations de producteurs (Commission) was established for the purpose of administering the Acts.

As a consequence of the discussions around the UNESCO *Recommendation*, the federal Task Force and the Advisory Committee, other provinces began to consider the issue of the status of the artist. British Columbia, Ontario and Saskatchewan all launched processes to review these issues in the early 1990s.

Federal⁸

The Canadian Artists and Producers Professional Relations Tribunal administers Part II of the federal *Status of the Artist Act*. This establishes a framework to regulate the relationships between artists associations and producers operating in federal jurisdiction.

The consequences of the Tribunal's operation have been the following:

- Twenty associations have been certified as exclusive bargaining agents:
 - for the associations that already had voluntary agreements, recognition has provided a legal foundation for bargaining with engagers in federal jurisdiction and has provided them with a legal exemption from action under competition laws;

⁸ Collective Bargaining Rights for Associations and Unions of Professional Artists in Saskatchewan <http://www.tpcs.gov.sk.ca/macsacollectivebargainingrights> (pg. 3)

- for the associations that had been unable to negotiate voluntary agreements, certification has brought little progress in the first 10 years of operation of the Tribunal.
- The federal legislation is limited to “independent contractors.”
- National agreements negotiated under its terms are fully protected, but the scope of the legislation is national and narrow.
- The law was generally welcomed by the community when it was introduced, although there is no evidence about whether all organizations supported all elements of the Act.
- The Act has been neutral on private sector engagers since the few of them operating in federal jurisdiction were generally parties to voluntary agreements prior to the legislation.
- The nature of the relationship with engagers has generally not changed.
- The budget of the Tribunal in 2005/06 is more than \$2.2 million.
- The Act has had no impact on individual contracts, except by providing exemption from potential competition action.
- There does not appear to have been any unintended consequences of the Act on individual artists.

It should be noted that given the division of powers between the federal and provincial governments inscribed in the Constitution Act, the federal legislation affected only areas of federal labour jurisdiction such as banking, transportation, communications and international trade, and all federal institutions engaging artists and creators.

Québec ⁹

Québec is seen as a world leader as far as its Status of the Artist legislation. In 1987, the government of Québec enacted Canada's first legislation in this field, *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*. The following year, the province enacted *An Act Respecting the Professional Status of Artists in the Visual Arts and Crafts and Literature and their Contracts with Promoters*. Both Acts have been amended since they came into effect.

Collective Bargaining and Contracts

⁹ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist
<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg.13-14)

In each case, the primary purpose of the statute is to recognize the unions, guilds and professional associations representing artists, and to regulate or encourage collective bargaining between them and the producers, promoters and employers who engage artists. In the Act covering performing, recording and film artists, there is explicit acknowledgement that those covered by the Act are independent contractors. Since 1987, there has been only one case where artists on long term contracts in the covered sectors in the province were reclassified as employees by Revenue Canada, and this was resolved.

The key difference between the two Acts is that the one governing performing, recording and film artists, in a sector with a long established history of voluntary collective bargaining, includes a provision for first contract negotiations and an arbitration process if the parties are unable to reach agreement within a set time. The other Act has provisions requiring the use of individual contracts between the artists and their engagers and promoters, and provides authority for the government to establish minimum standards for such contracts through regulation.

Fiscal Issues

The government followed its legislation with a number of important initiatives. In the process, it has become the leading jurisdiction in the world with respect to improving the socioeconomic situation of its artists and implementing the provisions of the UNESCO Recommendation. Québec was the first jurisdiction to implement special legislation on Status of the Artist and it has the broadest range of measures that address explicitly the particular circumstances of individual artists.

In 1995, the government introduced a measure to provide that annual copyright income up to \$15,000 received by creators can be deducted from their taxable income for provincial income tax purposes. The copyright income tax exemption was expanded in 2003 to include income earned by authors through the public lending right and the limits were raised to \$30,000 on a declining basis. The budget in 2004 again expanded the income that qualifies for the deduction, adding copyright income received by performing artists (neighbouring rights). That same budget established a limited system of income averaging for artists with fluctuating income through the purchase of a qualifying annuity.

