

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

DECISION #006

95-0010-A: In the matter of an application for certification filed by the
Association québécoise des auteurs dramatiques (AQAD)

Interim decision of the Canadian Artists and Producers Professional Relations
Tribunal: February 13, 1996.

BACKGROUND

[1] On October 10, 1995, the Association québécoise des auteurs dramatiques (hereinafter referred to as "AQAD") applied to the Canadian Artists and Producers Professional Relations Tribunal for certification to represent, throughout Canada, a sector composed of:

- a) authors of original French-language dramatic works and original librettos for French-language dramatico-musical works created for the stage, in respect of the public performance of such work or the recording of that performance on any medium; and
- b) authors of French-language translations or French-language adaptations, intended for the stage, of dramatic works or librettos originally written in another language or in another variant of the French language, or based on a work intended for another medium of distribution, in respect of the public performance of such translation or adaption or the recording of that performance on any medium.

[2] Public notice of this application was given in the Canada Gazette on Saturday, November 4, 1995 and in the Globe and Mail and La Presse on November 15, 1995. The public notice set a closing date of December 15, 1995 for the filing of notices of intervention by artists, artists' associations and producers. On November 14, 1995, the National Film Board notified the Tribunal that it did not wish to intervene in respect of the determination of the sector but that it might wish to make representations should the definition of the proposed sector be amended. On November 21, 1995, the Canadian Broadcasting Corporation filed a notice of intervention. On December 14, 1995, a request for intervenor status was filed by a copyright collective, la Société du droit de

reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc.; on December 15, 1995, two other requests for intervenor status were filed by copyright collectives, namely the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the Société des auteurs et compositeurs dramatiques (SACD). Also on December 15, 1995, the Réseau de Télévision Quatre Saisons inc. filed a notice of intervention. The Writers Guild of Canada filed a notice of intervention on December 14, 1995 but withdrew it on December 22, 1995 after receiving a clarification as to the applicant's definition of the sector.

[3] In the context of these applications for intervenor status, the issue for the Tribunal to decide is whether permission to intervene should be granted to the organizations that have notified the Tribunal of their desire to make representations regarding AQAD's application for certification.

THE STATUS OF THE ARTIST ACT

[4] The provisions of the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter "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.

[5] Section 16 of the *Act* confers on the Tribunal the power to make regulations of general application on a number of subjects, including practice and procedure before the Tribunal, the certification of artists' associations and the periods for sending notices and other documents. The Tribunal has not yet exercised its authority to make regulations under section 16 but has instead

written and published guidelines setting out the procedures it intends to follow in its initial years of operation before moving to the regulation-making stage. In developing these guidelines, the Tribunal took into account the direction contained in subsection 19(1) of the *Act*, which reads as follows:

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

[6] With respect to applications for certification, the procedure adopted by the Tribunal provides that when the public notice provided for in subsection 25(3) of the *Act* is given, it must indicate not only the period in which competing applications may be made by other artists' associations but also the period in which artists, artists' associations and producers with an interest in the application must notify the Tribunal of their interest. The purpose of this time limit is to ensure that artists, artists' associations and producers notify the Tribunal of their intention to intervene under subsections 26(2) and 27(2) of the *Act*. The notice also permits other interested persons to file requests for intervenor status with the Tribunal under subsection 19(3) of the *Act*. This enables the Tribunal to give the applicant artists' association timely notice of the interventions that have been filed with respect to its application, which in turn enables the applicant to amend its application or to prepare a response to the concerns raised by the intervenors.

[7] The Tribunal does not consider its certification proceedings to be adversarial, except where a competing application is filed. There are only two issues to be determined by the Tribunal in ruling on an application for certification: (1) whether the proposed sector is suitable for professional relations; and (2) whether the applicant is the organization most representative of the artists working in the sector. Accordingly, the Tribunal considers its proceedings to be an investigative process whose outcome is the required decision.

THE ISSUES

[8] In the three interim decisions it has rendered [decision No. 001 in respect of the Union des écrivaines et écrivains québécois (UNEQ); decision No. 002 in respect of the Société des auteurs, recherchistes, documentalistes et compositeurs (SARDeC); and decision No. 003 in respect of the Writers Guild of Canada], the Tribunal held that it has the power to grant intervenor status to individuals or organizations other than artists, artists' associations and producers and it adopted a test to be applied when determining whether intervenor status should be granted.

[9] In the above-mentioned decisions the Tribunal also held that it can:

... 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.

[10] The Tribunal has adopted the following test for determining whether intervenor status should be granted:

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 a person has a sufficient interest to warrant granting them intervenor status in a proceeding, the Tribunal will consider the following four factors:

- (1) whether the proposed intervenor is directly affected by the outcome of the proceeding;
- (2) whether the position of the proposed intervenor is 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.

Should intervenor status be granted to the organizations that have notified the Tribunal of their desire to make representations regarding AQAD's application for certification?

[11] Three organizations have requested intervenor status in respect of AQAD's application for certification:

- (1) la Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc.;
- (2) the Society of Composers, Authors and Music Publishers of Canada (SOCAN); and
- (3) the Société des auteurs et compositeurs dramatiques (SACD).

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

[12] SODRAC is a licensing body within the meaning of section 70.1 of the *Copyright Act* (R.S.C. 1985, c. C-42, as amended). It carries on the business of collective administration of the right to reproduce musical and dramatico-musical

works in any medium as Canadian agent of the Société des auteurs et compositeurs dramatiques (SACD).

