



CANADIAN ARTISTS REPRESENTATION /
LE FRONT DES ARTISTES CANADIENS

ADVISORY NOTE

Hidden Dangers in the Sale of Artworks

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GENERAL INTRODUCTION

There are several legal matters that arise during the course of the sale of artworks that can cause the artist consternation and regret unless they are carefully attended to. One is the protection of intellectual property rights so that the artist can enjoy remuneration from any further exploitation of his/her artwork. The other is the continuing legal responsibility imposed by law upon the artist to anyone who happens to purchase the artwork.

These matters grow out of the legal nature of a work of art. On the one hand, the law treats the work as a normal chattel subject to the rules governing the sale of goods; on the other, the law recognizes the creative endeavour inherent in any work of art by affording its creator copyright protection, including moral rights. Both matters are complex and require the artist to remain alert to possible legal ramifications whenever a work is sold, exhibited or reproduced.

Because a work of art is, among other things, a chattel, its sale calls into play the legal rules that govern the sale of goods. Whether the artist sells the work directly to a purchaser or through an intermediary party such as a gallery or a dealer certain legal consequences arise automatically because this is a situation where the law has interfered heavily to structure the transaction and to allocate responsibilities and risks between the seller and the purchaser.



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There are three areas of law that need to be kept in mind when art is sold:

1. The law of contract.
2. Statutory sale of goods law.
3. Consumer protection legislation.

CONTRACTUAL ISSUES

The sale and purchase of an artwork brings a contract into existence between the buyer and the seller. Generally speaking, the parties to the transaction are free to decide what terms will be contained in the contract including any ongoing obligations the artist will assume. However, in addition to the terms specifically agreed to by the seller and the purchaser, there will also be certain matters implied by the law and that appear in the contract whether or not the parties intend it or not.

So, for instance, the purchaser could request in the contract of sale that the artist (assuming the artist is the seller) guarantee that the work will not deteriorate physically for a specific period of time, or that when the work is placed in a given environment it will not be adversely affected by that environment. The purchaser might also try to insist that, if the artwork does suffer damage or deterioration for one reason or another, the artist will either repair or restore the work at the artist's cost, or return to the purchaser the purchase price for the work.

This is only one example of the kind of obligation that can find its way into a contract of sale. There are all kinds of other warranties that an artist might be asked to give, such as a warranty that the artist is the creator of the work and that it contains no unlawful subject matter such as copyright infringement. The possibilities for explicit contractual terms are limited only by the imagination and resources of the parties to the contract. The artist is free to either accept these obligations or to try and bargain with the seller for a contract that exposes the artist to fewer risks.

Also, because of the context in which a piece of art is sold, even if a contractual term is not specifically mentioned by the parties, the law might insist that it be included in the contract, either because, in all of the circumstances, the parties must have intended that it be there, or because the custom of a particular market place demands its inclusion. For instance, if the artist and the purchaser have agreed that the work is to be installed at a particular location, but there is no specific contractual provision which defines the dimensions of the work, the law is likely to imply a term into the contract that the work must be constructed so that it fits, or is suitable for, the location it was intended for.

But even if the contract itself, either explicitly or by implication, does not address all matters between the parties, there are additional statutory provisions which come into play that allocate risks and responsibilities between the seller and the buyer.

SALE OF GOODS LAW

All Canadian provinces have sale of goods legislation, which comes into play whenever a seller transfers, or agrees to transfer, ownership in goods to a buyer in exchange for money. There are some small differences between the governing legislation in each province but, by and large, it is fairly uniform. In Saskatchewan the governing legislation is The Sale of Goods Act.

Sale of goods legislation imposes certain obligations and rights upon the parties to a sales transaction. Generally speaking, these obligations and rights involve the incorporation of warranties into the contract and the allocation of the risk for the deterioration or destruction of the work.

For instance, under sale of goods legislation, the seller is deemed to provide the following warranties to the buyer:

1. Unless the circumstances of the contract indicate otherwise, there is an implied condition on the part of the seller that he or she has a right to sell the goods, an implied warranty that the buyer shall have and enjoy quiet possession of the goods, and an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party not declared or known to the buyer before or at the time when the contract is made.
2. Where there is a contract for the sale of the goods by description, there is an implied condition that the goods when delivered shall correspond with the description.
3. Where the buyer expressly, or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description that it is the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for that purpose.
4. Where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of a merchantable quality (i.e. commercially adequate so that the buyer has examined the goods, in which case there will be no implied condition with regard to defects which such examination ought to have revealed).
5. Where there is a contract for sale by example, there is an implied condition that the bulk shall correspond with the sample and quality, and that the buyer shall have a

reasonable opportunity of comparing the bulk with the sample, and that the goods shall be free from any defect rendering them unmerchantable that would not be apparent on a reasonable examination of the sample. Another important provision incorporated into a sales contract by law is the rule that, unless otherwise specifically agreed between the parties, goods remain at the seller's risk until the ownership of the goods is transferred to the buyer. Ownership can be transferred to the buyer, so that the goods remain at the buyer's risk, whether or not delivery of the goods has been made.

