

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, February 2, 1996

File No. 95-0002-A

Decision No. 005

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY THE UNION DES ÉCRIVAINES ET ÉCRIVAINS QUÉBÉCOIS (UNEQ)

Decision of the Canadian Artists and Producers Professional Relations Tribunal

The application for certification is granted.

Place of hearing: Montréal, Québec

Date of hearing: January 16, 1996

Quorum: Mr. André Fortier, Chairperson
Mr. Armand Lavoie, member
Mr. David P. Silcox, member

Appearances: Payette et Carbonneau, Daniel Payette; Bruno Roy, President; Pierre Lavoie, Director General; Henri Lamoureux; and Rose-Marie Lafrance for the applicant. Paul-François Sylvestre for the Association des auteures et auteurs de l'Ontario français (AAAOF) and la Fédération culturelle canadienne-française (FCCF). Martineau Walker, Stéphane Gilker for the Society of Composers, Authors, and Music Publishers of Canada (SOCAN) and the Société des auteurs et compositeurs dramatiques (SACD). Brodeur Matteau Poirier, Colette Matteau for the Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc. and the Société professionnelle des auteurs et compositeurs du Québec (SPACQ).

REASONS FOR DECISION

95-0002-A: In the matter of an application for certification filed by the Union des écrivaines et écrivains québécois (UNEQ)

STATEMENT OF FACTS

[1] This decision concerns an application for certification submitted under section 25 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter "the Act") by the applicant, the Union des écrivaines et écrivains québécois (hereinafter "UNEQ"), on July 13, 1995. The application was heard at Montréal on January 16, 1996.

[2] UNEQ applied for certification to represent, throughout Canada, a sector composed of: (a) authors of original French language literary or dramatic works intended for publication; and (b) the authors of French language literary or dramatic works originally intended for the stage, radio, television, cinema or audio-visual media at the time of publication of the work in any medium and for that purpose only.

[3] Public notice of this application was given in the Canada Gazette on Saturday, August 19, 1995 and in the Globe and Mail and La Presse on September 7, 1995. The public notice set a closing date of October 20, 1995 for the filing of notices of intervention by artists, artists' associations and producers.

[4] Three artists' associations representing Francophone writers from outside Quebec filed notices of intervention in the case: the Association acadienne des artistes professionnel.le.s du Nouveau-Brunswick, the Association des artistes acadiens de la Nouvelle-Écosse and the Association des auteures et auteurs de l'Ontario français. As well, the Conseil culturel acadien de la Nouvelle-Écosse joined in the representations filed by the Association des artistes acadiens de la Nouvelle-Écosse.

[5] The Fédération culturelle canadienne-française also filed representations, and in an interim decision (#001) rendered on December 8, 1995, the Tribunal granted it intervenor status.

[6] In that same decision, the Tribunal also granted intervenor status to three copyright collectives that had applied for such status. The Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc., the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the Société des auteurs et compositeurs dramatiques (SACD) were granted limited status as intervenors to make representations to the Tribunal on the definition of the sector and the representativeness of the applicant.

[7] UNEQ's application for certification raises the following issues:

- (1) Is the sector proposed by UNEQ a sector that is suitable for professional relations?
- (2) Is UNEQ representative of artists in the sector?

THE STATUS OF THE ARTIST ACT

[8] The provision of the *Status of the Artist 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.

THE ISSUES

Issue 1: Is the sector proposed by UNEQ a sector that is suitable for professional relations?

[9] The sector proposed by UNEQ is a nation-wide sector composed of:

- (a) authors of original French language literary or dramatic works intended for publication; and
- (b) authors of French language literary or dramatic works originally intended for the stage, radio, television, cinema or audio-visual media at the time of publication of the work in any medium and for that purpose only.

Songs, musical works and publication

[10] The Société professionnelle des auteurs et des compositeurs du Québec (SPACQ), which has also filed an application for certification with the Tribunal, informed the Tribunal that it would like to intervene because its application could be in competition with that of the applicant.

[11] At the hearing, UNEQ confirmed that the sector proposed in its application for certification does not include artists who create texts intended to be accompanied by music, such as the words of a song. The applicant and SPACQ entered into an agreement confirming this clarification and, as a result, SPACQ now supports UNEQ's application. The Tribunal takes official notice of the agreement between the applicant and SPACQ dated December 22, 1995,

filed on the record as Exhibit 32.