Other Issues

The province also has some creative measures, such as coverage for workers compensation purposes of performers when they participate in the reimbursement program for training classes administered by the Regroupement québécois de la danse and when training is not covered in their work contract.

In 2004, the Québec Minister of Culture issued an action plan on the improvement of the socioeconomic conditions of artists, entitled *Pour mieux vivre de l'art*. The document reviews issues such as workplace safety, pensions, income security and employment insurance. It includes an invaluable study of the income tax returns of 14,000 Québec artists. Later that same year, the Minister of Culture created within the ministry the *Secrétariat permanent sur la condition socioéconomique des artistes* and appointed a permanent advisory committee, comprised of representatives of the arts and culture sector.

Work continues on a number of fronts and the Advisory Committee is looking at various issues. In March 2010, a ministerial task force tabled 25 recommendations regarding the two pieces of legislation. A consensus was reached on several of these, including providing authority for the governing tribunal to receive complaints alleging bad faith bargaining, making the legislation

technology neutral and including the restoration of historical structures in the definition of *Métier d'art*. Further actions are likely and discussions remain active.

*The consequences of the Commission's operation have been the following:*¹⁰

- Fifteen associations have been certified as exclusive bargaining agents. The Acts have had a greater impact on the sector than the federal Act since the bulk of artistic activity takes place in provincial jurisdiction. Associations with existing agreement have been able to bring non-union productions under the agreements. There is a greater use of individual contracts in the visual arts, crafts and publishing, but collective agreements in these sectors generally do not exist.
- The Act governing performing arts et al, confirms the self-employed status of artists represented by the certified associations. Since Québec has greater control of its income tax system than other provinces, this has secured that status, although there has not yet been a definitive case under the Act.
- The Acts provide that collective agreements must be ratified by members covered by them, and associations have generally chosen to ratify national agreements on a provincial basis. A process to remove certification can be launched only by 25 percent of the artists in the sector.
- The Commission's decisions respecting the historic and linguistic divisions between artists' associations alleviated earlier concerns.
- There is anecdotal evidence that a few producers in the audiovisual field have moved production outside the province.
- The nature of the relationships with engagers has generally not changed.
- The budget of the Commission is roughly \$ 670,000.
- Individual contracts in visual arts, crafts and publishing are now more common, although there is anecdotal evidence that they are not yet universal. Confirming bargaining rights may have reduced the threat of action under competition laws.
- All artists in a sector are bound by any collective agreement, however, artists are not obligated to become members of the certified association and remain free to negotiate beyond the minimum standards.

Saskatchewan¹¹

The province first considered the Status of the Artist issues in 1992 but took no action. In 2002, Saskatchewan adopted legislation which identified equity for artists in the workforce as a key

¹⁰ Collective Bargaining Rights for Associations and Unions of Professional Artists in Saskatchewan
<http://www.tpcs.gov.sk.ca/macsacollectivebargainingrights> (pg. 3-4)

¹¹ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist
<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 14-15)

issue. It also launched a process to implement “practical measures” to improve the situation for professional artists in that province. The Saskatchewan Act is broad in its scope and touches on most of the issues addressed in the UNESCO *Recommendation*, including:

- the important contribution artists make to society;
- the right of artists to free speech, freedom to create and freedom to form associations;
- the right and need for artists to earn a living from their art;
- education and training.

In May 2005, a second Ministerial Advisory Committee on the Status of the Artist was appointed and in July 2006, the Committee released its final report. The 123-page report entitled, *Laying the Groundwork*, outlines three goals of and for Saskatchewan professional artists: engagement in viable careers; access to thriving markets and; access to information that supports efforts to achieve viable careers. The report’s 30 recommendations cover the full range of issues.

Following a further study of labour relations, The Arts Professions Act¹⁰ was tabled and approved, and its provisions came into force June 1, 2010. The Act has a new definition of professional artist, which is similar to the wording of the 1988 Canadian Artists Code, a definition of engager, making the Act binding on the Crown, and providing a requirement for written contracts between engagers and artists. An enabling provision permits the government to implement regulations relating to such contracts.

