

Canadian Artists and Producers
Professional Relations Tribunal



CANADA

Tribunal canadien des relations
professionnelles artistes-producteurs

Ottawa, July 16, 2003

File No.: 1310-02-003

Decision No. 044

**In the matter of an application for certification filed by the
Directors Guild of Canada**

Decision of the Tribunal:

The application for certification is granted.

Place of hearing: Toronto, Ontario

Date of hearing: April 15, 2003

Quorum: David P. Silcox, presiding member
Marie Senécal-Tremblay, member
John Van Burek, member

Appearances: Colette Matteau for the Directors Guild of Canada

Reasons for Decision

1310-02-003: In the matter of an application for certification filed by Directors Guild of Canada

Background

[1] This decision deals with an application for certification submitted to the Canadian Artists and Producers Professional Relations Tribunal (the “Tribunal”) under section 25 of the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter “the *Act*”) by the applicant, the Directors Guild of Canada (“DGC”) on June 24, 2002. The matter was heard in Toronto on April 15, 2003.

[2] The DGC is seeking certification to represent the following sector:

... a sector composed of all professional independent contractors engaged in all productions by a producer subject to the *Status of the Artist Act* to perform the function of director, first assistant director, second assistant director and third assistant director, excluding:

(a) the artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec (ARRQ) by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and

(b) the assistant directors in Quebec for which an application for certification is pending before the Canadian Artists and Producers Professional Relations Tribunal (APVQ-STCVQ, file no. 1310-96-0026A).

[3] A public notice appeared in the *Canada Gazette, Part I*, on September 14, 2002. The notice was also published in several other publications between September 17 and 30, 2002, namely: *Le Franco*, *Le Gaboteur*, *Le Courrier de la Nouvelle-Écosse*, *L’Acadie nouvelle*, *La Presse*, *The Gazette*, *L’Eau vive*, *L’Aiglon*, *L’Aurore boréale*, *L’Express*, *L’Express du Pacifique*, *La Liberté*, *Playback*, *La Voix acadienne* and *The Globe and Mail*. The public notice set October 22, 2002, as the deadline for the filing of expressions of interest and competing applications. As of the closing date, one artists’ association, one producer and one other organization had made their interest known to the Tribunal. They are:

- The International Film and Video Alliance (“IFVA”),
- The National Film Board of Canada (“NFB”),
- The Teamsters International Union, Local 847 (“the Teamsters”).

[4] Given that the Teamsters were neither an artists’ association nor a producer, they sought permission from the Tribunal in order to intervene in the matter pursuant to subsection 19(3) of the *Act*. On the basis of the written representations provided, the Tribunal found that the Teamsters were not an “interested person” and therefore declined to grant them permission to intervene.

[5] With respect to the IFVA’s intervention, an agreement was reached prior to the hearing between the DGC and the IFVA which fully addressed the IFVA’s concerns regarding the DGC’s application. The agreement states that the DGC does not endeavour to represent independent media artists. The IFVA did not appear at the hearing.

- [6] In its written intervention, the NFB made the following representations:
1. First, second and third assistant directors should not be certified under the *Act*, as they normally practice their trade under an employer-employee relationship.
 2. First, second and third assistant directors are not “artists” and should not be certified pursuant to paragraph 6(2)(b) and subparagraph 18(b)(i) of the *Act*, as they are not recognized as artists by their peers in Canada or abroad.
 3. Although the DGC considers that first, second and third assistant directors should be certified pursuant to subparagraph 6(2)(b)(iii) of the *Act* and the *Professional Category Regulations*, the NFB maintains that those professions make no direct contribution to the creative aspects of the production.
 4. Should assistant directors be certified by the Tribunal, the NFB requests that the Tribunal clarify the meaning of the exception made in the DGC’s application of “assistant directors in Quebec” and whether it refers to persons residing, hired or actually working outside the province.
 5. The NFB has never had a scale agreement with the DGC, contrary to other artists’ associations such as the Union des artistes, nor has the DGC ever represented a significant portion of directors under contract with the NFB.

The NFB did not attend the hearing or make further submissions.

