

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

DECISION No. 008

95-0008-A: In the matter of an application for certification filed by the American Federation of Musicians of the United States and Canada

Interim decision of the Canadian Artists and Producers Professional Relations Tribunal: March 5, 1996.

BACKGROUND

[1] On September 20, 1995, the American Federation of Musicians of the United States and Canada (“the AFM”) applied to the Canadian Artists and Producers Professional Relations Tribunal (“the Tribunal”) for certification to represent a sector composed of all American Federation of Musicians’ members including instrumental musicians, conductors, vocalists, music composers, arrangers, copyists and librarians engaged by any producer subject to the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter “the Act”).

[2] As required by subsection 25(3) of the *Act*, 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 14, 1995. This notice also appeared in the Canadian Conference of the Arts “INFO-FAX” of November 1, 1995; the Canadian Musician magazine of December 1995 and the magazine “Musicien québécois” of December 1995. The public notice set a closing date of December 15, 1995 for the filing of competing applications for certification by other artists’ associations and for the filing of expressions of interest by artists, artists’ associations, producers.

[3] As a result of the public notice, two applications for certification were filed for sectors composed of musicians. The Recording Musicians Association - Toronto Chapter (“the RMA”) sought certification for a sector composed of “musicians engaged in recording in the greater Metropolitan Toronto area”, and indicated that this was a competing application to that of the AFM. The Guilde des musiciens sought certification for a sector composed of “all performing musicians, conductors, arrangers, orchestrators, copyists and music librarians practising their art in the province of Quebec in the fields and disciplines listed in subsection 6(2) of the *Status of the Artist Act*” and expressly claimed intervenor status in the AFM application.

[4] Expressions of interest were received from the following artists' associations and producers:

- 1) Canadian Actors Equity Association (CAEA)
- 2) Société professionnelle des auteurs et compositeurs du Québec (SPACQ)
- 3) ACTRA Performers Guild
- 4) Union des artistes (UdA)
- 5) Songwriters Association of Canada
- 6) Canadian League of Composers
- 7) Guild of Film Composers
- 8) Canadian Broadcasting Corporation (CBC)
- 9) National Film Board of Canada (NFB)
- 10) Télévision Quatre Saisons

[5] In addition, a number of organizations applied to the Tribunal for intervenor status. These organizations are:

- 1) the Canadian Independent Record Production Association (CIRPA);
- 2) the Canadian Music Publishers Association (CMPA);
- 3) the Canadian Musical Reproduction Rights Agency Limited (CMRRA);
- 4) the Society of Composers, Authors and Music Publishers of Canada (SOCAN);
- 5) the Société des auteurs et compositeurs dramatiques (SACD); and
- 6) the Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) inc.

[6] Copies of the applications for certification and the expressions of interest were sent to the applicant in order to provide it with an opportunity to comment on the requests for intervenor status. By letters dated January 8 and 12, 1996, the applicant made its views known to the Tribunal, the intervenors and the applicants for intervenor status.

[7] No objection was raised by the applicant to the statutory right of the following artists' associations to intervenor status in accordance with subsections 26(2) and 27(2) of the *Act*: the Canadian Actors Equity Association ("CAEA"); the Société professionnelle des auteurs et compositeurs du Québec ("SPACQ"); the ACTRA Performers Guild ("ACTRA"); the Union des artistes ("UdA"); the Songwriters Association of Canada; the Canadian League of Composers; and the Guild of Film Composers. Four of these organizations (the CAEA, SPACQ, ACTRA and the UdA) have applications for certification pending before the Tribunal which are in one way or another affected by the AFM's application.

[8] In an effort to expedite the proceedings, as directed by section 19(1)(a) of the *Status of the Artist Act*, the Tribunal has decided that any artists' association which has not itself made an application for certification may be allotted a fixed time period during the oral proceeding for the purpose of making oral

representations to the Tribunal. The Songwriters Association of Canada, the Canadian League of Composers and the Guild of Film Composers fall in this category. The length of time to be allotted will be determined by the Tribunal prior to the oral proceeding on the basis of the results of a consultation between each of these organizations and the Tribunal Secretariat. These organizations will, however, have the right to file any written representations they wish the Tribunal to consider and to question any witnesses called by the applicant.