The Act recognizes the artist as a professional and emphasizes the importance of fair compensation. Written contracts are now required between artists, including performers, and anyone wanting to engage, hire, or contract them for their work or performance.

Ontario¹²

Like other provinces, Ontario first considered Status of the Artist issues in 1992-3 and undertook extensive research and community consultations, and produced several reports. That process did not bring any action. When it revisited the issues over a decade later, the roll out of the initiative highlights many of the challenges in Canada around Status of the Artist.

In the 2003 provincial election, the platform of Ontario’s majority government stated it would create a Minister’s Advisory Council for Arts and Culture which would table, within two years, “a Report on the Status of the Artist in Ontario in the 21st Century, to be used to develop Status of the Artist legislation for our artists.”

In 2004-05, there was an extensive consultation process, involving meetings, briefs, focus groups and an on-line survey between May and July 2005. There were more than 3,600 respondents to the survey. Given the high response rate and the fact its distribution accurately reflects the demographics in the community by artistic category and age, this data may have substantial and ongoing value if it is made available. For example, of the more than 3,300 individual artists who participated, it was reported that 67.0 percent had to work outside of their artistic activity to survive economically. On average, the respondents spent 67.2 percent of their time on their artistic activity.

¹² Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist

<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 14-16)

The Report of the Status of the Artist Sub-Committee, which was dated October 2006, was released on-line days before Christmas. It has 23 recommendations, including new funding for the arts council, new programs and funds for training and business development, housing initiatives that benefit artists, and actions on health care, marketing and promotion, and arts infrastructure development. The Sub-Committee recommended that legislation be introduced that would include tax measures such as a provincial tax credit based on a range of eligible expenses and measures to provide standard protection for children working in the performing arts. On the issue of collective bargaining, the Sub-Committee recommended a time-limited process to review collective bargaining issues and to seek a consensus among all stakeholders.

The government responded with the *Status of Ontario's Artists Act, 2007* which was passed later that year. The purpose of the Act is to "recognize that artists make contributions to Ontario's economy and quality of life." The operative provisions of the Act are modest. The first assigns responsibility to the Minister to develop "a strategy on arts and culture to guide the development of policies as they relate to artists" and authorizes the appointment of a committee to advise the Minister on these issues. The second provides that the first weekend every June will be Celebrate the Artist Weekend. A final section commits the Government to undertake to do certain things, such as implement marketing strategies, facilitate training programs, and promote health and safety, etc., "as far as it considers it reasonable and appropriate to do so." The only reference to collective bargaining is oblique; the Government undertakes to "strengthen the ability of arts and culture organizations to provide support to artists."

A concrete outcome of the process was the development and launch of www.ontarioartist.ca, a website filled with information for professional artists. There is information on these topics: tax and business information; funding, grants and awards; legal and copyright; health and safety; marketing; professional development and training; and associations and organizations. Importantly, the information is not just limited to Canadian government and industry sources; for example, in the health and safety section for visual artists and craftspeople, there is a link to an excellent Arizona website which has detailed and extensive information about various hazardous materials they may use.

When the recent process began in Ontario, there was considerable enthusiasm among Ontario artists. Thousands of artists and their organizations participated in the public consultation process, and the report of the Advisory Committee was greeted warmly. However, the fact the report was released surreptitiously may have hinted at coming disappointments. The mood shifted dramatically with the tabling of the legislation.

At best, the Ontario government actions are seen as being far too modest. There is yet no concrete action that will improve the daily working lives of Ontario artists or assist them to make a living as professionals. The Premier's Award announced in 2006 is given for the "arts", not for an artist. The Celebrate the Artist Weekend is seen cynically as a "take a starving artist to lunch" initiative.

