

INTRODUCTION TO MODEL AGREEMENTS FOR SASKATCHEWAN VISUAL ARTISTS

HOW TO USE THE CARFAC SASKATCHEWAN MODEL AGREEMENTS (REV 2010-05)

Background

In May 2009, the Saskatchewan government passed a new law called *The Arts Professions Act* (the “APA”). The APA will come into force and apply on and after June 1, 2010. The APA serves to recognize artists, including by affirming and recognizing:

- the important contribution of artists to the cultural, social, economic and educational enrichment of Saskatchewan;
- the value of artistic creativity in advancing Saskatchewan’s cultural, social, economic and educational life;
- the valuable contribution of artists to Saskatchewan’s cultural heritage and development; and
- the importance of fair compensation to professional artists for the creation and use of their artistic works.

To achieve these purposes, the APA requires a written agreement whenever a person (called an “engager” in the APA) intends to hire a “professional artist”: (1) to produce an artistic work or production; (2) to present an artistic work or production to the public; or (3) to engage in the circulation or dissemination of artistic works to the public (whether by lease, exchange, deposit, exhibition, publication, publicly presenting or other similar fashion). Under the APA, each contract between a professional artist and an engager must contain certain terms.

Questions about the Model Agreements?

Please contact CARFAC Saskatchewan if you have questions about the General Terms or about the model agreements in general. If we are unable to help you, or if you are looking for legal advice that only a lawyer can provide, CARFAC Saskatchewan will refer you to one of our recommended lawyers.

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The CARFAC Saskatchewan Model Agreements

CARFAC Saskatchewan has always recognized the value of artists entering into written contracts; but CARFAC Saskatchewan also recognizes that artists are not always in a position to develop and maintain a body of contracts that meet all the requirements of the APA. To simplify matters, CARFAC Saskatchewan has worked with its lawyers to develop a set of model agreements that meet all the criteria set out in the APA. CARFAC Saskatchewan is pleased to provide the following model agreements for reference:

For sales of works:

Bill of Sale

For commercial galleries, dealers, agents and retail consignees:

Agency Agreement

Consignment Agreement

For public galleries, artist-run centres, performance art and lectures:

Exhibition Loan Agreement

Performance Art Agreement

Artist Lecture Agreement

For copyright licensing, publication and use-by-others:

Copyright Licence

Digital Art Licence

Print Publication Agreement

For commissions and murals, etc.:

Commission Agreement

For lease and rental arrangements:

Lease of Artistic Works

For community art, groups and residency projects:

Community Art Agreement

For collaborations between two or more artists:

Artist Collaboration Agreement

Notice and Disclaimer

CARFAC Saskatchewan is hopeful that the model agreements will benefit artists.

Please note that CARFAC Saskatchewan prepared each of the foregoing model agreements to address the general requirements for a contract in the circumstances generally described by the title to the agreement. In other words, a model agreement contains only the most basic terms that might arise in the context identified by the title to the agreement. The model agreements are not comprehensive in nature; they do not contemplate anything beyond the most basic model for the relationship in question.

By way of example, the model “Commission Agreement” does not specifically address a circumstance where the artist is also selling (or retaining) the maquettes for a work. You will have to adapt and modify the terms of each model agreement to suit the specific set of facts or circumstances in question.

All artists and the public may access the CARFAC Saskatchewan model agreements to meet the requirements of the APA or otherwise; however, those persons who do so (“you”) acknowledge that CARFAC Saskatchewan created the model agreements and the accompanying notes to provide artists and others with information of a general nature only. The model agreements and accompanying notes are not intended as a substitute for professional legal consultation and legal advice in any particular case. CARFAC Saskatchewan is not entitled to, and does not by providing the template model agreements, provide legal advice. CARFAC Saskatchewan cautions you not to rely on any model agreement as professional legal advice.

CARFAC Saskatchewan encourages you to seek detailed legal advice before acting or relying upon any information contained in any model agreement or accompanying notes. While the model agreements and notes are based on information that was accurate and up-to-date as at the date of drafting, the accuracy and currency of any information will change over time. CARFAC Saskatchewan makes no representations whatsoever as to the applicability or suitability of any model agreement or any accompanying notes to any particular person or circumstance. CARFAC Saskatchewan disclaims any and all liability for any reliance by anyone upon any model agreement and the accompanying notes, if any.

You must seek the advice of a lawyer if you have any questions or concerns about the use of any model agreement.

General Terms and Conditions

Most of the model agreements contain a Schedule “A” called “Interpretation and General Provisions” which sets out some general terms and conditions which are often standard in contracts (the “General Terms”). Having been drafted by lawyers, you will find some “legalese” in the General Terms. To give you an understanding of the legalese, CARFAC Saskatchewan’s lawyers have provided the following explanation or translation of the General Terms:

- A.1.-3. Definitions.* A contract will usually have some defined terms. Defined terms help parties read and interpret the contract. The use of defined terms permits the parties to set specific definitions and to adopt definitions from the *Copyright Act* (Canada) or elsewhere. The General Terms schedule contains the definitions for three (3) terms that are used commonly among the model agreements. This allows for shorter contracts.
- B.1. Independent Contractors.* The professional artist and the engager who sign a contract do not want to create an employment relationship, a joint venture or a partnership because certain personal liability, tax consequences and source deduction remittance requirements flow from some of these relationships. This language is used to preclude the inadvertent creation of such a relationship.
- B.2. Changes to the Agreement require consent.* This clause is fairly self-explanatory. No party to an agreement should be permitted to make any change to the agreement without consent from the other party. This clause says that all changes to a model agreement must be in writing and signed by both parties. The clause also says that if a party intends to waive any of its rights, it must do so in writing. The latter part of the clause protects the professional artist’s rights to assign monies due under the agreement and the artist’s copyright, without needing to obtain the engager’s consent.
- B.3. Aboriginal Considerations.* The APA requires that agreements with a professional artist who is an Aboriginal set out the protocols respecting the use of Aboriginal symbols or artifacts or matters of importance to Aboriginal people. Basically, the APA imposes a duty on engagers to become aware of the protocols that exist with respect to the Aboriginal artist’s customs and traditions. This clause sets out a basic statement that the parties have taken this requirement into consideration.
- B.4. Waiver.* This clause is a standard term that simply says that a party’s failure to enforce a right does not prevent it from enforcing that right in the future. For example, if the artist fails to take action against an engager who makes an unauthorized reproduction of a work, the artist is not thereby prevented from taking action to stop further or other unauthorized reproductions.

- B.5. *Governing Law.* This standard term is in just about every contract you will see. The “governing law” part of this clause sets out the law that will be applicable to the agreement (here: Saskatchewan). The clause assists with interpretation of the agreement because we know to look to Saskatchewan law. Without this clause, an agreement could be subject to a different interpretation under the laws of another jurisdiction. For example, without this clause, if a Saskatchewan artist entered into a contract with an engager from British Columbia, that engager could try to have the contract interpreted under law in British Columbia which is more favourable to the engager. As the model agreements were prepared on the basis of the APA requirements, the law of Saskatchewan is the logical governing law of the model agreements.
- B.6. *Jurisdiction and Service.* The “jurisdiction” part of this clause provides that all disputes arising under a model agreement will be resolved in a particular forum (here: the Courts of Saskatchewan). As the model contracts were prepared on the basis of the APA requirements, the Courts of Saskatchewan are the logical forum for disputes. The “service” part of the clause provides that notwithstanding the *Rules of Court* relating to service of documents on a party, a party to the agreement may “serve” the other party with court documents in the same way that the party can deliver notices under the agreement. This makes it easier for parties to deliver court documents, if that becomes necessary.
- B.7. *Dispute Resolution.* This clause provides a process for the parties to resolve disagreements as to the meaning of the agreement without going to court (see General Term B.6.). The dispute resolution process starts with best efforts discussions, proceeds to mediation, and then to arbitration (and ultimately, the courts), if the disagreement is not resolved at an earlier stage. Resolution by agreement, mediation or arbitration will generally occur more quickly (and the process is more accessible to the parties) than resolution in the court system. Note, however, that the inclusion of an arbitration clause will mean that the parties must first try to resolve issues by arbitration, and cannot immediately take the matter to the Courts of Saskatchewan.
- B.8. *Severability.* This standard clause says that if a provision in an agreement is determined (by a court, usually) to be illegal or unlawful, then that provision is deemed never to have been in the agreement, while the rest of the agreement remains valid. This clause assists to avoid a circumstance where a change in law or interpretation that affects one small provision of the agreement might otherwise cause the entire agreement to become unenforceable.

- B.9. *Entire Agreement.*** This clause is a useful statement of facts. The clause says that the parties have put everything they agreed to do into the agreement. The clause excludes oral and unspoken/unwritten terms as being part of the agreement. In other words, with this clause in an agreement, it does not matter what the parties discussed orally or what one party believes the other party promised – if its not written in the agreement, then its not binding on the parties. Simply put, the clause says that whole agreement between the parties is contained in the written agreement and nothing outside the written agreement is relevant. Of course, this means that you must ensure that everything you have agreed to is written in the agreement, or written in a subsequent amendment to the agreement.
- B.10. *Counterpart Execution.*** This clause simply acknowledges that the parties may have to sign more than one copy of the agreement and may sign apart from each other (*e.g.*, by email, fax or otherwise) and thereby create counterparts of the agreement. Where that occurs all of the counterparts form one agreement (not multiple agreements).
- B.11. *Time.*** This is probably the most standard of all standard contract provisions. What the clause says is that time matters to the parties. In other words, if the agreement says that the engager is to pay the artist a commission on a specific date, then that payment must be made on that date. If the amount is paid late, then the engager is in breach of the agreement (because time is of the essence). The clause serves to prevent delay in performance and allows the parties to enforce timelines and dates in a strict manner.
- B.12. *Successorship.*** You will often see this clause referred to as the “enurement” clause, but no one other than lawyers thinks that “enurement” is an actual word. The provision speaks to who has the benefit of the agreement, or who can rely on the agreement. The clause says that if an individual dies, then that individual’s estate and heirs take the benefit of the agreement. If a corporate party is amalgamated with another corporation or otherwise ceases to exist, then the successor corporation takes the benefit of the agreement. If any party assigns the agreement to a third party (with permission of the other party), then the “permitted” assignee takes the benefit of the agreement. In each case, the benefit passes as if the heir, successor or permitted assignee, etc. were named in the agreement.
- B.13. *Further Assurances.*** The clause is a basic term that allows each party to ask for and receive additional written documents from the other party that the first party needs under the agreement. For example, if an agreement includes an assignment of copyright from the artist to the engager, this clause could be used by the engager to obtain a separate, stand-alone assignment of that copyright or a written confirmation of ownership of the work from the artist.

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