

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

DECISION #003

95-0005-A: In the matter of an application for certification filed by the Writers Guild of Canada

Interim decision of the Canadian Artists and Producers Professional Relations Tribunal: December 8, 1995. Decision No. 003.

BACKGROUND

[1] On August 25, 1995, the Writers Guild of Canada (“WGC”) applied to the Canadian Artists and Producers Professional Relations Tribunal for certification to represent a sector composed of:

- a) all authors of all original or adapted literary or dramatic works in English intended for radio and television broadcast, film, video and audiovisual production, corporate, sponsored, industrial, multi-media, satellite, telephone, computer or any other production or means of distribution where the producer is a Canadian entity, or has its principal place of business in Canada or establishes an office in Canada; and
- b) all authors reproducing, adapting or translating as English language scripts, literary or dramatic works originally distributed in a language other than English, for radio, television, film, video and audiovisual productions, corporate, sponsored, industrial, multi-media, satellite, telephone, computer or any other production or means of distribution where the producer is a Canadian entity, or has its principal place of business in Canada or establishes an office in Canada.

[2] Public notice of this application was given in the Canada Gazette on Saturday, September 16, 1995 and in the Globe and Mail and La Presse on October 11, 1995. The public notice set a closing date of November 17, 1995 for the filing of notices of intervention by artists, artists’ associations, producers.

[3] On November 7, 1995, the Writers Guild of Canada notified the Tribunal that as a result of discussions it had held with other associations representing writers, it wished to clarify the description of the sector it was seeking to represent. The amended sector description reads as follows:

- (a) all authors of all original or adapted literary or dramatic works in English written for radio and television broadcast, film, video, multi-media and all other audiovisual production by satellite, telephone, cable, computer and any other means of distribution where the producer is a Canadian entity, or has its principal place of business in Canada or establishes an office in Canada; and
- (b) all authors reproducing, adapting or translating as English language scripts, literary or dramatic works originally written in a language other than English, for radio, television, film, video, multi-media and all other audiovisual production by satellite, telephone, cable, computer and any other means of distribution where the producer is a Canadian entity, or has its principal place of business in Canada or establishes an office in Canada.

[4] On November 14, 1995, requests for intervenor status were filed by two copyright collectives, the Société des auteurs et compositeurs dramatiques (SACD) and the Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN). On November 16, 1995, the Canadian Copyright Licensing Agency (CANCOPY) filed an application for intervenor status and on November 17, a fourth copyright collective, the Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc., filed its application for intervenor status.

[5] These requests for intervenor status raise three issues for the Tribunal:

- 1) in the context of an application for certification, does the Tribunal have the authority to grant intervenor status to individuals or organizations who are not either an artist, an artists' association or a producer;
- 2) if the Tribunal has the authority to grant intervenor status to individuals or organizations who are not an artist, an artists' association or a producer, what factors should it use to determine whether intervenor status should be granted;
- 3) whether intervenor status should be granted to any of the organizations who have notified the Tribunal of their desire to make representations regarding WGC's application for certification.

THE STATUS OF THE ARTIST ACT

[6] The Canadian Artists and Producers Professional Relations Tribunal is the agency created to administer the professional relations provisions of the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter “the Act”).

[7] The provisions of the *Act* regarding certification are found in sections 25 to 28:

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.

(2) An application for certification must include the membership list of the artists' association, a certified copy of its by-laws, and any other information required by the Tribunal.

(3) The Tribunal shall give public notice of any application for certification in respect of any sector without delay, indicating any period in which another application may be made by any other artists' association, notwithstanding subsection (1), for certification in respect of that sector or any part of it.

(4) No application for certification in respect of a sector may be made, except with the consent of the Tribunal, after expiration of the period indicated by the Tribunal in any public notice given pursuant to subsection (3).

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.

(3) The Tribunal shall give the artists' association concerned and any intervenors notice of its determination under subsection (1) without delay, and that determination is deemed to be interlocutory, notwithstanding section 21.

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.