Others in the community believe that government actions reveal a serious misunderstanding about the very purpose of a Status of the Artist project. An early statement in the proposed legislation is "artists make contributions ... by strengthening and invigorating our arts and culture sector." They point out that artists don't "make contributions (to the) sector," they are the heart of the sector. Without them there is no "arts and culture sector" as it is the artists who give expression to culture. The proposal to develop an arts and culture policy is seen as missing the point. While artists would welcome a coherent policy, Status of the Artist is about acknowledging and improving the situation of individual professional artists.

The Ontario government did increase the budget of the Ontario Arts Council as recommended by the Advisory Committee. But some note that 75 percent of OAC resources are granted to arts organizations and only 15 percent flow to individual artists. Obviously, some organizational grants are used to engage artists. However, as the only funding measure adopted from the Advisory Committee report, it seems to reinforce a producer-driven view of arts and culture, rather than the artist-centered approach implied by Status of the Artist.

British Columbia¹³

The province first began to consider Status of the Artist issues in 1992 and commissioned a number of studies and reports over the next few years. But, little came from these initiatives. It has not subsequently considered the issue and the current challenge in the arts community relates to surviving in the face of massive cutbacks in provincial arts funding made in 2010.

Meanwhile, the British Columbia Labour Relations Board has been the most aggressive in the country in finding that artists can be considered “employees” for purposes of labour relations in the province. This has had enormous implications, particularly in the film and television production sector. To be valid in the province, an agreement must be negotiated and ratified locally. This has led to a restructuring of organizational relationships. For example, the Union of British Columbia Performers, the B.C. division of ACTRA, is responsible for negotiating and administering an agreement to cover independent producers who work there. This agreement has a number of substantive differences from the nationally-bargained agreement that applies in every other province.

Newfoundland and Labrador¹⁴

In March 2006, the government released *Creative Newfoundland and Labrador: The Blueprint for Development and Investment in Culture*¹². In its schematic outlining The Culture System, the report places the artist at the very centre, and developing and nurturing creative talent is seen as a fundamental requirement for developing the creative economy. Among the ten aims of the strategy are to; “support excellence in artistic endeavour,” and “improve the conditions under which professional artists and other cultural workers create and produce.” Strategic Direction One is to recognize and support professional artists. It acknowledges that many professional artists live a “fragile existence with low incomes and a general lack of employment benefits full-time workers take for granted.” Among other measures, the government commits to recognize the special place of professional artists in the creative economy and to improve their living and working conditions. It pledges to accomplish this “by exploring the feasibility of Status of the Artist legislation and a Newfoundland and Labrador Artists’ Code. Topics to be looked at include labour relations and collective bargaining rights in the arts sector; possible improvements through taxation measures; pension plans; and professional development and training.”

Best Practices from Other Countries¹⁵

¹³ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist

<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 17)

¹⁴ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist

<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 18)

It is extremely difficult to make comparisons between countries on these issues. The first reason is because there are very few people who understand them fully, as the paucity of Canada's information on the Observatory illustrates. There is also no universally accepted definition of the employment status of artists. Finally, as in Canada, the situation can vary substantially between different types of artists, different parts of the country, and most particularly between creative and interpretive artists.

However, some patterns are clear and there are some concrete examples of "best practices" provided below, from Western Europe, North America and Australia. In general, there are three overriding models for providing rights and benefits to artists.

- In some countries, particularly the Nordic countries and the former socialist countries that are now in the European Union, social programs have been adapted to deal with the reality of the work of artists.
- In countries such as **France**, **Belgium** and the **United States**, some categories of artists are deemed to be employees, and this enables them to obtain relevant benefits.
- In virtually every country, there are some provisions that have been designed uniquely for some categories of artists.

A significant study on the Status of the Artist undertaken by Ericarts for the European Parliament in November 2006 summarized several innovative or alternative measures:

Contractual or employment relations

- The "presumption of an employment contract" model for performers and a special status for "intermittent artists" (France);
- A "quasiemployed" status for self-employed artists who are economically dependent (Germany);
- Simplified procedures for freelance artists to create limited partnership companies (Hungary);
- Various types of administrative, contractual and financial services for artists, such as the "portage salarial" (France) or the "tiers-payant" (Belgium).