This rule can have serious economic consequences where an artwork is damaged or destroyed before it is delivered or where insurance has not been obtained to cover, say, damage during the course of transportation. It is often difficult to determine who has assumed the risk of physical damage to the work and so becomes responsible in the event that the risk materializes.

Other general rules imposed by statute that could come into play when artwork is sold are the following:

1. Unless otherwise agreed in the contract between the parties, delivery of the goods and payment of the price are concurrent conditions. This is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.
2. Where goods are delivered to a buyer but he or she has not previously examined them, the buyer is not deemed to have accepted them unless and until he or she has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
3. Where a seller is ready and willing to deliver goods and requests the buyer to take delivery and the buyer refuses to do so within a reasonable time thereafter, the buyer is liable to the seller for any loss occasioned by such refusal and also for a reasonable charge for the care and custody of the goods.
4. An unpaid seller of goods that have not been delivered has a lien on the goods or a right to retain them for the purchase price and, in the case of insolvency of the buyer, a right of stopping the goods in transit, as well as a limited right of resale.

Any right, duty or liability created by Sale of Goods Act can be enforced by one party against the other by means of legal action.

Remember that, under sale of goods law, the parties to the contract may chose to exclude or vary the conditions, warranties and risk provisions by specifically referring to

them in the contract itself. If they do not do so, those provisions will continue to apply whether they like it or not.

CONSUMER PROTECTION LEGISLATION

Over and above sale of goods legislation, most provinces of Canada impose a second level of obligations on the seller of goods if the sale in question happens to be a "consumer sale."

In Saskatchewan, this situation is controlled by The Consumer Products Warranties Act, the basic purpose of which is to impose certain warranties upon manufacturers and sellers of consumer items.

A consumer sale occurs when a consumer buys a consumer product from a retail seller. A consumer product is any chattel ordinarily used for personal, family or household purposes. Hence, a work of art, which is usually bought to be enjoyed, could well qualify as a consumer product within the meaning of the Act.

A "retail seller" is a person who sells consumer products to consumers in the ordinary course of his or her business. This would undoubtedly include a gallery or art dealer who sells art, and it may well include an artist who, in the ordinary course of his or her business, makes direct sales to consumers.

An artist may also be caught by the definition of "manufacturer" under the Act, which term is used to mean a person who carries on the business of assembling, processing or manufacturing consumer products. Some forms of art, at least, may well be caught by this definition.

These definitions are important because, for instance, the definition of "consumer" requires that the purchase of the consumer product be made from a retail seller. So someone who buys an artwork, for instance, from a private seller, will not be a consumer and so will not have the benefit of the warranties given by the Act.

Assuming that artwork is sold during the course of a consumer sale as defined by the Act, the following warranties will come into play:

1. Any promise, representation, affirmation of fact or expression of opinion or any action that reasonably can be interpreted by a consumer as a promise or affirmation relating to the sale or the quality, quantity, condition, performance or efficacy of a consumer product or relating to its use or maintenance, made verbally or in writing directly to a consumer or through advertising by a retail seller or manufacturer, or his/her agent or employee is deemed to be an express warranty if it would usually induce a reasonable consumer to buy the product, whether or not the consumer actually relies on the warranty or not. This means that any artist or gallery dealer selling an artwork could be

held liable for anything said to the consumer during negotiations or as part of a sale. The parties cannot agree in any way to exclude or limit this particular statutory warranty, so that sellers of art should be very careful what they say and do prior to the sale. Their words and actions could become legally binding.

2. Any retail seller is deemed to be party to express warranties contained on labels or on packaging accompanying or attached to a consumer product sold by him/her to a consumer unless he/she makes it clear to the consumer prior to the sale that he/she does not adopt the express warranties.
3. Any descriptive statements that appear on the label or container or otherwise accompany the consumer product are deemed to be part of the description of the product and to be part of the warranties.
4. Where a consumer product is sold by a retail seller (this could mean an artist or a dealer/gallery) the following warranties are deemed to be given by the retail seller to the consumer:
 - a) That the retail seller has a right to sell the product.
 - b) That the product is free from any security interest, lien, charge or encumbrance not expressly disclosed or actually known to the consumer before the sale and that the consumer will enjoy quiet possession of the product.
 - c) That the product will correspond with any description that was given of it.
 - d) That the product is of acceptable quality unless any defects are specifically drawn to the consumer's attention before the contract is made or, where the consumer examines the product before the contract is made, except with respect to any defects the examination ought to have revealed.
 - e) Where the consumer expressly or by implication makes known to the retail seller any particular purpose for which the product is being bought, the product supplied under the contract must be reasonably fit for that purpose, whether or not that is a purpose for which such a product is commonly supplied.
 - f) Where the sale is made by sample, the bulk of the product must correspond in quality with the sample, and the consumer will have a reasonable opportunity to compare the bulk of the product with the sample, and the product must be free from any defect that renders it not of acceptable quality and that would not be apparent on reasonable examination of the sample.
 - g) That the product and all its components must be durable for a reasonable period of time, having regard to all the relevant circumstances of the sale, including the