(2) Certification is valid for a period of three years after the date that the Tribunal issues the certificate and, subject to subsection (3), is automatically renewed for additional three year periods.

(3) Where, in the three months immediately before the date that the certification or renewed certification of an artists' association is to expire, an application for certification in respect of the same or substantially the same sector, or an application for revocation of certification, is filed, the period of validity of the association's certification is extended until the date that the application is accepted or rejected and, where it is rejected, renewal of the association's certification takes effect from that date.

(4) The Tribunal shall keep a register of all certificates that it issues and of their dates of issue.

(5) After certification of an artists' association in respect of a sector,
(a) the association has exclusive authority to bargain on behalf of artists in the sector;
(b) the certification of any association that previously represented artists in the sector is revoked in so far as it relates to them; and
(c) the association is substituted as a party to any scale agreement that affects artists in the sector, to the extent that it relates to them, in place of the association named in the scale agreement or its successor.

[8] Section 16 of the *Act* gives the Tribunal the power to make regulations of general application prescribing a number of things, including the practice and procedure before the Tribunal, the certification of artists' associations, and the period for sending notices and other documents. The Tribunal has not yet exercised its authority to make the regulations contemplated by section 16. It has instead published and distributed guidelines outlining the procedures it intends to use for the first year or two of operation before moving to the regulation making stage. In developing these guidelines, the Tribunal was mindful of the direction contained in paragraph 19(1)(a) of the *Act*, which provides:

19. (1) In any proceeding before it, the Tribunal
(a) shall proceed as informally and expeditiously as the circumstances and considerations of fairness permit.

[9] With respect to applications for certification, the procedure adopted by the Tribunal provides that when the public notice contemplated by subsection 25(3) of the *Act* is given, it not only indicates the period in which competing applications may be made by other artists' associations, but also sets a time period

in which artists, artists' associations and producers who have an interest in the application must notify the Tribunal of their interest. By setting a time limit, the Tribunal essentially requires artists, artists' associations and producers to notify the Tribunal of their intent to claim the right of intervention granted to them by subsections 26(2) and 27(2) the *Act*. This procedure enables the Tribunal to notify the applicant artists' association on a timely basis of the interventions that have been filed with respect to its application. This notification enables the applicant to either modify its application or prepare to meet the concerns raised by the intervenors.

[10] The Tribunal does not consider its proceedings in an application for certification to be adversarial, unless a competing application for certification is filed. There are only two issues to be determined by the Tribunal in an application for certification: (1) whether the proposed sector is suitable for bargaining; and (2) whether the applicant is the most representative of artists working in the sector. Accordingly, the Tribunal treats its proceedings as an inquiry or investigative process, leading to the required determinations.

THE ISSUES

Issue 1: In the context of an application for certification, does the Tribunal have the authority to grant intervenor status to individuals or organizations who are not either an artist, an artists' association or a producer?

[11] Although subsection 26(2) of the *Act* states that "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", it does so "notwithstanding subsection 19(3)". Similarly, subsection 27(2) which grants only artists in respect of whom the application was made and artists' associations the right to intervene on the issue of determining the representativity of an artists' association is also "notwithstanding subsection 19(3)". Subsection 19(3) reads as follows:

Any interested person may intervene in a proceeding before the Tribunal with its permission, and anyone appearing before the Tribunal may be represented by counsel or an agent.

[12] It is the Tribunal's view that the interaction of subsections 19(3), 26(2) and 27(2) establishes two categories of intervenors: those who are intervenors as of right and those who are intervenors by permission of the Tribunal. Since an application for certification is a "proceeding before the Tribunal", the Tribunal finds that it does have authority to grant intervenor status to individuals and organizations who are not an artist affected by the application, an artists'

association or a producer, so long as the applicant for intervenor status qualifies as an “interested person”.

[13] The Tribunal is also of the opinion that it has the power to limit the extent of the rights of participation which an intervenor will have. In order to ensure that the informality and expeditiousness of Tribunal proceedings are not unduly compromised, the Tribunal may decide that it is necessary to restrict an intervenor’s ability to cross-examine witnesses called by the parties to a proceeding and to place time limits on the presentation of oral argument to the Tribunal.