[7] Prior to the hearing, the DGC amended its proposed sector in order to limit the sector to persons who are Canadian citizens or permanent residents of Canada. The DGC also withdrew the functions of second and third assistant directors in response to the Tribunal’s decision in *Federation consisting of the Association des professionnelles et des professionnels de la vidéo du Québec and the Syndicat des techniciens du cinéma et de la vidéo du Québec*, 2003 CAPPRT 041 (hereinafter “APVQ-STCVQ”) wherein it was determined that those professions were not covered under the *Status of the Artist Act Professional Category Regulations* (SOR/99-191, hereinafter the “*Regulations*”). The final version of the proposed sector reads as follows:

... a sector composed of all independent contractors engaged in any production by a producer subject to the *Status of the Artist Act*, which are permanent residents of Canada or Canadian citizens, to perform the functions of Directors, Assistant-Directors or First Assistant-Directors, excluding:

- (a) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec (ARRQ) by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and
- (b) assistant-directors and first assistant-directors covered by the Quebec sector determined by the Tribunal for which a certification is to be granted to the Regroupement APVQ-STCVQ (Tribunal file no. 1310-96-0026A).

Evidence

[8] The DGC presented five witnesses, all officers of the DGC or of its Ontario District Council. The first witness, Mr. Alan Goluboff, is the current president of the DGC. He has been a member of the DGC since 1976 and has held several positions in the DGC's Ontario Council since 1987 until becoming DGC President in 2000. Before then, he held the position of National Assistant Director Representative to the DGC's National Executive Board. He started working as an assistant director in 1977 and as a director in 1995, primarily in television.

[9] Mr. Goluboff explained that the DGC was founded in 1961 in reaction to the Directors Guild of America's plans to expand its activities to the East coast of the United States and into Canada. Beginning in 1963, the DGC lobbied the federal government, encouraging it to take an active policy role in the establishment and support of a feature film industry in Canada. During the same year, the DGC began negotiating what would become its first scale agreement with a producers' association: the Association of Motion Picture Producers and Laboratories of Canada. This association later grew into the present day Canadian Film and Television Producers of Canada ("CFTPA") with whom the DGC has scale agreements in force to this day.

[10] The DGC amended its constitution in 1964 to include assistant directors. It continued its expansion over the years by adding professions to its represented base, such as art directors, assistant art directors and editors, and gradually formed regional councils and opened offices across the country. The DGC's British Columbia Council began negotiating with American producers in the late eighties as the latter began production in that part of the country on a regular basis.

[11] Mr. Goluboff noted that the DGC has become a vocal and sought-after participant in the discussion and development of government policy in the entertainment industry. In 1992, the DGC began its involvement in copyright issues affecting its members. It appeared before the Canadian Radio-television and Telecommunications Commission ("CRTC") in 1993 and in 1998 during the CRTC's Canadian Television Policy Review. Also in 1998, the DGC participated in a review of the Canadian Feature Film Policy spearheaded by the Department of Canadian Heritage.

[12] In 1995, the DGC's Ontario District Council negotiated the DGC's first basic agreement with the CFTPA. The agreement applied to all CFTPA members producing in Ontario contrary to previous agreements which were negotiated on an individual production basis. A similar agreement was negotiated in 1996 between the British Columbia District Council and American producers. In 2000, the Ontario agreement became the Standard Agreement which applied to all productions in Alberta, Saskatchewan, Manitoba and Ontario.

[13] As the DGC continued to grow, it began playing a role on the international stage. Mr. Goluboff stated that it was instrumental in the creation of the International Forum of Directors' Organizations ("IFDO") which now has a membership of about 28 organizations. In recent years, the DGC also became part of the Canadian Coalition of Audiovisual Unions, an organization representing some 50,000 unionized workers from coast to coast in both French and English in the audiovisual field. The Coalition was

formed to address, among other things, the decline of audiovisual production in the country.

[14] Mr. Goluboff described the work of an assistant director and its relation to that of the director. He noted that the work of an assistant director does not differ from one part of the country to the other, nor between film and television. The assistant director's role is to implement the director's vision of the work. He defined this role as that of an administrator, though not an administrator in the bureaucratic sense, but in that of managing the creative process that is film making. In this process logistics is key. He used the example of shooting a bank robbery scene. The director will tour the location and describe his vision for that particular scene. From that point on, the first assistant director's job is to oversee all the logistical planning of the shoot, thus allowing the director to concentrate on the actors' work.

