

Attachment (A)

Draft: January 6, 2016

ARTWORK LOAN AGREEMENT BETWEEN  
THE TOM THOMSON ART GALLERY AND  
THE CORPORATION OF THE CITY OF OWEN SOUND MADE AS OF  
●, 2016

## ARTWORK LOAN AGREEMENT

THIS AGREEMENT is made as of ●, 2016

BETWEEN

THE TOM THOMSON ART GALLERY, a corporation incorporated  
under the laws of Canada (the "Gallery"),

- and -

THE CORPORATION OF THE CITY OF OWEN SOUND, a corporation  
incorporated under the laws of the Province of Ontario, Canada (the "City"),

WHEREAS the City is the owner of the Owen Sound Collection (as defined below);

WHEREAS the City desires to loan and the Gallery desires to borrow the Owen Sound Collection upon and subject to the terms and conditions set out in this Agreement;

WHEREAS the Gallery was incorporated on ●, 2016 for the purpose of, among other things, establishing a public gallery for the exhibition and display of works of art, artifacts and objects;

WHEREAS the Gallery has applied to the Canada Revenue Agency for approval of charitable organization status on ●, 2016;

WHEREAS the Gallery intends to apply for a designation status under the provisions of the *Cultural Property Export and Import Act* following receipt of its charitable status;

WHEREAS the City and the Gallery have agreed to enter into this Agreement for the operation and maintenance of a public art gallery, designated as the Tom Thomson Art Gallery, located at 840 First Avenue West, Owen Sound, Ontario, Canada, or such other place as the parties may agree, and preserve for posterity such artwork, ensuring its continued public exhibition and display for the promotion, appreciation and study of art,

NOW THEREFORE, in consideration of the covenants and agreements herein contained and other good and valuable consideration the receipt and sufficiency of which are hereby confirmed, the parties agree as follows:

### ARTICLE 1 - INTERPRETATION

#### 1.1 Definitions

In this Agreement, unless something in the subject matter or context is inconsistent therewith:

"Agreement" means this agreement, including its recitals and schedules, as amended from time to time.

"Business Day" means a day other than a Saturday, Sunday or statutory holiday in the Province of Ontario.

"Claim" means any actual or threatened civil, criminal, administrative, regulatory, arbitral or investigative inquiry, action, suit, investigation or proceeding and any claim or demand resulting therefrom or any other claim or demand of whatever nature or kind.

"Gallery Collection" has the meaning set out in Section 2.07.

"Closing Date" means (i) a date within 60 days of the later of (a) the Gallery obtaining a charitable status; and (b) the Gallery obtaining a designation status under the provisions of the Cultural Property Export and Import Act, or (ii) such other date as may be agreed to in writing by the City and the Gallery.

"Damaged Collection" has the meaning set out in Section 2.05.

"Governmental Authority" means any domestic or foreign legislative, executive, judicial or administrative body or person having or purporting to have jurisdiction in the relevant circumstances.

"Initial Term" has the meaning set out in Section 5.01.

"Owen Sound Collection" has the meaning set out in Section 2.01.

"Losses" means all damages, fines, penalties, deficiencies, losses, liabilities (whether accrued, actual, contingent, latent or otherwise), costs, fees and expenses (including interest, court costs and reasonable fees and expenses of lawyers, accountants and other experts and professionals).

"Renewal Terms" has the meaning set out in Section 5.02.

"Tax Act" means the *Income Tax Act* (Canada).

"Third Party Claim" means a Claim made against any person entitled to indemnification under this Agreement by any person who is not a party to this Agreement.

## 1.2 **Headings**

The division of this Agreement into Articles and Sections and the insertion of a table of contents and headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement. The terms "hereof", "hereunder" and similar expressions refer to this Agreement and not to any particular Article, Section or other portion hereof. Unless something in the subject matter or context is inconsistent therewith, references herein to

Articles, Sections and Schedules are to Articles and Sections of and Schedules to this Agreement.

### 1.3 **Extended Meanings**

In this Agreement words importing the singular number include the plural and vice versa, words importing any gender include all genders and words importing persons include individuals, corporations, limited and unlimited liability companies, general and limited partnerships, associations, trusts, unincorporated organizations, joint ventures and Governmental Authorities. The term "including" means "including without limiting the generality of the foregoing" and the term "third party" means any person other than the City and the Gallery.