[9] No objection was raised by the applicant to the statutory right of the following producers to intervenor status in accordance with subsection 26(2) of the *Act*: the Canadian Broadcasting Corporation (“CBC”); the National Film Board of Canada (“NFB”); and Télévision Quatre Saisons. In a further effort to expedite the proceedings, these organizations will have the right to file written representations and to question witnesses called by the applicant at the oral proceeding but a fixed time period for the presentation of their oral representations will be established by the Tribunal prior to the oral proceeding on the basis of the results of a consultation between each of these organizations and the Tribunal Secretariat.

[10] The AFM raised an objection to the granting of intervenor status as of right to the Recording Musicians Association - Toronto Chapter and the *Guilde des musiciens* on the grounds that these organizations do not meet the criteria in the *Act* for such status because they are part of the AFM.

[11] With respect to the applicants for intervenor status (CIRPA, CMPA, CMRRA, SOCAN, SACD and SODRAC), the applicant points out that a party seeking to intervene should have a direct and identifiable interest in the two issues relevant to an application for certification (i.e., the suitability of the sector and the representativeness of the applicant). Because a number of these organizations identified their interest as relating to copyright, the AFM provided a “clarity note” indicating that representation by the AFM will not interfere with or include the copyrights of its members and will not interfere with or include the commission agreements or the minimum fees negotiated by members who are composers. Despite this assurance, none of the applicants for intervenor status has as yet withdrawn its application.

[12] The submissions made to the Tribunal raise the following issues:

- 1) Are the Recording Musicians Association - Toronto Chapter and the *Guilde de musiciens* entitled to intervenor status as of right with respect to the AFM application;

- 2) Should intervenor status be granted to the organizations who have indicated a desire to make representations regarding the AFM's application for certification.

THE ISSUES

Issue 1: Are the Recording Musicians Association - Toronto Chapter and the *Guilde de musiciens* entitled to intervenor status as of right with respect to the AFM application for certification.

[13] There are two means by which an artists' association can obtain standing to intervene in an application for certification filed by another artists' association. One is by filing its own application for certification for the same sector or any part of it during the time period prescribed by the Tribunal in the public notice (see subsection 25(3) of the *Act*); the second is by claiming the statutory right to intervenor status provided for in subsections 26(2) and 27(2) of the *Act*.

[14] The Toronto chapter of the Recording Musicians Association of the U.S. & Canada was founded in October 1993 to represent musicians engaged in recording in the Greater Metropolitan Toronto area. On December 15, 1995, it filed an application for certification to represent this sector. Article I of the Toronto Chapter's by-laws which were filed with the application indicate that they are subject to and subordinate to those of the RMA and of the American Federation of Musicians. In view of this, the AFM has taken the position that the RMA does not meet the criteria in the *Act* to be entitled to a statutory right to intervene in the AFM application for certification.

[15] The *Guilde des musiciens* is a body incorporated under the Professional Syndicats Act of the province of Quebec ("*Loi sur les syndicats professionnels*", R.S.Q. c.S-40). It has been recognized by the Commission de reconnaissance des associations d'artistes as the representative of instrumental musicians working in that province. On December 15, 1995, the *Guilde* filed an application with the Tribunal seeking certification to represent all performing musicians, conductors, arrangers, orchestrators, copyists and music librarians practising their art in the province of Quebec in the fields and disciplines listed in subsection 6(2) of the *Status of the Artist Act*. The By-laws of the *Guilde des musiciens* indicate that it is affiliated with the American Federation of Musicians and that with reference to this affiliation, the *Guilde* is to be referred to as "Local 406" of the AFM. The AFM has taken the position that the *Guilde des musiciens* does not meet the criteria in the *Act* to be entitled to a statutory right to intervene in the AFM application for certification.

[16] The AFM has raised a question as to the authority of the Recording Musicians Association - Toronto Chapter and the *Guilde des musiciens* to file

applications for certification with the Tribunal in their own names. This is a matter that will have to be dealt with by the Tribunal at a later date after hearing full submissions from all parties involved.

[17] With respect to the alternative of obtaining intervenor status under subsections 26(2) and 27(2) of the *Act*, these provisions read as follows:

26(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. [our emphasis]

27(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. [our emphasis]

[18] Section 5 of the *Act* defines an “artists’ association” as:

... any organization, *or a branch or local thereof*, that has among its objectives the management or promotion of the professional and socio-economic interests of artists who are members of the organization, and includes a federation of artists’ associations. [our emphasis]

In the Tribunal’s view, because both the Recording Musicians Association - Toronto Chapter and the *Guilde de musiciens* are branch or local affiliates of the AFM, they qualify as artists’ associations within the meaning of the *Act*. Accordingly, the Tribunal finds that both organizations are entitled, as of right, to intervenor status with respect to the AFM’s application for certification by virtue of subsection 26(2) and 27(2) of the *Act*.

