



National Policy Conference 2006

DISCUSSION PAPER THE ARTIST / CREATOR: KEYSTONE OF CULTURAL IDENTITY AND EXPRESSION

The primary focus of this paper will deal with creativity and the role of the artist/creator, the role of the state and society, and the inter-relationships that flow from the continuum of creativity.

The artist/creator is the progenitor of the continuum. Without the artist/creator there would be no production, nothing to distribute and less to preserve or conserve. While this assertion may need to be nuanced, for the purposes of cultural policy and culture itself, the artist/creator must be regarded as the fountainhead of the continuum.

The artist/creator gives shape, expression and tone to ideas and inspiration. The creative process is a mysterious one and from it emerges the manifestation of a work of art. The process and the art itself are indivisible in their appeal and their ability to communicate complex ideas with grace, beauty and poignancy.

There are no laws of physics, no magical formulae that can fully explain or govern the creative process. It is an innate human response to making sense of the world

Antonine Maillet, the great Acadian writer has reflected on the transaction between the human creative drive and the palette of materials used in creating works of art.
“The great role of the artist is to add an eighth day to creation, to render the impossible possible... A few little words, four musical notes, just 26 letters in the alphabet – with these tiny tools, art recreates the universe and penetrates the heart of humanity....the responsibility of the visionary, of the artist is to create a society in which all people can be at home.”

or capturing, in one form or another, the beauty, cruelty or inventiveness of the human species.

It is fitting that any contemplation of public policy affecting the creative process or creators begin with an appreciation of this mystical essence of the act of creation. It engenders a necessary and deep respect for the work of artists, creators and creative individuals.

It is also important to consider the appropriate relationship between the state and the creator/artist, and the creative process itself. In addressing this relationship through the continuum, the quest for balance is an eternal one.

History has seen various states take an undue interest and control of the artistic/creative process. One need only consider the impact of the Cultural Revolution in China, the impact of fascism on the creation of art during the Nazi era, or the impact of religious extremists on art from the bonfires of the vanities in the Renaissance Florence of Savonarola, to the iconoclastic terrorism of the Taliban of Afghanistan. Some of these societies traded financial support from the state or mere tolerance for artistic or intellectual pursuits for compliance to a state dictated criteria for the production of any artistic or creative work.

There is a delicate balance that must be achieved when governments address any element of creative and artistic expression. Unlike the creative process, public policy development is subject to an impressive (and sometimes oppressive) array of intervenors. The very process of articulating public policy requires a lengthy, complex and challenging series of steps before anything tangible is achieved. It rarely flows from the single pen or mind of a creative policy maker, but is the culmination of a constant process of writing and rewriting, consulting and consulting again, politic tradeoffs, and compromises between interest groups and the disciplines of government.

To justify the intervention of the state through policies, programs or practices in support of artists and creators, it is of foremost importance to have clear objectives rooted in a respect for artistic freedom and the diversity of expression and form of the artist/creator.

Artists/creators

The artist/creator must also understand the impact of turning to the state and assess the advantages and disadvantages of doing so. While a large element of the appeal of the arts is the aura of mystification of the creative process, the artist/creator must assess not only the personal gains or losses but the impact of government intervention on the process itself.

An acid test for responsible public policy in this area must be that the measures must improve the ability of the artist/creator to function in society and to rise to the challenges inherent to their craft. The juncture between the artist/creator and the public policy domain must be as light as the mists over a morning lake, while at the same time fostering an environment conducive to creativity and expression.

Generally, artists/creators look to government for very specific things:

- providing an environment conducive to free expression of their ideas or interpretations;
- financial support or economic conditions to allow them to create, disseminate and preserve their work;
- protection of their works from unauthorized use or distortion by others;

- flexible interpretation of tax and labour law to reflect the unique manner in which artists/creators function;
- access to the social benefits available to the majority of society;
- infrastructure necessary to stimulate innovation, creativity and experimentation.

Governments must for their part ensure that the policies and measures in support of artist/creators contribute to the larger public good of society. This is an area particularly fraught with tension for the artist/creator community and the government itself.

Freedom of Expression

Perhaps the most important thing that the state can do to encourage the artist/creator community is to guarantee freedom of expression. Censorship is both a slippery slope and an antidote to creativity and artistic expression. The artist/creator cannot function adequately in an environment where freedom of expression is unduly curtailed or prohibited. While some measures can be considered reasonable for the interests of the larger society, care must be taken to ensure that such measures are taken with full regard for the potential impact on the creative/artistic life of a society.