Collective bargaining (labour law)

- Extension of negotiating rights to self-employed or economically dependent artists (Germany).

Social security measures

- Extension of all forms of social insurance including unemployment benefits to all artists (Belgium);
- Social security funds for all self-employed artists (Germany);
- Special social funds for independent artists (Austria), for stage professionals or writers (Italy);
- Voluntary unemployment insurance for self-employed (Denmark);
- Social assistance for low-income professionals (Netherlands, Luxembourg);
- Alternative means to fund social security contributions (France, Germany);
- Adjustment of the qualifying criteria for social insurance (France, Italy).

Taxation (in several countries)

¹⁵ Status of the Artist in Canada: An update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist

<http://ccarts.ca/wp-content/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> (pg. 23-27)

- Flat-rate professional expense deductions;
- The spreading of income and expenditure over several years;
- Reduced VAT rates (equivalent to Canada's Goods and Services Tax, or Harmonized Sales Tax);
- Tax exemptions for self-employed artists."

Tax Rules

Perhaps the most famous measure of all is the tax exemption for creative artists (visual artists, writers and composers) resident in **Ireland**. All earnings derived from sales of artistic works or copyright fees to a maximum of €250,000 are exempt from income tax for the year in which the claim is made. The only tax on this income is a 5 percent Pay-Related Social Insurance scheme, which provides a minimal level of insurance and pension. In February 2006, the Canadian Council of Chief Executives released *From Bronze to Gold: A Blueprint for Canadian Leadership in a Transforming World*. The CCCE is composed of the chief executives of 150 of Canada's leading enterprises. Among other recommendations, the CCCE called for taxes on creativity to be abolished and cited the Irish model as an example.

Income averaging is a widely used mechanism to support artists and other independent contractors. **Sweden, Germany, the Netherlands, France,** and the **United Kingdom** each have income averaging measures. **Australia** classifies artists (along with a few other categories such as inventors and sportspeople) as "special professionals" who can average income for tax purposes for a period of up to five years. In January 2005, Australia's Taxation Office published a ruling which addresses "the principles to be applied in determining whether an artist is carrying on a business as a 'professional artist'." A key distinction from the Canadian test is that the "profit motive" is considered to be pivotal, thus relying on the intention of the taxpayer.

In **Germany**, most professional artists are covered by tax laws as freelancers, with an ability to deduct professional expenses against earned income. In some cases they can deduct a lump sum on their turnover instead of deducting individual expenses. Occasional artists may deduct 5 percent of their turnover and self-employed writers and journalists can deduct 30 percent; in each case to a maximum amount. In **Bulgaria, Poland** and **Slovenia**, creative artists can deduct 40-50 percent of earnings generated from their artistic work without documenting or detailing expenses.

In **Australia** and the **United Kingdom** arts grants are income tax exempt. In several other countries, grants may enjoy an exemption, depending on their purpose and duration.

Grants and Financing

Grants can be provided as a kind of "salary" to outstanding artists in **Sweden, Finland** and **Norway**. These income schemes can either be for a defined period in an artist's career (for example at the beginning or near the end), or for life. What distinguishes the Nordic model is that funding is directed at individual artists, not to support artistic objectives, but rather to support the individual artist who has achieved a certain artistic excellence. These grants are awarded by arm's-length experts in consultation with the appropriate professional association. In **Finland**, these grants have also been used to ensure that retired artists receive the full benefits from the public pension program and to compensate for years when the artists' income was low.

In the **Netherlands**, artists whose incomes are below a certain level can claim a social security benefit the same as other citizens under the National Assistance Act (ABW). However, under the

Income Provision for Artists Act (WIK) there are special rules to support artists in launching their careers. Young artists can receive a basic income (70 percent of welfare payments) for a period of four years to help build their professional careers. An independent advisory board decides on applications. This incentive does not prevent artists from selling their work and collecting a value of up to 125 percent of the benefit they receive. They are entitled to use this provision for a maximum of four years, which do not necessarily have to be consecutive, but artists must claim it within a period not exceeding 10 years.