### 1.4 **Statutory References**

In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as now enacted or as the same may from time to time be amended, re-enacted or replaced and includes any regulations made thereunder.

### 1.5 **Accounting Principles**

Wherever in this Agreement reference is made to a calculation to be made or an action to be taken in accordance with generally accepted accounting principles, such reference will be deemed to be to the generally accepted accounting principles from time to time approved by the Canadian Institute of Chartered Accountants, or any successor institute, applicable as at the date on which such calculation or action is made or taken or required to be made or taken.

### 1.6 **Currency**

All references to currency herein are to lawful money of Canada.

### 1.7 **Schedules**

The following are the Schedules to this Agreement:

Schedule A - Owen Sound Collection

## **ARTICLE 2 - LOAN OF ARTWORK**

### 2.1 **The Owen Sound Collection**

- (a) Subject to the terms and conditions hereof, the City shall provide the Owen Sound Collection to the Gallery for a twenty five (25) year term commencing on the Closing Date; and
- (b) the Gallery shall have custody, management and use of the Owen Sound Collection for the normal purposes of an art gallery including the exhibition, preservation, maintenance and research thereof commencing on the Closing Date.
- (c) The Gallery will conserve the Owen Sound Collection as a record of cultural heritage and carry this out according to accepted professional museological standards.

## **2.2 Lending of the Owen Sound Collection by the Gallery**

(a) The Gallery may, from time to time, temporarily lend any works from the Owen Sound Collection to such institutions that maintain accepted professional museological standards provided that:

- (i) the recipient institution provides proof of security arrangements and insurance not less than the security and insurance that the Gallery is required to maintain with respect to the works of art loaned from the Owen Sound Collection (“Loaned Work”);
- (ii) proper and complete records and contracts with respect to the Loaned Work are maintained and are made available to the City upon request;
- (iii) suitable transportation and security arrangements are made with respect to the transfer of the Loaned Works; and
- (iv) the loan arrangements entitle the City to require the return of the Loaned Works in the event that this Agreement is terminated.

## **2.3 Insurance**

(a) The Gallery will insure the Owen Sound Collection under an insurance policy against risks of physical loss or damage from any external cause during the term of this Agreement that provides coverage not less than the City’s Tom Thomson Gallery existing insurance policy and is adjusted annually as mutually agreed between the parties to reflect reasonable coverage taking into account the estimated value of the Owen Sound Collection, the appropriate risks that need to be insured against and the premiums required to be paid to obtain the insurance. A copy of the insurance certificate, naming the City as additional insured will be sent to the City prior to the date of Closing Date and insurance certificates shall be provided similarly showing the City as an additional insured, for each replacement insurance term prior to each expiry date of the previous insurance policy.

(b) Any insurance proceeds collected shall be used towards the repair or replacement of the damaged or lost works of art from the Owen Sound Collection (“Damaged Owen Sound Collection”).

## **2.4 Loss or Damage to the Owen Sound Collection**

(a) The Gallery shall be responsible for and indemnify the City for any and all Loss to the Owen Sound Collection, or any part thereof arising out of or as a result of the negligence of the Gallery.

(b) The Gallery shall notify the City of any damage to, loss or theft of the Owen Sound Collection.

## **2.5 Future Purchases/Donations/Loans**

(a) Any works of art (i) purchased by the Gallery, (ii) donated to the Gallery, or (iii) received by any other means by the Gallery other than the loan contemplated by this Agreement, will be

the property of the Gallery (the "Gallery Collection") and will not form part of the Owen Sound Collection. Any works of art donated to the City after the Closing Date will be the property of the City.

(b) The Gallery may, from time to time, borrow works from other public and private collections to augment exhibitions and displays at the Gallery. Such works of art will not form part of the Owen Sound Collection.

## **2.6 Reporting**

Within 6 months of the Gallery's annual financial year end, the Gallery shall provide to the City with, (i) a written report on the operations around the use and condition of the Owen Sound Collection; and (ii) audited financial statements of the Gallery.