The recent debate over measures to proscribe child pornography is instructive in this regard. While artists/creators seek the widest latitude in the expression of their work, governments are concerned that such latitude could be misused in a manner that compromises the public good. The tension of legitimate concern for the preservation of the public good and the freedom of expression vital to a healthy artistic/creator community has proven difficult to resolve without costs on both sides of the issue.

The legislation initially sought to remove the exemption for works of artistic purpose from the child pornography provisions of the Criminal Code of Canada. Advocates for the artist/creator community vigorously resisted the measure on the grounds that it violated the freedom of expression guarantees in the Charter of Rights and Freedoms. Proponents of the revision underscored the need to protect the public good from misuse of the exemption, while others including the police felt that the measure was unenforceable and overly broad.

In the final analysis, the legislation preserved the exemption but added provisions to ensure that the impact on the public good was added as an essential dimension to the assessment of harm. Neither the creator/artist community nor the proponents of the removal of the exemption were completely satisfied with the end result.

In passing the legislation, the Senate added its own commentary to the legislation. This is a device which allows passage of the legislation but also reflects outstanding concerns of the legislators regarding the measures contained in the bill.

In addressing the issue the Senators wrote:

“Protecting children from sexual abuse and exploitation has been a deep and abiding interest of your Committee. We do, however, have some concerns with several of its details....

We are also concerned about the revised defence, which will permit art that has a legitimate purpose, and does not pose an undue risk of harm to minors. This new defence is vague and subjective; leading to uncertainty for artist and writers and a possible restraint on their creativity.”

The observation of the Senators is a succinct demonstration of the balancing act that must take place each time the instruments of the state are used to address issues of creativity and expression – the very life-blood of the artist/creator community.

The need for perpetual vigilance is clear both for the artist/creator and also society as a whole. Rights that are essential to our democratic society must be ever defended.

Copyright and Intellectual Property Protection

Artists and creators look to the state to protect the economic and moral rights inherent in their works. Copyright law is the vehicle through which such objectives are realized.

The task of protecting and enhancing the economic and moral rights of the creator/copyright owner is another study in the balancing of interests by the state.

The creator/copyright owner sees the potential economic benefit from a broad use of their work and is loathe to relaxing the exercise of their rights which constitute an important source of revenue.

The challenge for both the creator/copyright owner is to ensure that new technologies for the creation and distribution of artistic work or copyrighted material are captured by legislation and regulation. There is a critical differential between the speed with which copyright reforms are implemented and that of the introduction of new technologies. The gap between the adoption of new technologies by the public and legislative reform always mitigates against the interests of the creator/copyright owner.

Another dimension of the copyright landscape can be found in those organizations, institutions and individuals which mediate between the interests of the creator/copyright owner and the marketplace. Institutions such as copyright collectives, enterprises such as sound recording and publishing interests are an important dimension in the rights equation. New technologies have also led to some of these moderators acting as "converters": mediators who convert copyright-protected works from one medium to another, an example of which can be found in electronic publishing. When a writer contracts with a periodical or publisher to have work produced in one medium and then the producer converts it to an electronic data base or archive without the express consent of the creator/copyright owner, should not the contract be modified? This is an issue which is an interesting, but worrisome by-product of technological development.

There are also copyright owners whose interests run counter to many within the creator/copyright community. Academics and researchers have sought a loosening of copyright protections to afford a quicker dissemination of ideas and informed debate. Educators seek freer access to copyright materials for use in the classroom and internet proponents see copyright as an obstacle to developing the full potential of this technology. The power of the arguments marshalled by these groups adds considerable confusion to a complex system designed to protect and reward creativity and innovation.

Copyright is an area where the power of the state is also affected by its adherence to international treaties governing the management of copyright on a global scale. While at once affording more extensive protection to the interests of the creator/copyright owner, the international system of copyright policy development is subject to similar pressures from user groups and those who believe that copyright is an archaic concept.

The quest for an approach to copyright which balances the interests of the creator/copyright owner/licensee with the user community is one that requires deftness and, as always, a clear political vision of the import and impact of policy development. In the final analysis, political will must be exerted to ensure the various streams of interest see a reflection of their circumstances in any new legislation.

The challenge for both the creator/copyright owner and the state is to find a way to expedite copyright reform so that both technological innovations and international policy developments can be quickly dealt with in legislation.

With the rapid pace of technological development, the process of copyright reform will be a staple in the policy diet of the federal government and the cultural sector.

Status of the Artist/Creator

In 1980, Canada signed on to the Belgrade Recommendations on the Status of the Artist. The Recommendations were the product of lengthy and detailed discussions by the sponsoring body UNESCO. These discussions touched on every aspect of the life of an artist/creator in society.

In 1985, the Minister of Communications, the Hon. Marcel Masse, declared that the status of the artist was one of his highest policy priorities. It was with this proclamation that Canadians began to consider what status of the artist/creator would mean in our own country.