Social Benefits

Certain artists in **France**, including directors, stage managers, cinematographers and sound and lighting technicians, have always been considered to be employees and are covered by the Labour Code. In 1969, special legislation provided that performing artists are also considered to be employees and thus covered by the Code, except in limited circumstances. This means that all provisions apply to them including minimum pay rates and a comprehensive benefits system providing medical care, protection for workplace accidents, wage continuation in the case of illness or disability, unemployment benefits, professional training, holidays and vacations, maternity leave and a retirement plan.

While writers, visual artists, photographers and others similar creative artists are not considered to be employees under the Code in **France**, a special social security insurance package is available for professional artists with minimum earnings of roughly €7,000. The Maison des artistes manages this scheme for the government and acts as the “employer” of some of these categories, and an equivalent body plays the same role for photographers, illustrators and authors of software programs and audiovisual works.

In **Croatia**, independent artists have the right to retirement and disability payments and to health insurance on the basis of their artistic work and the contributions are paid by the state budget.

In **Germany**, the *Kunstler Sozialkasse* (KSK) was established to provide independent artists with some social security protection. It covers health insurance and pensions, but not unemployment benefits. The artist contributes 50 percent of the premium, the government pays 20 percent and enterprises “regularly using artists’ work” pay 30 percent. In 2000, more than 112,000 artists were registered:

- 39 percent visual artist;
- 26 percent musicians and composers;
- 24 percent authors, journalists and translators;
- 11 percent performing artists.

Changes in 2005-06 in **Belgium** created a social security system for all professional artists, offering a comprehensive range of benefits. As in **France**, effectively, the scheme is premised on artists being deemed to be employees. A 13 percent deduction is taken from the fees of the artist and a 35 percent contribution is paid by the employer. Artists have access to public funds to compensate their share of social security costs. If an artist certifies that they are providing services on a self-employed basis, they will be required to make all of the social security payments themselves and they will be eligible for a far less comprehensive package of benefits, but will have greater scope in deducting business expenses from their income.

The social benefits available in the **United Kingdom** are funded by contributions made by employers and deductions taken from employees. Employed workers have Class 1 benefits, while freelancers pay for their own benefits as either Class 2 or Class 4. Actors have a true Dual Status, since their employers are required to make contributions on freelance income for Class 1

benefits, while they continue to enjoy the ability to deduct all legitimate expenses against their earned income and yet still have certain legal rights in their performance as freelancers. Class 1 benefits include a full range of protections, from medicare, disability insurance, unemployment insurance, to pensions.

In the **United Kingdom**, other freelancers pay both portions of the National Insurance Contributions for a reduced level of benefits. Some unions operate programs to supplement the public scheme for such freelance artists.

Income Maintenance

The general unemployment insurance system in **Denmark** is based on voluntary membership in an unemployment insurance fund. A self-employed artist who has to “close his business” will be entitled to benefits if a number of conditions are met such as membership in an unemployment insurance fund for at least one year and full-time self-employed activities for at least 52 weeks within the previous three years.

Provisions relating to specific financial remuneration for periods of unemployment for freelance artists exist in three other European countries, **Sweden**, **Belgium** and the **Netherlands**, but each is limited in scope and the amount of compensation paid. The challenge of determining when a freelance artist is “unemployed” also remains for these systems. For example, a few years ago in **Belgium**, a musician, novelist and sculptor each had received unemployment benefits. However, as each continued to practice their art (by playing, writing and sculpting) during the period of benefits, they were declared ineligible and ordered to repay the benefits, even though they had not received payment, or sold their art work during the period in question.