Issue 2: If the Tribunal has the authority to grant intervenor status to individuals or organizations who are not an artist, an artists’ association or a producer, what factors should it use to determine whether intervenor status should be granted?

[14] The condition stated in the *Act* for granting intervenor status to an individual or organization who is not an artist, an artists’ association or a producer is that the applicant must be an “interested person”. In determining whether someone has a genuine interest in the proceeding and thus should be granted intervenor status, the Tribunal has decided that it will consider the following factors:

- (1) whether the proposed intervenor is directly affected by the outcome of the proceeding;
- (2) whether the position of the proposed intervenor is already adequately represented by one of the parties to the proceeding;
- (3) whether the public interest and the interests of justice would be better served by the intervention of the proposed intervenor; and
- (4) whether the Tribunal could hear and decide the case on its merits without the intervention of the proposed intervenor.

Issue 3: Should intervenor status be granted to any of the organizations who have notified the Tribunal of their desire to make representations regarding WGC’s application for certification?

[15] With respect to the WGC’s application for certification, there are four applicants for intervenor status:

- 1) Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc.
- 2) Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN)
- 3) Société des auteurs et compositeurs dramatiques (SACD)
- 4) Canadian Copyright Licensing Agency (CANCOPY)

Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc.

[16] SODRAC is a corporation which carries on the business of collective administration of the right to reproduce musical and dramatico-musical works in any medium on behalf of some 2,177 Canadian authors and composers who have assigned to SODRAC the authority to deal with the reproduction of their works. Several hundred of the Canadians SODRAC represents are authors of lyrics in the French language. SODRAC also represents the interests of a large number of foreign authors and composers in respect of the reproduction of their works in any medium in Canada.

[17] SODRAC represents its Canadian and foreign members with respect to work that has already been created, rather than at the point in time when the artist is engaged in creating work for a specific producer. SODRAC suggests that WGC's application for certification may include the creation of song lyrics in the French language, as lyrics are literary works. It therefore requests that the Tribunal render a determination that:

- (1) Part II of the *Status of the Artist Act* does not apply to the collective administration of copyright or to collective licensing bodies referred to in the *Copyright Act*;
- (2) the general licences which the licensing bodies enter into with undertakings in the federal jurisdiction are not scale agreements within the meaning of the Status of the Artist Act, especially paragraph 28(5)(c);
- (3) the collective copyright licensing bodies and the general agreements which they enter into remain subject to the *Copyright Act*;
- (4) the collective administration of copyright in song, as an undivided musical work, is not completely changed or artificially divided from the literary part consisting of the words to the song.

[18] SODRAC has also specifically requested that the Tribunal exclude the collective administration of copyright related to lyrics from the sector requested by WGC.

[19] The *Status of the Artist Act* provides a regime for the certification of an artists' association to represent freelance artists working in a particular sector. Certification by the Tribunal gives the artists' association the exclusive authority to bargain on behalf of artists working in that sector. It is not necessary for each individual artist to grant a licence or mandate to the artists' association to bargain on his or her behalf; by virtue of the certification, the statute effectively appoints the certified artists' association as the bargaining agent for all individuals working in the sector designated by the Tribunal.

[20] The objective of the bargaining undertaken by an artists' association subsequent to certification is to put in place one or more scale agreements prescribing the minimum terms and conditions under which the artists covered by the agreement will provide their services to producers in the federal jurisdiction. The content of the scale agreement is a matter for negotiation between the certified artists' association and the producers; the scale agreement could touch on matters of copyright but need not necessarily do so.

[21] The regime envisioned in the *Copyright Act*, in contrast, is one that provides for the collective administration of the economic aspects of copyright. Individual artists may voluntarily assign their copyright to a collective, or otherwise licence a collective to manage their copyright in the works which they create. An individual artist must expressly mandate a copyright collective to act on his or her behalf. Depending on the nature of the right which they administer, copyright collectives either submit a royalty rate to the Copyright Board for approval (i.e. with respect to performance rights and the retransmission right) or negotiate a royalty rate with the user (for other rights such as reproduction rights). Anyone who uses a work for which a collective holds the copyright is obliged to pay the royalty rate established through the process set out in the *Copyright Act*.