In essence, there are three main thrusts to the Canadian version of the status of the artist/creator discussion:

- recognition of the contribution artists/creators make to Canadian society;
- economic status (including taxation, income, copyright, the rights of collective association and access to funding);
- occupational status (access to social benefits, education, training and professional development, freedom of expression and recognition of professional status).

Each of these areas has been the focus of previous recommendations by Royal Commissions, working groups and artists' associations over the years.

The Massey-Lévesque Royal Commission on the State of the Arts, Sciences and Humanities in Canada reflected these three areas in its 1951 report by quoting the Canadian Arts Council (precursor to the CCA) that reported to the Commission that:

“No novelist, poet, short story writer, historian, biographer or other writer of non-technical books can make even a modestly comfortable living by selling his work in Canada. No composer of music can live at all on what Canada pays him for his compositions. Apart from radio drama, no playwright, and only a few actors and producers, can live by working in the theatre in Canada. Few painters and sculptors, outside the fields of commercial art and teaching, can live by the sale of their work in Canada.”

In 1980 when the Applebaum-Hébert Federal Cultural Review Committee issued its report, it was noted that:

“It is clear to us that the largest subsidy to the cultural life of Canada comes not from governments, corporations or other patrons, but the artists themselves, through their unpaid or underpaid labour. When creative activity is diminished because artists are unable to earn a decent living, something is lost to us all and our entire culture fails to fulfil its promise.”

The Canadian experience in the art of public policy to support and reward creativity and artistic expression is most instructive.

The nature of the Canadian Constitution makes a fast and universal solution to some of these issues illusive and challenging. The collective representation issue is a good example of these challenges.

The Right of Collective Association

The division of labour jurisdictions between the federal and provincial governments precludes a silver bullet approach to resolving the collective representation issue.

The federal government is responsible for transportation, banking, broadcasting and telecommunications, and international trade. Everything else falls to the provinces.

When the federal government enacted legislation in 1992 granting the right of collective representation to self-employed professional artists/creators, it was recognized as an important first step. It is also generally recognized that the majority of Canadian artists/creators work in areas of exclusive provincial jurisdiction.

Quebec took the lead in enacting legislation granting self-employed professional artists the right to collective representation in the 80s. Since then only Saskatchewan has made any real progress to dealing with this issue. Discussions have been held in Newfoundland and Labrador, consultations have been held in fits and starts in Ontario, and vague rumblings can be heard on the issue from time to time in Manitoba and New Brunswick.

The challenge for those artists who now enjoy the rights of collective representation is further complicated by the uneven range of support programs and measures that provincial governments have created across the country. The artist/creator must be highly mobile to take advantage of opportunities to work, and navigating the complex and inconsistent range of programs and regulations is often a daunting task.

There have been repeated calls for a national solution to the issues that are agglomerated under the rubric of status of the artist/creator but the patchwork quilt of jurisdictions and governments makes this more of a quixotic dream than a likely scenario, unless the cultural community can force various levels of government to look at this simultaneously from a shared perspective.

Taxation of Artists and Creators

The problems associated with the collective representation of self-employed artists/creators has created serious “echo” difficulties in the artistic sector, such as the issue of taxation of the income of artists/creators.

Taxation of the artist/creator has been a staple on the list of urgent problems for decades. The issue has been studied, discussed, occupied the time and attention of the courts, bureaucrats, artists, arts advocates, lawyers and academics – but continues to fester.

There has been a serious and sustained failure of political will to resolve this issue in a systematic way. Where the resolution of the collective representation question is dependent on a common approach by the federal, provincial and territorial governments, the taxation issue can be resolved unilaterally by the federal government.

Despite court rulings, rogue tax assessors continue to challenge the self-employed status of artists/creators based on standards that have been consistently repudiated by the courts.

In 1986, the Status of the Artist Task Force focused on this issue as integral to the welfare of professional artists/creators in Canada. The Siren-Gélinas Task Force called upon the government to implement a “dual status” approach; that is, deeming artists to be self-employed for taxation purposes and employed for the purposes of social benefit programs. Such efforts have been repudiated by both the Department of Finance and the Canada Revenue Agency (CRA). Officials in these departments regard such an approach as inconsistent with the responsibility of CRA to make the determination of tax status on a case by case basis.

At the heart of the issue is the division of responsibility for the Income Tax Act, domain of the Department of Finance, and the interpretation and enactment of its provisions which falls to the Canada Revenue Agency. CRA has insistently pointed out that, without amendments to the Income Tax Act, it must respect the existing provisions of the legislation. This stand appears to be unchanged in the face of a variety of court rulings supportive of a more flexible approach to the interpretation of the Income Tax Act.