[15] The assistant director will act as the contact person for any member of the crew who wishes to address questions to the director and will likewise disseminate the director's wishes to the crew. It is essential therefore that in relaying the director's wishes, the assistant director have a clear understanding of the director's creative vision for the work. The assistant director's level of creative autonomy will depend on his or her relationship with the director.

[16] Some of the assistant director's tasks during the shoot will include directing background performers and stunt performers. Background performers are contractually prevented from being directed by the director as this would essentially make them actors in the production and therefore entitle them to higher compensation. Mr. Goluboff went on to explain that assistant directors do not necessarily become directors, nor do all directors start out as assistant directors; he noted that this tradition is more characteristic of European film making. He further noted that this has changed with the growth of television – the volume of production in that medium having provided assistant directors with more opportunities to direct.

[17] He stated that the functions of director and assistant director should be part of the same bargaining sector as they are intertwined and do not work independently from each other. Although the director has some say, it is the producer who manages human resources in a production. The DGC represents a total of 688 directors and first assistant directors combined, the quasi-totality of directors across Canada with the exception of directors of French language productions in Quebec. Mr. Goluboff noted that of the 300 productions across Canada last year, virtually all of them employed DGC assistant directors and, to a lesser extent, directors, as several of these productions employed foreign directors. There is no other association representing directors and assistant directors outside Quebec.

[18] The second witness, Ms. Pamela Brand, has worked at the DGC for 15 years and has been National Executive President for the last ten years. She works primarily at lobbying policy makers at the national and international levels. She explained that the DGC publishes a magazine entitled *Montage* aimed at informing the its membership and the industry on the art and craft of film making. The DGC also publishes a newsletter aimed at informing its members on issues affecting their day-to-day life as filmmakers such as health plans, RRSPs and activities in other district councils.

[19] Ms. Brand explained that the National Executive Board (“NEB”) is the governing body of the DGC. It is composed of one seat for each of the seven district councils and one seat for each of the six professional categories represented by the DGC. District councils have their own elected boards and executives. They are responsible for local collective bargaining. The national organization deals more with overall policy issues that affect the DGC, its members and the industry at the national and international levels.

[20] She also mentioned that the DGC has several national committees whose members are appointed by the NEB from all regions of Canada. The committees include the National Directors Division, the National Membership Admission Committee (“NMAC”) and the Training Committee. The DGC has also established the Directors’ Rights Collective of Canada to collect royalties under foreign copyright legislation.

[21] Ms. Brand underscored the DGC’s initiative in lobbying to have directors recognized as authors of their work and in countering American initiatives to limit and remove cultural exclusions found in international trade agreements. She also noted initiatives within the IFDO to create an international code of creative rights for directors in order to establish common working standards from one country to another.

[22] Ms. Brand stated that there is no other voice representing directors and assistant directors in Canada for English language productions. She estimates that the DGC represents 90 to 95 per cent of directors and 75 to 90 per cent of assistant directors working in English in Canada.

[23] The third witness, Mr. Marcus Handman, is the Executive Director of the Ontario District Council of the DGC, the association’s largest district council. The Council’s primary responsibility is the negotiation and enforcement of collective agreements. It also works to promote the DGC’s membership and represents it before provincial and municipal institutions.

[24] Mr. Handman explained that before the DGC reached its first fully negotiated agreements, it relied on promulgated agreements consisting of a unilateral setting of terms and conditions of work by the DGC after consulting producers but without requiring their consent. As the industry matured, both the DGC and producers began to understand the value of formalizing their relationship and reaching consensual agreements.

[25] A few years ago, directors wanted more consistent terms and conditions as they work from one part of the country to another on a single production. This led to the negotiation of the Standard Agreement covering four district councils : Saskatchewan, Manitoba, Alberta and Ontario. At the time of the hearing, negotiations were still ongoing with a view to include the Atlantic Regional Council.