## **ARTICLE 3 – NO REPRESENTATIONS AND WARRANTIES**

### **3.1 No Representation by the City**

The City provides the Owen Sound Collection to the Gallery on an "as is" basis without representation or warranty.

## **ARTICLE 4 -TERM**

### **4.1 Initial Term**

The initial term of this Agreement will be for a period of twenty five (25) years from the date hereof (the "Initial Term"), unless terminated earlier in accordance with the provisions of Article 5 hereof.

### **4.2 Renewal Terms**

This Agreement will automatically renew following the Initial Term for successive renewal terms of ten (10) years each (the "Renewal Terms"), unless terminated in accordance with the provisions of Article 5 hereof.

## **ARTICLE 5 -TERMINATION**

### **5.1 Default and Termination**

This Agreement shall terminate in the event that any of the following occurs:

- (a) The Gallery:
  - (i) attempts to move the Tom Thomson Art Gallery or the Owen Sound Collection or any substantial part of it, permanently out of Owen Sound;
  - (ii) institutes voluntary liquidation, dissolution or winding-up procedures;
  - (iii) takes any voluntary proceeding under any bankruptcy or insolvency;
  - (iv) makes an assignment for the benefit of creditors;

- (v) has a receiver, manager or receiver-manager appointed with regard to any part of its property; or
  - (vi) is adjudicated a bankrupt or the subject of an order requiring the liquidation, dissolution or winding-up of it;
- (b) The Gallery's charitable status is revoked or the Gallery's corporate existence is otherwise terminated; or
- (c) The Gallery is in default of its obligations under this Agreement and the City has provided written notice of such default to the Gallery and the Gallery has not remedied, or commenced to remedy and thereafter diligently pursued the remedy of such default within sixty (60) days of the date of receiving written notice thereof from the City.

## 5.2 Option to Terminate by the Gallery

The Gallery has the right to terminate this Agreement in the event that any of the following occurs:

- (a) The City:
  - (i) institutes voluntary liquidation, dissolution or winding-up procedures;
  - (ii) takes any voluntary proceeding under any bankruptcy or insolvency;
  - (iii) makes an assignment for the benefit of creditors;
  - (iv) has a receiver, manager or receiver-manager appointed with regard to any part of its property; or
  - (v) is adjudicated a bankrupt or the subject of an order requiring the liquidation, dissolution or winding-up of it;
- (b) The City's corporate existence is otherwise terminated; or
- (c) The City is in default of its obligations under this Agreement.

## 5.3 Termination with Notice

- (a) The Gallery may, upon giving, in writing, one (1) year's advance notice to the City, terminate this Agreement.
- (b) The City may, upon giving, in writing, one (1) year's advance notice to the Gallery, terminate this Agreement.

## 5.4 Effect of Termination

Upon termination, the Gallery shall forthwith surrender and deliver up to the City the Owen Sound Collection.

## **ARTICLE 6 - CLOSING ARRANGEMENTS**

### **6.1 Closing**

The transfer of possession of the Owen Sound Collection pursuant to this Agreement will be completed at the Closing Date.

## **ARTICLE 7 - INDEMNIFICATION**

### **7.1 Indemnity**

(a) The Gallery shall indemnify and save harmless the City from any loss or damage caused to the Owen Sound Collection and from any Third Party Claims brought against the City by any third party as a result of or arising out of the performance or non-performance by the Gallery of its obligations under this Agreement, save and except damages, and arising out of or as a result of the actions of the City, its agents or employees.

(b) Provided the Gallery is in compliance with section 2.3, the Gallery's limit of liability with respect to loss or damage to the Owen Sound Collection shall be equivalent to the policy limit of the insurance required to be obtained and maintained pursuant to section 2.3.

## **ARTICLE 8 -GENERAL**

### **8.1 Purpose**

The Parties jointly acknowledge and agree that the purpose of this Agreement is to:

- (a) provide for the continued public display of the Owen Sound Collection in the City of Owen Sound and elsewhere pursuant to loan arrangements as contemplated in section 2.2;
- (b) for the promotion and appreciation of the art; and
- (c) to provide for the proper care and maintenance of the Owen Sound Collection,

and agree to provide to each other such reasonable cooperation and assistance as may be required to attain the same.