[22] In the Tribunal's view, there is no necessary conflict between the provisions of the *Status of the Artist Act* and those of the *Copyright Act*. However, the Tribunal recognizes that in the context of the collective bargaining which will eventually take place between the certified artists' association and producers subject to the *Status of the Artist Act*, there is a potential for conflict between the terms contained in the scale agreements and the royalty rates set by the copyright collective. If such conflict should materialize, SODRAC's interests could be affected.

[23] However, this potential conflict has not yet materialized. In the context of the proceeding which is before it, namely WGC's application for certification, the Tribunal therefore intends to deal only with questions that are related to the application. The Tribunal thus declines to make the determinations sought by SODRAC at this time.

[24] SODRAC has, however, also requested that the definition of the sector which the Tribunal determines to be suitable for bargaining exclude the collective administration of copyright as it relates to lyrics. The determination of the suitability of a sector is a matter which is directly before the Tribunal in an application for certification. SODRAC has a legitimate interest in the manner in which the sector is defined, and should therefore be entitled to present its representations to the Tribunal on this subject.

[25] Accordingly, SODRAC is granted limited status as an intervenor. It will be permitted to make written representations to the Tribunal in advance of the oral proceeding on the suitability of the proposed sector and the representativeness of the applicant. In addition, it will be permitted a period of 30 minutes during the oral proceeding to make any oral representations it considers relevant to either or both of these two questions.

Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN)

[26] The Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) is a corporation incorporated pursuant to Part II of the *Canada Corporations Act*. SOCAN administers the right to publicly perform works created by artists who have entered into an agreement with the corporation, to communicate them to the public by telecommunication and to collect royalties for the retransmission of the work.

[27] SOCAN represents some 46,569 Canadian authors and composers with respect to the performance and retransmission rights in their original literary or dramatic works in any language. An artist who signs an agreement with SOCAN assigns to the collective his or her performance and retransmission rights in all works created both before and during their membership in SOCAN. It is

SOCAN's position that as the assignee of the copyright, SOCAN alone is entitled to authorize or prohibit the work's public performance or communication to the public by telecommunication, and subject to the prerogative of the Copyright Board, to fix the conditions for such use and the royalties to be paid.

[28] SOCAN has asked the Tribunal to make the following declarations:

- (1) that the exclusive rights conferred on an artists' association certified pursuant to the *Status of the Artist Act* do not include the exclusive right to authorize or prohibit the exploitation by any producer subject to the *Act* of any copyright in works created by an artist for that producer, or to negotiate any remuneration for the exploitation of the copyright;
- (2) that the activities of societies, associations and corporations to which section 67 *et seq.*, 70.1 *et seq.* and 70.61 *et seq.* of the *Copyright Act* apply (the copyright collectives) are not governed by the *Status of the Artist Act*; and
- (3) that licences and other agreements between a copyright collective and someone who uses works in the collective's repertoire are not scale agreements within the meaning of the *Status of the Artist Act* and, in particular, paragraph 28(5)(c) and section 67 of the *Act*.

[29] In the context of the proceeding which is before it, namely WGC's application for certification, the Tribunal intends to deal only with questions that are directly related to the application. It therefore declines to make the declarations sought by SOCAN in its request for intervenor status at this time.

[30] However, for the reasons stated above regarding SODRAC, the Tribunal recognizes that SOCAN may have an interest in the determinations which the Tribunal will make relative to the suitability of the proposed sector for bargaining and the representativeness of the applicant.

[31] Accordingly, SOCAN is granted limited status as an intervenor. It will be permitted to make written representations to the Tribunal in advance of the oral proceeding on the suitability of the proposed sector and the representativeness of the applicant. In addition, it will be permitted a period of 30 minutes during the oral proceeding to make any oral representations it considers relevant to either or both of these two questions.