Issue 2: Should intervenor status be granted to the organizations who have indicated a desire to make representations regarding the AFM's application for certification.

[19] The relevant portions of the *Status of the Artist Act* read as follows:

19(3) 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.

[20] In Decisions #001, #002 and #003, dated December 8, 1995, the Tribunal determined that the effect of subsection 19(3) is to provide it with the authority to grant intervenor status to individuals and organizations who are not either 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". The Tribunal also expressed the view 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 statutorily mandated 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.

[21] In the same decisions, the Tribunal set out the factors it will consider when determining whether someone has a genuine interest in the proceeding and thus should be granted intervenor status. These are:

- (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.

The Canadian Independent Record Production Association

[22] The Canadian Independent Record Production Association (CIRPA) was established in 1975 and represents corporations and individuals involved in the independent sound recording production sector. Although it represents the interests of producers of sound recordings, the Tribunal has been informed that none of its members is a “producer” within the meaning of the *Status of the Artist Act*, namely a federal government institution or broadcasting undertaking. Accordingly, CIRPA’s request for intervenor status must be considered in light of the provisions of subsection 19(3) of the *Act*, as set out above.

[23] CIRPA states that the AFM’s application for certification indicates a desire on the applicant’s part to become involved in jurisdiction over independent producers whose products may be destined for broadcast, and over new media. If the jurisdiction sought by the AFM were to be granted, the interests of those members of CIRPA who are independent producers could be directly affected. There is presently no party or intervenor representing the interests of independent producers with respect to the AFM application for certification. Although the AFM application could be heard and determined on its merits without the intervention of CIRPA, it is important that the Tribunal be fully informed of all relevant considerations before reaching a conclusion on regarding the appropriateness of a particular sector for collective bargaining. The Tribunal is therefore of the view that the public interest could be better served by permitting CIRPA to make submissions regarding the suitability of the sector proposed by the AFM.

[24] The *Status of the Artist Act* does not provide producers with a statutory right to make submissions regarding the representativeness of an applicant for certification (see subsection 27(2)). In the Tribunal’s view, representativeness should be a matter between the applicant artists’ association and the individual artists in the sector determined by the Tribunal to be suitable for collective bargaining. Accordingly, CIRPA will not be entitled to make submissions to the Tribunal regarding the representativeness of the AFM.

[25] Although the Tribunal is prepared to grant limited intervenor status to CIRPA, in order to assist it in determining the weight to be given to CIRPA’s submissions the Tribunal must satisfy itself as to the extent of CIRPA’s representativeness of independent producers. Accordingly, contingent upon its filing with the Tribunal, in confidence, a copy of its membership list within two weeks of the issuance of these reasons for decision, CIRPA is granted limited intervenor status. It will be permitted to make written representations to the Tribunal in advance of the oral proceeding on the suitability of the proposed sector. In addition, it will be permitted a period of 30 minutes during the oral proceeding to make any oral representations it considers relevant to this issue.

The Canadian Music Publishers Association

[26] The Canadian Music Publishers Association (CMPA) was founded in 1949 and represents a majority of music publishers doing business in Canada. CMPA's main activities centre on copyright reform, matters involving the CRTC and the interaction between Canada's cultural industries and new and developing technologies. CMPA has requested intervenor status on behalf of composers, arrangers and authors of music. Specifically, it seeks to exclude these professional categories from the sector which the AFM is seeking to represent.

[27] The CMPA submits that the decisions made under the *Status of the Artist Act* which define appropriate sectors to deal with the music industry are of utmost importance, as great harm could be done by the imposition of a crude or overly broad sector definition that disrupts historical and functional patterns of contracting and business relationships. As the CMPA represents one of the groups involved in these business relationships, it clearly has an interest in the outcome of the Tribunal's proceeding involving the AFM. The position put forward by the CMPA has been endorsed by the Canadian League of Composers and the Guild of Canadian Film Composers. In this respect, the Tribunal finds itself in the unusual position of finding that the position of the proposed intervenor leads rather than follows the representations of two groups that, as artists' associations, are entitled to intervenor status as of right. Thus, although the Tribunal could hear and decide the case on its merits without the intervention of the CMPA, it would appear that this organization is taking a lead role with respect to the issue of the possible inclusion of composers in the sector. As the CMPA may be able to bring a separate perspective on the issue, as well as to perform a co-ordinating role, the Tribunal is prepared to conclude that the public interest could be served by granting it intervenor status to make submissions regarding the suitability of the sector proposed by the AFM. Because the CMPA primarily represents music publishers, it is more analogous to a producers' association than to an artists' association. Therefore, for the reasons given above, the Tribunal is not prepared to entertain submissions from the CMPA regarding the representativeness of the AFM.