[26] There are three other agreements in force as of the date of the hearing. The Quebec District Council has a promulgated agreement, the British Columbia Council has a negotiated agreement with the Alliance of Motion Picture and Television Producers and the Atlantic Regional Council also has a promulgated agreement.

[27] Mr. Handman noted that all the aforementioned agreements cover both directors and assistant directors. Topics addressed in the agreements include hiring practices, strikes and lockouts, grievance arbitration, and health and safety. Issues specific to directors are addressed in specific parts of the agreements. They include artistic and creative direction, script changes, casting sessions, director's cuts, screen credits, input in post-production, reservation of rights for secondary use payments and buyout provisions for additional use.

[28] As did the other witnesses, Mr. Handman stated that, save for some representation in Quebec, that DGC represents a clear majority of individuals working as directors and assistant directors in film and television.

[29] The fourth witness, Ms. Avrel Fisher, works as a first assistant director. She began her career at the NFB in the seventies. She then worked as a third assistant director in Toronto moving up through the ranks to second assistant director and, in 1986, to first assistant director. She has worked in every province but British Columbia, in film and television. She has always worked as a freelancer.

[30] She joined the DGC in 1985 and began her involvement in the organization in 1992, first in the Ontario District Council and then at the national level. She is currently the national assistant directors' spokesperson for first, second and third assistants on the NEB and has held that position since 2000. Ms. Fisher is also chair of the NMAC which acts as the final screen in an admission process that begins with the collection of pertinent information from the applicant by the district council. Once the NMAC has signed off on a membership application, the minutes of the NMAC meeting are submitted to the NEB for final approval. Ms. Fisher noted that this final sanction was a matter of formality. She further explained that membership standards are set at the national level. Individuals are members of their district council and of the national organization at the same time. Changes to membership standards are made by the NEB from recommendations submitted by the NMAC.

[31] Ms. Fisher described the work of a first assistant director as being both a facilitator and the right arm of the director. The two individuals work as a team in the two distinct phases of a production. In the preparation phase, the script must be interpreted. The director will develop a vision of how the script will come to life. It is important for the first assistant director to understand this vision in order to communicate it to the art department, the locations department and the rest of the crew.

[32] In the execution phase, the first assistant director is the voice of the director; he or she will chair all production meetings. Questions to the director and answers to these questions go through the first assistant director. Sometimes first assistant directors will be asked to direct the second unit and be given scenes or elements of a scene to direct. Ms. Fisher noted that many first assistant directors get their first opportunity to direct and eventually become directors by first directing second units. First assistant directors also direct background action. She maintains that although a director stands hierarchically

above a first assistant director, the former does not manage the latter. Both work as a team.

[33] The fifth witness, Ms. Leah Bazian, is the DGC's Associate National Executive Director. Her responsibilities include issues such as member benefits, the RSP plan and the health plan. They also include working with various member committees providing them with information and analysis to assist them in their functions. She noted that the amount of membership dues for each district council varies to reflect the nature of the work and opportunities in each council and are set by the NEB every year.

[34] Ms. Bazian stated that most official documents sent to the members, such as the constitution, are translated. Members residing in Quebec get both the French and English versions of official documents. The French version is available on request for members residing in the rest of Canada. With respect to training opportunities provided by the DGC, she noted they range from introductions to the language used on a film or television set to more specialized subjects such as supervisory skills and computer programs used in the trade.

Issues

[35] The DGC's application raises the following issues:

- (a) Is the sector proposed by the DGC suitable for bargaining?
- (b) Is the DGC representative of artists in that sector?

The Status of the Artist Act

[36] The relevant provisions of the *Status of the Artist Act* are as follows:

5. In this Part,

...

“artist” means an independent contractor described in paragraph 6(2)(b).

...

6. (2) This Part applies

...

(b) to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who :

- (i) are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audiovisual works;
- (ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or

(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.

...

18. The Tribunal shall take into account

(a) in deciding any question under this Part, the applicable principles of labour law;

...