description and nature of the product, the purchase price, the express warranties of the retail seller or manufacturer, the necessary maintenance the product normally requires and the manner in which it has been used. This is an extremely important warranty for artists.

- h) Where a product normally requires repairs, the spare parts and repair facilities must be reasonably available for a reasonable period of time after the date of sale.

From the above list, it is obvious that the warranty evading durability could be of extreme importance in the sale of an artwork. The difficulty is that the warranty of durability depends upon all of the circumstances, so that it cannot be said with certainty how long a particular artwork has to maintain its physical integrity before the warranty is broken.

Even if the artist cannot be classified as a retail seller and the artwork is sold through a dealer/gallery, the artist could become liable for the same warranties because the Act also provides that the manufacturer of a consumer product (which definition could include the artist) is deemed to give to the consumer the same statutory warranties.

So, in many situations where defective art is purchased from a retail seller by a consumer, the purchaser may be able to take legal action against both the seller of the work and/or the artist and will be able to rely upon the same warranties.

Where the statutory warranties have been broken, the purchaser of the artwork has a wide range of remedies to choose from. For instance, where the breach is remedial and not of a substantial character, the party in breach has to make good the breach free of charge to the consumer and, if this isn't done within a reasonable period of time, the consumer is entitled to have the breach remedied elsewhere and to recover from the party in breach all reasonable costs incurred in having the breach remedied. Also, the consumer is entitled to recover damages for losses that he/she has suffered and that were reasonably foreseeable as liable to result from the breach, regardless of whether the breach is remedied.

Where the breach is of a substantial character, or is not remediable, the consumer has an option to either reject the consumer product and recover the purchase price, or to recover damages for any other losses that he/she has suffered and that were reasonably foreseeable as liable to result from the breach.

The consumer has the right to exercise the rights of rejection within a reasonable period of time. However, where the consumer delays because he/she has relied upon assurances made by the party in breach, or his/her agent, that the breach will be remedied, then this will not be held against the consumer. A reasonable period of time runs from the time of delivery of the product to the consumer and is said to consist or a period of time sufficient to permit such testing, trial or examination of the consumer

product as may be normally required by consumers of that product and as may be appropriate considering the nature of the product.

In the case of an artwork, defeat in durability may not be discoverable by the consumer, and the consumer may have no means of ascertaining whether the artwork is durable, until such time as it begins to disintegrate. Hence, the reasonable period of time wouldn't run until it became reasonably obvious that the work was deteriorating.

One interesting aspect of the consumer remedies which artists should take great note of is that, where the purchase price for the work was paid to a retail seller other than the artist, and the consumer rejects the consumer product, the artist can still be made liable to refund the purchase price of the product. In any such claim, the artist would be entitled to recover from the consumer, or set off against the refund of the purchase price of the product, an amount that is considered equitable for the use of the product.

In addition to any other remedy provided for by the Act and any other law in force, the consumer can recover exemplary damages where a wilful and knowing violation of the Act has occurred. In other words, damages are awarded to punish the seller rather than merely to compensate the purchaser for his/her loss.

What makes this statute particularly potent and dangerous for artists and dealer/galleries is the fact that where the breach in question is not the breach of an express warranty made to the consumer purchaser, but is the breach of a statutory warranty, the remedies against the retail seller and the artist are also available to anyone who derives ownership of an interest in, the consumer product from or through the consumer. This means that subsequent owners of a work of art will be able to avail themselves of the statutory remedies for breach of the statutory warranties.

CONCLUSIONS

In conclusion, once an artist enters the market place by engaging in the sale of his or her art, either directly or through a gallery/dealer, a host of legal obligations arise. This is inevitable and cannot be avoided. What should be avoided is the sale of art under circumstances that will eventually come back to haunt the artist.

Artists, and other sellers of art, should be aware of the obligations, which the law imposes on them, and take steps in their contractual dealings to offset those obligations insofar as the law allows.

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