[13] SODRAC represents its Canadian and foreign members with respect to works that they have already created and not at the stage when they are creating works for producers. SODRAC suggests that AQAD's application for certification might affect the public performance or reproduction of existing works, as opposed to the provision of services. It therefore requests that the Tribunal exclude from AQAD's sector "the recording of that performance on any medium" and all aspects of the collective administration of the right to reproduce dramatic or dramatico-musical works.

[14] The determination of the sector is a question which is directly before the Tribunal in an application for certification. Since SODRAC requests that the sector which will be defined by the Tribunal exclude the collective administration of the right to reproduce dramatic or dramatico-musical works, it has a legitimate interest in the manner in which the sector will be defined and should therefore be granted the right to make representations to the Tribunal on that subject.

[15] SODRAC is accordingly granted limited status as an intervenor. It may submit written representations to the Tribunal regarding the determination of the sector for bargaining and the representativeness of the applicant. In addition, it will have 30 minutes at the hearing to make any oral representations it considers relevant to either or both of these questions.

Society of Composers, Authors and Music Publishers of Canada (SOCAN)

[16] SOCAN administers the right to publicly perform works created by artists who have entered into agreements with it, to communicate them to the public by telecommunication and to collect royalties for the retransmission thereof.

[17] SOCAN represents some 46,569 Canadian authors and composers. Artists who sign agreements with SOCAN assign to it their rights in the performance or retransmission of any works created before and during the period when they are members of SOCAN. SOCAN submits that, as the assignee of the copyright, it alone may authorize or prohibit the public performance of a work or the communication thereof to the public by telecommunication and, subject to the prerogatives of the Copyright Board, fix the terms and conditions related to the use of the work and the royalties to be paid.

[18] Any author of librettos for original dramatico-musical works in any language, whether created for the stage or not, whether derived from already-existing works of the same kind or another kind, and whether or not they are translations or adaptations of already-existing works, may become a member of

SOCAN once his or her librettos are used in combination with a non-dramatic musical work. As a result, the sector proposed in the applicant's application for certification includes SOCAN's members in respect of any librettos they write for dramatico-musical works as independent contractors where their services are retained by a producer subject to the *Act*.

[19] 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 royalties related to the exploitation of the said copyright;
- (2) that the activities of societies, associations and corporations to which sections 67 *et seq.*, 70.1 *et seq.* and 70.61 *et seq.* of the *Copyright Act* apply are not governed by the *Status of the Artist Act*; and
- (3) that licences and other agreements between the societies, associations and corporations referred to in paragraph (2) and the users of works in the repertoires of the said societies, societies and corporations are not "scale agreements" within the meaning of the *Status of the Artist Act*, and paragraph 28(5)(c) and section 67 of the *Act* in particular;

or in the alternative, that the Tribunal exclude the following from the sector proposed by AQAD:

- (4) the right to authorize or prohibit the public performance or communication to the public by telecommunication (including retransmission in the circumstances described in sections 70.61 *et seq.* of the *Copyright Act*), by any producer subject to the *Act*, of librettos for dramatico-musical works, whether original or resulting from the translation or adaptation of already-existing works, created by artists for such a producer where they are used in combination with a non-dramatic musical work; and
- (5) the right to negotiate or fix any royalties related to the public performance or communication to the public by telecommunication (including retransmission under sections 70.61 *et seq.* of the *Copyright Act*) of the said works in the said circumstances.

[20] In the present proceeding, namely AQAD's application for certification, the Tribunal intends to deal only with questions directly related to the application.

It therefore declines to make the declarations sought in SOCAN's request for intervenor status at this time.

[21] However, for the reasons given above in respect of SODRAC, the Tribunal recognizes that SOCAN may have an interest in the Tribunal's decision regarding the proposed sector and the representativeness of the applicant.

[22] SOCAN is accordingly granted limited status as an intervenor. It may submit written representations to the Tribunal regarding the determination of the sector for bargaining and the representativeness of the applicant. In addition, it will have 30 minutes at the hearing to make any oral representations it considers relevant to either or both of these questions.

Société des auteurs et compositeurs dramatiques (SACD)

[23] 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. SACD administers the right to publicly perform works created by artists who have assigned their copyrights to it, to communicate those works to the public by telecommunication and to collect royalties for the retransmission thereof. SACD has in turn mandated la Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc. to administer its right to authorize or prohibit the reproduction in any media of works of the Canadian authors it represents.

[24] Worldwide, the SACD represents some 30,000 authors and composers of original dramatic works in all languages, of whom approximately 450 are Canadians. By entering into agreements with the SACD, artists assign to it the right to reproduce and publicly perform all their works, whether created before or during the period when they are members of the SACD, to communicate those works to the public by telecommunication and to collect royalties for the retransmission thereof.

[25] It is SACD's position that, when one of the artists who have assigned their rights to it creates an original dramatic work, the copyright so assigned vests in SACD as of the date of creation. It therefore submits that it is the exclusive owner of the copyright and that it alone may authorize or prohibit the reproduction or public performance of a work or the communication thereof to the public by telecommunication and, subject to the prerogatives of the Copyright Board, fix the amount of the royalties to be collected from the user.

[26] SACD has requested essentially the same declarations as SOCAN. For the reasons given above, the Tribunal declines to make the declarations sought by

SACD. However, it recognizes that SACD, like the other copyright collectives, has an interest in the Tribunal's decision regarding the proposed sector for bargaining and the representativeness of the applicant.

[27] SACD is accordingly granted limited status as an intervenor. It may submit written representations to the Tribunal regarding the determination of the sector for bargaining and the representativeness of the applicant. In addition, it will have 30 minutes at the hearing to make any oral representations it considers relevant to either or both of these questions.

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

“André Fortier”
A/Chairperson

“J.A. Lavoie”
Member

“David P. Silcox”
Member