[12] The two parties have also agreed that it is not necessary to change the description of the sector proposed by the applicant. According to the applicant, based on section 2 of the *Copyright Act* (R.S.C. 1985, c. C-42, as amended), a work consisting of words and music - a song or other musical work - is distinct in nature from a literary or dramatic work as described in its application for certification. Thus, the proposed sector does not include songwriters or lyricists.

[13] As a result of the agreement between UNEQ and SPACQ, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) withdrew its intervention in the case, since its interests were no longer affected.

[14] UNEQ also explained that the terms "publication" and "publication in any medium" as used in their description of the proposed sector must be read in their ordinary meaning, that is, "the action of publishing a text or work". However, the applicant noted that, with increasing frequency, the authors of texts deliver their creations on computer diskettes rather than on paper. As a result of the arrival of new technologies, such as the CD-ROM, the number of literary works published in printed form will decline in favour of other media, primarily electronic, by means of which a literary or dramatic work can be read on-line.

[15] The Tribunal accepts these explanations and confirms its understanding that UNEQ's application does not relate to the creation of French-language lyrics for songs or other musical works and applies only to the publication of literary and dramatic works in any medium, including paper and electronic media.

The Community of Interest

[16] Subsection 26(1) of the *Act* requires that, when considering an application for certification, the Tribunal take into account the common interests of the artists in respect of whom the application was made, 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 any geographic and linguistic criteria that the Tribunal considers relevant.

[17] UNEQ was established in 1977, and its membership now includes most of the French-speaking authors of literary and dramatic works in Canada. While there is no formal agreement between it and the Writers Union of Canada, which represents English-speaking authors, there is a sort of *modus vivendi* permitting each to represent the interests of its own members. UNEQ's mandate is to promote the moral, social, professional and economic interests of writers and to work for the development of Quebec literature. UNEQ has an extensive program of activities, including speaking tours by authors, school tours and literary awards. UNEQ has set up a regional structure in Quebec that enables authors from the various regions to better express their needs and to have an influence on its policies. There are agreements with other associations of authors working for other purposes, such as the Société des auteurs, recherchistes,

documentalistes et compositeurs (SARDeC) in respect of radio, television and cinema and the Association québécoise des auteurs dramatiques (AQAD) in respect of the stage. In 1991, governments at the federal, provincial and municipal levels helped UNEQ establish a “*maison des écrivains*”.

[18] In their representations to the Tribunal, the associations representing Francophone writers from outside Quebec emphasized that they now form a sizeable community and that it would be difficult to characterize their work as “Quebec literature”. Under the auspices of the Fédération culturelle canadienne-française (FCCF), these groups have, however, entered into a co-operation agreement with UNEQ. The FCCF and UNEQ have agreed to a consultation process involving the FCCF and eight other French-Canadian or Acadian organizations that would be set in motion prior to bargaining for the purpose of entering into or renewing scale agreements. As a result, the FCCF, in its own name and on behalf of the other intervenors representing French-language authors from outside Quebec, supports UNEQ's application for certification.

[19] The Tribunal hopes that the consultation agreement between UNEQ and the FCCF will lead UNEQ to assume a pan-Canadian role in respect of French-language literature, in accordance with the application made to this Tribunal, and that this role might eventually be reflected in its by-laws and through regional representation.

[20] In light of these facts, the Tribunal is of the opinion that the artists in the proposed sector form a community of interest with respect to writers who create French-language works intended for publication.

History of professional relations and copyright

[21] Professional relations between UNEQ and producers, publishers and broadcasters have never taken a contractual form, although they have been continuous since the early 1980s. In this respect, UNEQ informed the Tribunal that a model agreement was drafted in 1982 to facilitate negotiations between authors and publishers. The applicant also indicated that a new model agreement is being drafted and will be submitted to producers in 1996.

[22] In 1991, the Quebec Commission de reconnaissance des associations d'artistes recognized UNEQ as the representative for [TRANSLATION] "all professional artists working in the field of literature in Quebec" (file No. R-20-90). That recognition does not include an obligation to bargain.

[23] Professional relations between UNEQ and the federal government exist in respect of the administration of several programs for writers, including the reprography and speaking tour programs. UNEQ drew the Tribunal's attention to its 1994 agreement with the Canadian Copyright Licensing Agency (CANCOPY) and the Treasury Board of Canada, which provides lump sum compensation to authors for the photocopying of books, newspapers and magazines by federal government departments. The applicant also noted the annual grant it receives from the Canada Council for its writers' speaking tour program.