In the **United States**, performers and others engaged in the performing arts, and film and television, are considered to be “employees.” Under U.S. tax laws, all employees may deduct business expenses. This also means that unions and guilds are covered by the labour laws and that the producer is the first owner of the copyright in their work. But, these artists are entitled to collect unemployment benefits in appropriate conditions. Once again, there may be some difficulty collecting benefits because of the intermittent nature of the work and the need to practice and rehearse. However, while Ronald Regan was President, there was a famous photograph of his son, Ron Jr., lining up to collect unemployment benefits when he was laid-off from his job as a professional dancer.

A note on Bill C-11¹⁶

On September 29, 2011, Bill C-11 was introduced into Canadian 41st Parliament by the federal Industry Minister Christian Paradis with the short title *Copyright Modernization Act*. The bill is virtually identical to Bill C-32 from the previous Parliament which did not pass due to the dissolution of Parliament. Most of the opposition to the Bill from the opposition parties, in

¹⁶ Copyright Act of Canada, http://en.wikipedia.org/wiki/Copyright_Act_of_Canada

particular the NDP's opposition is about two aspects: 1) The fact that it's prohibited to circumvent digital locks even for lawful purposes and henceforth all the fair dealing rights in the bill can easily be removed by the usage of such a digital lock. 2) The missing compensation of creators of works through a scheme similar to the one used in the past that puts a levy on recording media at the time of sale of such blank media. The bill received Royal Assent on June 29, 2012 with all amendments rejected.

Provisions of the Copyright Act of Canada

Rights granted

Copyright grants the sole and exclusive right to create and recreate a work whether wholly or substantially. It also includes the sole rights to:

- publish the work if unpublished
- perform the work in public
- to produce, reproduce, perform or publish any translation of the work,
- in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
- in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
- in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
- in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
- in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
- to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
- in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,
- in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner, and
- in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

Originality

The Act provides protection for all "original literary, dramatic, musical and artistic" works. Close attention has been paid to the use of the word "original". It has been well established that the foremost requirement for the subsistence of copyright is that the work be original.

The *CCH Canadian* case re-evaluated the meaning of "original" and found that for a work to be original it must be the result of the exercise of "skill and judgment". More specifically: skill, meaning the "use of one's knowledge, developed aptitude or practiced ability in producing work", and judgment, meaning the "use of one's capacity for discernment or ability to form an

opinion or evaluation by comparing different possible options in producing the work". Nevertheless, originality does not require any novelty or creativity. It does require intellectual effort beyond mere mechanical exercise.

The determination of originality on the basis presented in *CCH Canadian* depends on the facts. For a large part, it depends on degree to which the work originated from the author. Many factors are considered; the medium or form used is significant. Whether it comprises elements that are in the public domain or not, whether it the ordering of data or facts, or whether the form is pedestrian or novel. Mere selection is generally not enough. As well, it is significant to consider whether there are any artistic elements to it.

Fixation

Copyright provides the protection of expression of ideas. This entails that there must be a form, or "fixation", to the expression. It is fixation that distinguishes an expression from an idea.

In *Canadian Admiral Corp. v. Rediffusion*, the court considered fixation: "for copyright to exist in a 'work' it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance." In this case, the court found that there was insufficient fixation in the live broadcast of a sports event. Any sort of broadcast, telecast, or display of a spectacle on its own is not sufficient to be fixed. At the least, it must be simultaneously recorded in some fashion to be fixed.

To the possible exception of choreographed works, there is a requirement that the work be recorded in a relatively permanent form. Typing a note into a computer screen may be sufficiently permanent. Some cases have shown that unstructured speech or other spontaneous or improvised creations, such as a sports game, cannot contain copyright.

Exclusion

Both facts and ideas are by their very nature uncopyrightable. This will often create difficulties when it becomes necessary to separate the idea from the expression as well as in the separation of fact from the arranging and use of those facts. Where the distinction between idea and expression becomes obscured the Courts often take a precautionary view that it cannot be copyrighted so as to avoid preventing others from expressing the same idea.

Ownership

The copyright of an artist's work is owned directly by the artist in most cases with the exception of *engravings, photographs, portraits*, and works created in the course of employment. Furthermore, these rights can be alienated through assignment and licenses.