25. (1) An artists' association may, if duly authorized by its members, apply to the Tribunal in writing for certification in respect of one or more sectors

(a) at any time, in respect of a sector for which no artists' association is certified and no other application for certification is pending before the Tribunal;

(b) in the three months immediately preceding the date that the certification or a renewed certification is to expire, where at least one scale agreement is in force in respect of the sector; or

(c) after one year, or such shorter period as the Tribunal may fix on application, after the date of the certification or a renewed certification, where no scale agreement is in force in respect of the sector.

...

26. (1) After the application period referred to in subsection 25(3) has expired, the Tribunal shall determine the sector or sectors that are suitable for bargaining, taking into account

(a) the common interests of the artists in respect of whom the application was made;

(b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; and

(c) any geographic and linguistic criteria that the Tribunal considers relevant.

(2) Notwithstanding subsection 19(3), only the artists in respect of whom the application was made, artists' associations and producers may intervene as of right on the issue of determining the sector that is suitable for bargaining.

...

27. (1) After determining the sector pursuant to subsection 26(1), the Tribunal shall determine the representativity of the artists' association, as of the date of filing of the application for certification or as of any other date that the Tribunal considers appropriate.

(2) Notwithstanding subsection 19(3), only artists in respect of whom the application was made and artists' associations may intervene as of right on the issue of determining the representativity of an artists' association.

28. (1) Where the Tribunal is satisfied that an artists' association that has applied for certification in respect of a sector is the most representative of artists in that sector, the Tribunal shall certify the association.

[37] As well, section 2 of the *Professional Category Regulations*, SOR/99-191 (the "*Regulations*"), which came into force on April 22, 1999, is relevant:

2. (1) Subject to subsection (2), in relation to the creation of a production, the following professional categories comprising professions in which the practitioner contributes directly to the creative aspects of the production by carrying out one or more of the activities set out in paragraph (a), (b), (c), (d) or (e), respectively, are prescribed as professional categories for the purposes of subparagraph 6(2)(b)(ii) of the Act:

(a) category 1: camera work, lighting and sound design;

(b) category 2: costumes, coiffure and make-up design;

(c) category 3: set design;

(d) category 4: arranging and orchestrating;

(e) category 5: research for audiovisual productions, editing and continuity.

(2) The professional categories prescribed by subsection (1) do not include any profession in which the practitioner of the profession

(a) carries out, in connection with an activity referred to in subsection (1), the activities of accounting, auditing, legal, representation, publicity or management work or clerical, administrative or other support work; or

(b) is a person referred to in subparagraph 6(2)(b)(ii) of the Act or carries out an activity referred to in subparagraph 6(2)(b)(ii) of the Act.

Submissions

[38] The applicant DGC dealt with three issues in her final submissions: the status of directors and first assistant directors as artists under the *Act*, the suitability of the proposed sector for collective bargaining and the representativity of the DGC for that sector.

[39] The DGC noted that the status of directors as artists should pose no problem since they are explicitly referred to at subparagraph 6(2)(b)(i) of the *Act*. With respect to first assistant directors, their status was discussed by the Tribunal in *APVQ-STCVQ*, *supra*, where the Tribunal determined that first assistant directors were indeed artists pursuant to the *Act* and were included in the sector sought by the applicants. The DGC argued that the evidence adduced in the instant case shows that first assistant directors are called upon to direct background performers and therefore can be considered artists pursuant to subparagraph 6(2)(b)(ii) of the *Act* as they are directing a dramatic work.

[40] The DGC also argued that first assistant directors are also artists pursuant to 6(2)(b)(iii) of the *Act* as they contribute to the creation of a film or television production and are involved in all professional categories mentioned in the *Regulations* such as lighting, the art department, camera and sound. As the "right hand" of the director, they must possess a certain degree of artistic skill and qualities to interpret the script and do

the work they do. The DGC indicated that it is also clear from the evidence presented that they have a high degree of input in how the script is interpreted.

[41] Although the DGC maintains the work of a first assistant director as described in *APVQ-STCVQ*, *supra*, is essentially the same as what the DGC has presented to the Tribunal, counsel pointed out one inaccuracy. In *APVQ-STCVQ*, *supra*, it was mentioned in the evidence portion of the Reasons that the function of first assistant director did not exist in television. The DGC notes that it has presented evidence that does establish that such a function exists in television and that it is identical in nature to what the first assistant director does in the context of film.