[24] The Société des auteurs et compositeurs dramatiques (SACD) and the Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc. raised concerns regarding the certification of UNEQ for the proposed sector. Their concerns are based on the exclusive authority to bargain on behalf of the artists in the sector provided for in subsection 28(5) of the *Status of the Artist Act*.

[25] SACD argued:

[TRANSLATION] That as the holder of the right to reproduce in any medium, whether by graphic, sound or audiovisual reproduction, the original French-language dramatic works of its members, it is therefore essential for it to have this tribunal specify that the sector concerned in UNEQ's application would in no way confer on UNEQ, in its meaning or application, the exclusive authority to negotiate or enter into any agreement authorizing or prohibiting the reproduction of an original French-language dramatic work created by an author on behalf of a producer, but only the exclusive authority to negotiate or enter into an agreement with producers respecting the minimum terms and conditions for the creation of such works by artists.

SACD also wished to ensure that the sector affected by UNEQ's application would not include the exclusive authority to enter into agreements relating to the public performance of original French-language dramatic works or the communication of such works to the public by telecommunication.

[26] SACD compared the scope of the *Status of the Artist Act* with that of the *Copyright Act* and concluded that there is a potential conflict in the application of the two Acts resulting from the exclusiveness of the rights conferred by each. The *Copyright Act* confers an absolute right on a copyright owner to authorize or prohibit any exploitation of his or her work, while the *Status of the Artist Act* confers exclusive authority on a certified artists' association to enter into scale agreements with producers under federal jurisdiction respecting the provision of artists' services and other related matters in the sector for which it has been certified. Since copyright is not specifically excluded from the exclusive bargaining rights granted by the *Status of the Artist Act*, SACD concluded that there is reason to believe there could be a potential conflict in the application of these two Acts.

[27] SACD, which administers the copyrights of 453 Canadian members as their assignee, therefore asked the Tribunal that the sector granted to UNEQ:

[TRANSLATION] exclude the exclusive authority to negotiate or agree in a scale agreement to any provision authorizing, prohibiting or restricting the exploitation of the rights of reproduction, public performance or communication to the public by telecommunication of dramatic works created by an author, or to establish the remuneration for or terms and conditions related to the exploitation of the said rights.

[28] For its part, SODRAC asked the Tribunal to exclude the collective administration of copyright in literary and dramatic works from the sector. SODRAC intervened as a licensing body for the collective administration of the right to reproduce literary and dramatic works in Canada. In its opinion, part (b) of the sector proposed by UNEQ in its application for certification includes collective administration of the right to reproduce literary and dramatic works, which is provided for in the *Copyright Act*. SODRAC indicated that it has been authorized in Canada by the Société pour l'administration du droit de reproduction mécanique

des auteurs, compositeurs et éditeurs (SDRM) on behalf of the SACD (dramatic works), the Société civile des auteurs multimédia (SCAM) (literary works) and the Société civile de l'édition littéraire française (SCELP) (publishers) to administer the right to reproduce such works, with the exception of the graphic reproduction thereof. This latter element is administered by UNEQ itself.

[29] In respect of parts (a) and (b) of the sector proposed in UNEQ's application, SODRAC argued that Parliament did not intend the *Status of the Artist Act* to give the certified association exclusive authority to authorize or prohibit any act provided for in the *Copyright Act*, since authors have a personal right over the exploitation of their works. SODRAC does not agree that such administration can be authorized by way of certification under the *Status of the Artist Act*.

[30] Lastly, SODRAC submitted that the term "publication" must be defined so as to limit it to books, since it is SODRAC that has been authorized to reproduce works in any medium, with the exception of the graphic reproductions.

[31] SODRAC therefore proposed that the definition of UNEQ's sector be the following:

[TRANSLATION] Authors of literary and dramatic works intended for publication in a book with respect to their provision of services to a producer to whom the *Status of the Artist Act* applies, but excluding the collective administration of copyright in those works within the meaning of the *Copyright Act*.

[32] The Tribunal received the representations of SACD and SODRAC with interest and has taken note of their concerns as to the relationship between the regimes set out in the *Status of the Artist Act* and the *Copyright Act*.

[33] SODRAC and the applicant both reminded the Tribunal that the rules of statutory interpretation include a presumption of coherence, namely that Parliament does not intend to create conflicts between statutes when passing new legislation.

[34] The Tribunal is convinced that the regimes established by the *Status of the Artist Act* and the *Copyright Act* can co-exist harmoniously so as to contribute to improving the well-being of independent artists working in sectors under federal jurisdiction.