Société des auteurs et compositeurs dramatiques (SACD)

[32] The Société des auteurs et compositeurs dramatiques (SACD) is a non-trading partnership [*société civile*] within the meaning of article 1832 of the

French Civil Code. It is represented in Canada by the Société des auteurs et compositeurs dramatiques SACD Ltée, a corporation incorporated pursuant to the *Canada Business Corporations Act*. SACD administers the right to reproduce and publicly perform works created by artists who have assigned these copyrights to it, to communicate the works to the public by telecommunication and to collect royalties for retransmission of the works. SACD has in turn mandated the Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc. to administer its right to authorize or prohibit the reproduction on all media of the works of the Canadian authors it represents.

[33] Worldwide, SACD represents some 30,000 authors and composers of original dramatic works in any language, of whom approximately 450 are Canadians. By entering into an agreement with SACD, artists assign to this collective the right to reproduce and public perform all of their works, whether created before or during their membership in SACD, to communicate these works to the public by telecommunication and to collect royalties for retransmission of the works.

[34] It is SACD's position that when one of the artists who has assigned his or her rights to SACD creates an original dramatic work, the copyrights that have been assigned vest in SACD as of the date of the creation. They submit, therefore, that SACD is the exclusive owner of the rights, and is the only body entitled to authorize or prohibit the work's reproduction, public performance or communication to the public by telecommunication and, subject to the prerogatives of the Copyright Board, to fix the conditions for such authorization and the amount of the royalties to be collected from the user.

[35] SACD has requested essentially the same declarations as those sought by SOCAN. For the reasons given above, the Tribunal declines to make the declarations SACD has requested. However, the Tribunal recognizes that SACD, like the other copyright collectives, may have an interest in the determinations which the Tribunal will make relative to the suitability of the proposed sector for bargaining and the representativeness of the applicant.

[36] Accordingly, SACD is granted limited status as an intervenor. It will be permitted to make written representations to the Tribunal in advance of the oral proceeding on the suitability of the proposed sector and the representativeness of the applicant. In addition, it will be permitted a period of 30 minutes during the oral proceeding to make any oral representations it considers relevant to either or both of these two questions.

Canadian Copyright Licensing Agency (CANCOPY)

[37] CANCOPY is a licensing body within the meaning of section 70.1 of the *Copyright Act*. It was established in 1988 as a non-profit organization under the *Canada Corporations Act* to collectively license and protect the copyrights of writers and publishers in their literary and other works. CANCOPY provides copyright clearances to users and remuneration to authors and publishers in its repertoire.

[38] Although the type of copying with which CANCOPY presently concerns itself relates to photocopying and the use of other reprographic means, it has issued licences to over 100 post-secondary institutions covering limited transmission of copyright works over telephone lines (i.e. facsimile transmission of works for interlibrary loan). CANCOPY anticipates negotiating licences in the near future which would permit some electronic transmission and is concerned that these activities may overlap with the sector described in the WGC's application for certification.

[39] CANCOPY admits that it does not license first production or publication of materials, but instead authorizes the distribution of previously published works (i.e., it deals with secondary rather than primary rights). Nevertheless, CANCOPY has indicated that it has an interest in the description of the sector which WGC is seeking to represent in order to ensure that its own ability to license copyright material is not impaired.

[40] The Tribunal recognizes that CANCOPY has an interest in the determination which the Tribunal will make regarding the definition of the sector which is suitable for bargaining and, possibly, on the representativeness of the WGC. Accordingly, CANCOPY is granted limited status as an intervenor. It will be permitted to make written representations to the Tribunal in advance of the oral proceeding on the suitability of the proposed sector and the representativeness of the applicant. In addition, it will be permitted a period of 30 minutes during the oral proceeding to make any oral representations it considers relevant to either or both of these two questions.

[41] A procedural order setting out the rights accorded to each intervenor, including those granted limited intervenor status, will be issued and sent to all of the parties and the intervenors.

A. Fortier, A/Chairperson

A. Lavoie, Member

D. Silcox, Member

M. Walsh, Member