[42] Counsel for the DGC addressed the subject of the suitability of the proposed sector in three parts. She first noted that assistant directors and directors have been represented together by DGC since 1964, that it is common for assistant directors to go on to work as directors, that both functions work as a team, and that both functions are involved in all departments in the course of a production. All these elements point to a strong community of interests between directors and assistant directors. Secondly, there is a history of professional relations in this field as evidenced by the scale agreements already in force in various district councils of the DGC that cover directors and assistant directors. Finally, as to geographic and linguistic considerations, the DGC argued that the proposed sector purports to extend representation to directors and assistant directors across the country with no linguistic restrictions, except for certifications previously granted by the Tribunal.

[43] The representativity of the DGC is evidenced by the growth of its membership numbers and by the quality of representation that directors and assistant directors have received from the DGC. Each function has a seat on the NEB. The DGC has district offices across the country and the various national committees have members from across Canada. The DGC has lobbied government institutions on behalf of its members and has also been active on the international stage. Finally, the DGC bargains collectively on behalf of its members with American and Canadian producers and has scale agreements in force with both.

[44] In response to the NFB's written arguments, the DGC maintains that they do not constitute an objection to the DGC's certification but serve merely to raise concerns regarding the status of assistant directors as artists and independent contractors as well as concerns as to the clear distinction to be made between the potential sector and those already in existence.

Analysis and Conclusion

[45] Given that subparagraph 6(2)(b)(i) of the *Act* makes specific reference to directors of audiovisual works, no further analysis is required to determine that directors are covered under the legislation.

[46] In the course of their testimony, the witnesses talked about assistant directors and first assistant directors interchangeably. Upon questioning by the panel, it was clarified that an important production may have a number of assistant directors (first, second, third, etc.) whereas another production may only have one assistant director. The Tribunal understands from this that the DGC's proposed sector covers only the assistant director who would be highest in the hierarchy whether that person be called the "assistant director" or the "first assistant director".

[47] With respect to assistant directors, the Tribunal concluded the following in *APVQ-STCVQ*, *supra*:

[309] On the one hand, section 2 of the *Copyright Act* provides that a work of cinematography is like a dramatic work. The following is the relevant provision:

Dramatic work

includes any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise, **any cinematographic work**, and any compilations of dramatic works. (Our emphasis)

[310] On the other hand, part of the work of the assistant director or first assistant director is to do directing, in other words, to direct, to some extent, supporting roles or background performers. Subparagraph 6(2)(b)(ii) of the *Act* provides as follows:

6. This Part applies

[...]

(b) to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who

[...]

(ii) perform, sing, recite, **direct** or act, **in any manner**, in a musical, literary or **dramatic** work, or in a circus, variety, mime or puppet show,

[...] (Our emphasis)

[311] Even if part of the duties of the assistant director or first assistant director is administrative or involves coordinating, the Tribunal finds that it may include this profession under subparagraph 6(2)(b)(ii) of the *Act* because the evidence shows that these individuals are called upon to direct actors, if only in secondary roles or as background performers, and that they may be called upon to direct other aspects of the production.

[48] In the instant case, Ms. Fisher testified that first assistant directors are sometimes called upon to direct the second unit and may be given scenes or elements of a scene to direct. She noted that many first assistant directors get their first opportunity to direct and eventually become directors by first directing second units. Mr. Goluboff testified that one of the assistant director's tasks during the shoot includes directing background performers and stunt performers. There was also testimony confirming that some of the work of assistant directors has to do with the logistics of a production. However, as the Tribunal found in *APVQ-STCVQ, supra*, this in and of itself does not take away from the fact that first assistant directors are called upon to "direct" in some manner audiovisual productions and are therefore covered under 6(2)(b)(ii) of the *Act*.

[49] The DGC has also argued that assistant directors are artists pursuant to 6(2)(b)(iii) of the *Act* as they contribute to the creation of a film or television production and are involved in all professional categories mentioned in the *Regulations* such as lighting, the art department, camera and sound. Given that the Tribunal has determined that assistant directors carry out an activity referred to in 6(2)(b)(ii) of the *Act*, it is precluded from including them under the *Regulations* (see paragraph 2(2)(b) of the *Regulations*).