[35] It is clear that the Canadian Artists and Producers Professional Relations Tribunal does not have the power to confer rights which are within the jurisdiction of the Copyright Board. The right to bargain conferred as a consequence of the Tribunal's certification of an artists' association is the only right which is contemplated by the *Status of the Artist Act*.

[36] What is included in this right to bargain? Subsection 31(1) of the *Act* states that the purpose of bargaining is to enter into a scale agreement. A scale agreement is defined as "an agreement in writing between a producer and an artists' association respecting minimum terms and conditions for *the provision of artists' services and other related matters*". [Our emphasis]

[37] In these early stages of collective bargaining on behalf of artists who are independent

contractors, the Tribunal is not inclined to begin defining or limiting the subjects that can be included in the category of "matters related to the provision of artists' services". In our view, it would be unacceptable to divide the provision of services from the use of the work. A producer who commissions a work must be able to use or disseminate the work for which he or she has paid.

[38] The Tribunal agrees with the applicant that the *Status of the Artist Act* will not have the effect of disrupting the existing system. In its arguments, the applicant stated:

[TRANSLATION] The *Status of the Artist Act* certainly does not establish a legal regime that sweeps away the old rules. The *Status of the Artist Act* fits into an existing legal framework and the collective bargaining is conducted in conformity with the rules of public policy or private rules established by contract that govern the producer-artist relationship; the two must not be confused.

[39] In its written response to the copyright collectives, the applicant stated:

[TRANSLATION] The scale agreement does not modify existing legislation, however. It fits into the usual legislative framework. The content of the scale agreement must *be consistent with the rules imposed by the Copyright Act, including the provisions relating to the collective administration of copyright*; this is true *a fortiori* where that collective administration already exists for the sector determined through the certification process to be suitable for bargaining. [Our emphasis]

Conclusion regarding the sector

[40] The Tribunal is not convinced that it is appropriate, at this time, to define or limit the exclusive authority resulting from the determination of a sector under the *Status of the Artist Act*. As we stated in interim decision #001 dated December 8, 1995, "there is no necessary conflict between the provisions of the *Status of the Artist Act* and those of the *Copyright Act*." We are certain that if an artists' association were to try, without the necessary authorization, to appropriate the exclusive rights held by a body mandated by the Copyright Board, that transgression would be brought to the Tribunal's attention by way of a complaint.

[41] As a result, after considering all of the oral and written representations of the applicant and the intervenors, the Tribunal agrees that the sector that is suitable for professional relations with all producers subject to the *Status of the Artist Act* throughout Canada is a sector composed of:

- (a) authors of original French language literary or dramatic works intended for publication; and
- (b) authors of French language literary or dramatic works originally intended for the stage, radio, television, cinema or audio-visual media at the time of publication of the work in any medium and for that purpose only.

Issue 2: Is UNEQ representative of artists in the sector?

[42] According to the documents filed by the applicant, it represents 1,035 authors in a sector comprised of some 1,200 authors. At the hearing, the applicant explained that its membership presently numbers approximately 900. No one has disputed those figures or objected to the

representativeness of the applicant for the proposed sector.

[43] The Fédération culturelle canadienne-française informed the Tribunal that it considers UNEQ to be the organization in the best position to speak on behalf of Francophone writers in all ten provinces of Canada. The fact remains that the number of UNEQ's members from provinces other than Quebec is small. However, the Tribunal takes note of the declaration made on behalf of the FCCF by its agent:

[TRANSLATION] We are convinced that UNEQ intends to take the pan-Canadian reality into consideration in performing its role.

[44] The Tribunal therefore accepts the applicant's submission that it is the organization most representative of artists in the above-described sector.

DECISION

[45] For all these reasons, and in view of the fact that the applicant is in compliance with the requirements of section 23 of the *Status of the Artist Act*, the Tribunal:

Declares that the sector suitable for professional relations throughout Canada is a sector composed of:

- (a) authors of original French language literary or dramatic works intended for publication; and
- (b) authors of French language literary or dramatic works originally intended for the stage, radio, television, cinema or audio-visual media at the time of publication of the work in any medium and for that purpose only.

Declares that the Union des écrivaines et écrivains québécois is the organization most representative of artists in the sector.

An order will issue to confirm the certification of the Union des écrivaines et écrivains québécois to represent the said sector for the purposes of professional relations with producers under federal jurisdiction.

Ottawa, January 30, 1996

André Fortier, A/Chairperson

J.A. Lavoie, Member

David P. Silcox, Member