### **8.2 Further Assurances**

Each of the City and the Gallery will from time to time execute and deliver all such further documents and do all acts and things as the other party may, either before or after the Closing Date, reasonably require to effectively carry out or better evidence or perfect the full intent and meaning of this Agreement.



**8.3 Time of the Essence**

Time is of the essence of this Agreement.

**8.4 Fees and Commissions**

The Gallery will pay the its professional consultant costs and expenses incurred in connection with the preparation, execution and delivery of this Agreement and all documents and instruments executed pursuant to this Agreement and any other costs and expenses whatsoever and howsoever incurred and shall pay the City’s professional consultant costs in the amount of \$1,800.

**8.5 Benefit of the Agreement**

This Agreement will ensure to the benefit of and be binding upon the respective heirs, executors, administrators, other legal representatives, successors and permitted assigns of the parties.

**8.6 Entire Agreement**

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between the parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this Agreement.

**8.7 Amendments and Waivers**

No amendment to this Agreement will be valid or binding unless set forth in writing and duly executed by both of the parties. No waiver of any breach of any provision of this Agreement will be effective or binding unless made in writing and signed by the party purporting to give the same and, unless otherwise provided, will be limited to the specific breach waived.

**8.8 Assignment**

This Agreement may not be assigned by parties without the written consent of the other party.

**8.9 Notices**

Any demand, notice or other communication to be given in connection with this Agreement must be given in writing and will be given by personal delivery, by registered mail or by electronic means of communication addressed to the recipient as follows:

To the City:

828 2<sup>nd</sup> Avenue East

Owen Sound Ontario

[Fax No.]:

Attention: City Manager

To the Gallery:

[Fax No.]:

Attention:

or to such other street address, individual or electronic communication number or address as may be designated by notice given by either party to the other. Any demand, notice or other communication given by personal delivery will be conclusively deemed to have been given on the day of actual delivery thereof and, if given by registered mail, on the fourth (4th) Business Day following the deposit thereof in the mail and, if given by electronic communication, on the day of transmittal thereof if given during the normal business hours of the recipient and on the Business Day during which such normal business hours next occur if not given during such hours on any day. If the party giving any demand, notice or other communication knows or ought reasonably to know of any difficulties with the postal system that might affect the delivery of mail, any such demand, notice or other communication may not be mailed but must be given by personal delivery or by electronic communication.

#### **8.10 Remedies Cumulative**

The right and remedies of the parties under this Agreement are cumulative and are in addition to, and not in substitution for, any other rights and remedies available at law or in equity or otherwise. No single or partial exercise by a party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that party may be entitled.

#### **8.11 No Third Party Beneficiaries**

This Agreement is solely for the benefit of

(a) the City, and its legal representatives, successors and permitted assigns, with respect to the obligations of the Gallery under this Agreement, and

(b) the Gallery, and its legal representatives, successors and permitted assigns, with respect to the obligations of the City under this Agreement

and this Agreement will not be deemed to confer upon or give to any other person any Claim or other right or remedy.

#### **7.12 Governing Law**

This Agreement is governed by and will be construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

**7.13 Attornment**

For the purpose of all legal proceedings this Agreement will be deemed to have been performed in the Province of Ontario and the courts of the Province of Ontario will have jurisdiction to entertain any action arising under this Agreement. The City and the Gallery each attorns to the jurisdiction of the courts of the Province of Ontario.

**7.14 Counterparts**

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same

IN WITNESS WHEREOF the parties have executed this Agreement.

THE TOM THOMSON ART GALLERY

Per: \_\_\_\_\_

Name: Title:

Per: \_\_\_\_\_

Name: Title:

THE CORPORATION OF THE CITY OF OWEN SOUND

Per: \_\_\_\_\_

Name: Title: Mayor

Per: \_\_\_\_\_

Name: Title: City Manager

**Schedule A – The Owen Sound Collection**

No.	Identification No.	Title and Date of Work	Name of Artist	Medium	Dimensions in inches (with frame or base and without frame or base)	Conditions of work and defects
1.	[NTD: to be added]					
2.						
3.						
4.						
5.						
6.						
7.						

[NTD: TTAG to update]