Community of interests and history of professional relations

[50] Directors and assistant directors work in a constant collaborative effort, one acting as the "right hand" of the other in the implementation of an artistic vision. The work of the assistant director also serves in many cases as a stepping stone to becoming a director, namely through the direction of background performers and of a second unit in a production. These elements establish a strong community of interest between assistant directors and directors.

[51] Detailed evidence was presented at the hearing regarding the DGC's history and in particular its record in representing the interests of directors and assistant directors. The DGC's representation dates back to the early 1960s and touches on an extensive array of interests from labour relations proper, to training, copyright issues and government policy in the arts. Several scale agreements have been negotiated with Canadian and even foreign producers. Consequently, the Tribunal finds there is a long and important history of professional relations in the proposed sector.

Linguistic and geographic considerations

[52] The DGC has indicated that it is able to provide essential services to its members in both official languages. Its principal documentation, including its constitution and its membership requirements are available in both official languages. The DGC has offices in all areas of the country and staffs its principal committees with members from across the country.

[53] The Tribunal has already certified a sector composed of directors in *Association des réalisateurs et réalisatrices du Québec*, 1997 CAPRT 024. In that case, the sector was limited to directors of audiovisual productions in any language other than English produced primarily in Quebec. The DGC seeks to represent all directors in Canada with the exception of those covered by ARRQ's certification. In Quebec, the DGC's

application only covers English language productions. However, there is no such limitation when it comes to productions in other provinces.

[54] With respect to assistant directors, the sector sought by the DGC covers all productions regardless of language with the exception of assistant directors covered by the APVQ-STCVQ certification which is geographical in nature and is not limited in terms of language.

Should directors and first assistant directors be part of the same sector?

[55] The Tribunal must, pursuant to paragraph 18(a) of the *Act*, take into account the applicable principles of labour law in reaching its decision. One of these principles stipulates that persons in managerial positions should not be included in the same bargaining unit as the persons under their supervision.

[56] The Tribunal has previously looked at this issue. It certified a sector that included conductors and the musicians under their leadership in *La Guilde des musiciens du Québec*, 1997 CAPPRT 020, and designers and their assistants in *Association des professionnels des arts de la scène du Québec*, 2002 CAPPRT 037 (hereinafter “APASQ”). In *APASQ*, *supra*, the Tribunal concluded the following:

[174] The Tribunal dealt with a similar issue when it considered the application for certification by the *Guilde des musiciens* [1997 CAPPRT 020]. In that case, the Tribunal had to determine whether conductors could be included in the same bargaining sector as performing musicians. It was clear from the evidence that a conductor is more akin to a leader and has few, if any, administrative duties. The Tribunal therefore concluded that it was appropriate to include them in the same bargaining sector as musicians.

[175] In this case, the relationship between set and costume designers and their respective assistants bears more resemblance to the relationship between a conductor and his or her musicians than to the relationship between a stage director and the performers or designers. The stage director is the “*maître d'oeuvre*” of the production, while the designer is not. The administrative duties are primarily the producer's responsibility, not the designer's. Set and costume designers and their assistants contribute in a collaborative manner to the creative aspects of a production, and in most cases they report to the same person. The Tribunal therefore concludes that they share a community of interest and that it is appropriate to include them in the same bargaining sector.

[57] The DGC presented evidence showing that the relationship between a director and a first assistant director is more collaborative in nature with most of the managerial duties in the production being assumed by the producer. Directors and first assistant directors work in tandem and, although it is clear that the director provides the vision and the first assistant director implements that vision, the former does not “manage” the latter in a strict authoritative sense. The Tribunal believes that the relationship between a director and a first assistant director bears more resemblance to the relationship between a conductor and his musicians. For this reason, the Tribunal finds it appropriate to include directors and first assistant directors in the same sector.