The resolution of this chronic problem would be a major step forward in resolving ongoing difficulties artists/creators have in securing their social and professional status in Canadian society.

Social Benefits

Inextricably linked to the issue of taxation status is the issue of access to social benefits. The largely self-employed ranks of artists/creators are predominantly seeking fairness and equity in such access, rather than special status.

Most artists/creators prefer to elect for self-employed status; this choice is consistent with the non-standard manner in which artist/creators earn their livelihoods. They may hold several short-term contracts simultaneously, they may have secondary sources of income such as teaching or selling their work, or they may take advantage of opportunities for foreign engagements.

The structure of the social benefit system in Canada evolved under the labour market regime of the industrial era. The labour force consisted of employees who often worked for the same employer for their entire careers. The design of our social programs was predicated on this arrangement and continues to be funded by contributions from both the employer and the employee. Given the steady growth of self-employment in the Canadian labour force, it is clear that this model must be revisited to ensure that all Canadian workers can have access to these programs.

While the artist/creator can still participate in the Canada Pension Plan by paying both the employer and employee share of contributions, the low income levels of most within this community make regular contributions a rarity. Non-participation of the artist/creator in the CPP means they are also ineligible for public disability benefits should they need them.

The adamancy of the creator/artist to retain self-employed status also shuts them out of the Employment Insurance Program, as the self-employed are not eligible to participate as contributors or beneficiaries. This means that during periods where work is hard to find, or the artist/creator is sick or disabled, they have no access to a public benefit program to help them through the rough times. Nor do self-employed Canadians, including artists and creators, have access to EI benefits to support professional development opportunities.

For performing artists, Union des artistes, ACTRA and Equity have developed benefit plans which provide some of the protections for pension provisions and other forms of insurance benefits. The costs of these benefits are borne by the engager of the artist/creator.

The transition in the contemporary Canadian labour force compels governments to revisit their approach to social benefits and labour standards to accommodate an ever-growing body of self-employed in the Canadian labour market. Like artists/creators, this element of the labour market is looking to government to rebalance the social benefit system to ensure that self-employed, independent

and dependent contractors, and non-standard workers receive the protection from the state enjoyed by employees within the same labour market.

For the artist/creator, one thing is perfectly clear – such a solution will never be accepted if it means the loss of self-employment status for the purposes of taxation. This has been the battle-cry of most of the artists/creators for decades and little is likely to change in the decades to come,

The key question for the artist/creator community in this area is how to build effective partnerships or a common front with other elements of the labour market facing the same challenges as artists/creators.

What role could existing benefit plans provided by artist/creator organizations have in the evolution of such a new model?

Another development in the Canadian labour market is the aging of the workforce. In the artist/creator community this is most visible when the generation of pioneers in creator-led organizations retires or changes employment. While Canadian universities, colleges and professional training institutions are generating thousands of new graduates a year, how can they be recruited into the creative/artistic sector to quickly fill the gaps left by the retirement of so many people within a short period of time?

Some of the most serious challenges in maintaining the requisite balance in the continuum arise not solely from sector or governmental inaction, but also stem from rapid developments in technology, international policy development in areas such as telecommunications, and international trade. The demographics of Canadian society are rapidly changing, highlighting the growing diversity of our people and the manner in which they choose to express themselves.

Policy and regulation are inelegant instruments, difficult to develop, explain and enforce. Can we find other means of effecting lighter-weight approaches to address the challenges and opportunities that stem from these changes? Is this part of the democratic deficit – a lack of democratic imagination in dealing with the changes around us and managing them for the greater public good?

QUESTIONS FOR CONSIDERATION

Can the balancing act between the public good and the freedom of expression of the artist/creator be resolved?

How can federal legislation and regulation keep pace with the rapid advances in technology?

How can the interests of creators/copyright owners be balanced with those of copyright users?

Québec has continually been in the forefront of artists' rights. How can we encourage the federal government to expand the federal Status of the Artist Act to reflect more closely Québec's version?

What more can be done to encourage other provinces to enact status of the artist legislation?

In the taxation file, is "dual status" still a valid concept? If so, how can the sector best achieve this?

How can the arguments for fair taxation for self-employed individuals best be made to the Department of Finance?

How can the existing model be improved to ensure all workers have access to social benefits?

How do we convince government to abandon the concept of social benefits based on the industrial labour model and stimulate creativity, innovation and productivity at the same time? How do we encourage the new government to accept this challenge as a priority for its renewed mandate?

How can the cultural sector build "common cause" partnerships with other sectors on these issues?

In referring back to the continuum of creativity, what additional measures can the artist/creator community undertake to consolidate its position in Canadian society?