An artist's moral rights, however, are inalienable and stay with the artist their entire lives. As with copyrights, moral rights are inheritable.

The copyright legislation from fifty years ago is considered by some experts to be reasonable whereas the current version has been diluted to the point being anorexic. The proposed legislation makes no distinction between artists and owners, and owners are not always the artists. The legislation as it is written does not outline its purpose, it is a "mashup" or combination of different interests that protects the rights of owners and users but does not protect either the moral or economic rights of artists. Artists should have the right to earn a living from what they do and new technology may consequently undermine an artist's ability to earn a living. There is a danger that the artists will do all the work while owners (i.e. publishers, producers, etc.) will earn all the money.

The proposed legislation, which is confusing and unduly complex, will have to be counteracted through the forming of collectives and the development of Status of the Artist legislation at a provincial level to protect artists.

Conclusion

Artists must be valued and treated equitably in consideration of the contributions they make to the social, economic, and cultural well-being of New Brunswick. The treatment of the artist by society reflects its appreciation of the value of creativity, the right to self-expression, and the respect it holds for its cultural heritage and development. The contribution of the artist to society is manifested in economic, labour market, social and industrial terms, true value being evidenced in the quality of life and the maturity of the province and the fundamental role of the artist as the creative force behind all cultural industries warrants that artists enjoy an equitable share of the profits and decisions in the sector.¹⁷

All people should have the broadest access to artists and their work through distribution, exhibition and education. New Brunswick's people must have full access to New Brunswick arts and artists, including the work of First Nations artists, whose cultural and aesthetic traditions predate European contact and must be nurtured and encouraged.

Moving forward, goals must be identified that are consistent with the needs and desires of New Brunswick's artists and arts organizations. Questions of funding, funding guidance, taxation, health and pension benefits, vulnerable workers, contracts, collective bargaining, information and training, market research, cultural industries development funding, market strategy development, arts education, arts programming, arts touring and capital construction and refurbishment, respect for artists by society, self-employment are just some that will need further consideration in a New Brunswick context.

¹⁷ Canadian Advisory Committee on the Status of the Artist,
http://www.carfac.sk.ca/assets/Code_CACSA_1988.pdf (3-4)

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<http://laws-lois.justice.gc.ca/eng/acts/S-19.6/>

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La Politique Culturelle du Québec

http://www.mcccf.gouv.qc.ca/index.php?id=3355&tx_lesecrits_pi1%5Becrit%5D=35&cHash=f6c0ea7ee5bd5bf43a62b94c4f0c35a1

Yukon's Arts Policy

http://www.tc.gov.yk.ca/pdf/yukon_arts_policy_ds.pdf

The Arts and Canada's Cultural Policy

<http://www.parl.gc.ca/Content/LOP/researchpublications/933-e.htm>

Cultural Policy of New Brunswick

<http://www.gnb.ca/0007/policy/pdf/e-report.pdf>

Newfoundland and Labrador: Blueprint for Development and Investment in Culture

<http://www.tcr.gov.nl.ca/tcr/artsculture/culturalplan2006.pdf>

Report on the Socio-Economic Status of the Artist in Ontario in the 21st Century

<http://www.ontla.on.ca/library/repository/mon/16000/269912.pdf>

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<http://www.tpcs.gov.sk.ca/Status-Artist-EN>

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<http://www.tpcs.gov.sk.ca/Pride-of-Saskatchewan>

The Arts Professions Act (Saskatchewan)

<http://www.tpcs.gov.sk.ca/arts-professions-act>

Collective Bargaining Rights for Associations and Unions of Professional Artists in Saskatchewan

<http://www.tpcs.gov.sk.ca/macsacollectivebargainingrights>

An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature and their Contracts with Promoters (Québec)

<http://www.canlii.org/en/qc/laws/stat/rsq-c-s-32.01/latest/rsq-c-s-32.01.html>

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<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&File=9>

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http://en.wikipedia.org/wiki/Copyright_Act_of_Canada#Bill_C-11

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<http://www.michaelgeist.ca/content/view/6544/125/>

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