[28] Although the Tribunal is prepared to grant limited intervenor status to the CMPA, in order to assist it in determining the weight to be given to the CMPA's submissions the Tribunal must satisfy itself as to the extent of its representativeness of composers, arrangers and authors of music. Accordingly, contingent upon its filing with the Tribunal, in confidence, a copy of its membership list within two weeks of the issuance of these reasons for decision, CMPA is granted limited intervenor status. It will be permitted to make written representations to the Tribunal in advance of the oral proceeding on the suitability of the proposed sector. In addition, it will be permitted a period of 30 minutes

during the oral proceeding to make any oral representations it considers relevant to this issue.

The copyright collectives

[29] The Canadian Musical Reproduction Rights Agency Limited (CMRRA) is the licensing subsidiary of the CMPA. It was founded in 1975 and carries on business on behalf of more than 30,000 music publishers and copyright owners. It issues licenses to users for the reproduction of music, including licenses to television broadcasters with respect to the reproduction of music in their own productions. By virtue of its agreements with publishers, the CMRRA is the licensing agent for thousands of composers from Canada with respect to key aspects of copyright in the works they create. Like its parent entity, the CMRRA wishes to ensure that composers, arrangers and authors of music are excluded from the sector which the Tribunal determines to be suitable for collective bargaining.

[30] The CMRRA has a model agreement with respect to mechanical rights with the Canadian Recording Industries Association and a number of independent record companies. It takes the position that because the activities of composers are dealt with in a regulatory scheme encompassing the *Copyright Act*, the Copyright Board and the applicable statutes and common law of the provinces, there is no need to include composers in a sector in the context of the *Status of the Artist Act*.

[31] In the context of an earlier decision involving the Union des écrivaines et écrivains québécois (#005), the Tribunal dealt with the concerns of a number of copyright collectives regarding the relationship between the *Copyright Act* and the *Status of the Artist Act* insofar as sector determinations are concerned. Because that decision dealt with literary and dramatic works rather than musical works, the Tribunal is prepared to accept that the CMRRA may have something new and useful to contribute to the subject. As a copyright collective, it may have a different perspective to present than that of the CMPA or the artists' associations who represent composers.

[32] Accordingly, the CMRRA 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 for collective bargaining and on 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.

[33] The Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Société des auteurs et compositeurs dramatiques (SACD), and the Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada

(SODRAC) inc. are copyright collectives who have previously been found by the Tribunal to meet the criteria for recognition as intervenors in applications for certification.

[34] The Society of Composers, Authors and Music Publishers of Canada (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. 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.

[35] SOCAN submits that as the assignee of 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. For this reason, it claims an interest in the determination of the sector which the AFM is seeking to represent.

[36] 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. 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.

[37] SACD submits 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. SACD then becomes 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. For this reason, it claims an interest in the determination of the sector which the AFM is seeking to represent.

[38] The Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (SODRAC) inc. 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 2,181 Canadian authors and composers who have assigned to SODRAC the authority to deal with the reproduction of their works. SODRAC represents several hundred Canadian music composers as well as members of foreign copyright collectives. Although SODRAC's representation relates 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, it submits that the the management of the right to reproduce the works of composers and arrangers should be excluded from the definition of the sector.

[39] For the reasons given in Decisions #001, #002 and #003, the Tribunal recognizes that SOCAN, SACD and SODRAC 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. Accordingly, SOCAN, SACD and SODRAC are each granted limited status as an intervenors. They 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, each one will be allotted 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.

[40] The Tribunal strongly recommends that the intervenors who have common interests coordinate their oral submissions in an effort to make best use of the time allotted to them.

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

André Fortier, A/Chairperson

J.A. Lavoie, Member

David P. Silcox, Member

Meeka Walsh, Member