[58] In *APVQ-STCVQ*, *supra*, the Tribunal found it appropriate to include assistant directors and first assistant directors in a group comprising for the most part technical

functions found in film and television. In that case, however, there was a long established tradition of assistant directors and technicians being represented by the same association. In the instant case, there exists a long-standing tradition of directors and assistant directors being represented by the DGC.

The NFB's representations

[59] The NFB submits that assistant directors should not be certified under the *Act* because they are not artists and because they practice their trade under an employer-employee relationship. With respect to the first issue, the Tribunal has determined that assistant directors “direct” in some manner and that they are covered under subparagraph 6(2)(b)(ii) of the *Act*. With respect to the second issue, the Tribunal notes that the witness Avrel Fisher testified that she has worked as first, second and third assistant director and that throughout her career she has always worked as a freelancer. Also, the Tribunal has already considered this question in an interim decision it rendered in the *APVQ-STCVQ* matter (see 2001 CAPPRT 035):

[17] This legislative scheme does not require that the Tribunal determine, at the application for certification stage, the usual relationship between the producer(s) and the applicant’s different members when they exercise their profession. If the objection had been that the applicant had not met one or more of the above-specified requirements, or that its documents were forged or fraudulent, the objection would have been relevant. However, an objection to the effect that the Tribunal has a duty to determine the usual relationship between the producer(s) and each of the applicant’s different members when they exercise their profession is not relevant in light of the legislative scheme of the *Act*.

[18] In fact, such a requirement appears to go completely against the fundamental principles underlying the *Act*. When the Tribunal certifies an artists’ association, this does not mean that all persons working in a given artistic field will be affected by the certification. It stands to reason that artists engaged in an employer-employee relationship are excluded. However, it is important to bear in mind that there is nothing preventing someone from being an employee and working in the artistic world as an independent contractor at the same time: *Union des artistes*, 1996 CAPPRT 017, at para. 24. One must recognize that a person’s status—either as an employee or an independent contractor—can change. It appears to ensue from the case law that the Tribunal recognizes this fact and that this is why it has established a policy of defining sectors composed of “independent contractors” exercising one or more given artistic professions. Thus, the sector is limited to “artists” within the meaning of the *Act*, while being flexible enough to recognize that a person may exercise his or her profession in different ways.

Conclusion regarding the sector

[60] After taking into consideration all of the evidence and representations, the Tribunal finds that the appropriate sector for collective bargaining is a sector composed of all independent contractors, who are permanent residents of Canada or Canadian citizens, engaged in any production by a producer subject to the *Status of the Artist Act*, to perform the function of director, assistant director or first assistant director, excluding:

- (a) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Tribunal on December 30, 1997; and
- (b) assistant directors and first assistant directors covered by the certification granted to the Regroupement APVQ-STCVQ by the Tribunal on March 4, 2003.

Is the DGC representative of artists in the proposed sector?

[61] Witnesses testified that the DGC is the only organisation representing directors and first assistant directors in the proposed sector. Furthermore, its membership of 688 comprises nearly all directors and assistant directors working in the proposed sector. Ms. Brand estimated the DGC's representativity at 90 to 95 per cent of directors and 75 to 90 percent of first assistant directors in the proposed sector. This evidence was uncontested and no other artists' association has sought certification for this sector. The Tribunal therefore finds that the DGC is the association most representative of the artists in the proposed sector.

Decision

[62] For all these reasons, and in view of the fact that the DGC's by-laws are in compliance with the requirements of paragraph 23(1) of the *Status of the Artist Act*, the Tribunal:

Declares that the sector suitable for bargaining is a sector composed of all independent contractors, who are permanent residents of Canada or Canadian citizens, engaged in any production by a producer subject to the *Status of the Artist Act*, to perform the function of director, assistant director or first assistant director, excluding:

- (a) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Tribunal on December 30, 1997; and
- (b) assistant directors and first assistant directors covered by the certification granted to the Regroupement APVQ-STCVQ by the Tribunal on March 4, 2003.

Declares that the Directors Guild of Canada is the association most representative of artists in the sector.

An order will be issued to confirm the certification of the Directors Guild of Canada to represent the said sector.

Ottawa, July 16, 2003.

David P. Silcox

Marie Senécal-Tremblay

John Van Burek