

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

DECISION No. 009

95-0013-A: In the matter of an application for certification filed by the Periodical Writers Association of Canada

Interim decision of the Canadian Artists and Producers Professional Relations Tribunal: March 14, 1996. Decision No. 009.

BACKGROUND

[1] On November 9, 1995, the Periodical Writers Association of Canada (“PWAC”) applied to the Canadian Artists and Producers Professional Relations Tribunal for certification to represent a sector composed of professional freelance writers who write in all languages other than French for magazines, newspapers and other periodicals published in print or electronic form and whose work is distributed or made available electronically across inter-provincial borders by computer, telephone, satellite or any other means, where the publisher and/or the electronic information-distributor is a Canadian entity or has its principal place of business in Canada or establishes an office in Canada.

[2] As required by subsection 25(3) of the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter “the *Act*”), public notice of this application was given in the *Canada Gazette* on Saturday, December 9, 1995 and in the *Globe and Mail* and *La Presse* on December 18, 1995. This notice also appeared in the Canadian Conference of the Arts “INFO-FAX” of January 1, 1996. The public notice set a closing date of January 26, 1996 for the filing of notices of intervention by artists, artists’ associations, producers.

[3] On January 11, 1996, the Union des écrivaines et écrivains québécois notified the tribunal that it wished to be informed of any modifications made to the PWAC request for certification and that it was reserving its right to intervene should its interests be affected by any such modification.

[4] On January 22, 1996, the Canadian Daily Newspaper Association (“CDNA”) notified the Tribunal of its interest in the PWAC application and sought leave to intervene in the proceedings.

[5] On January 26, 1996, the Canadian Copyright Licensing Agency (“CANCOPY”) requesting that the Tribunal make a general, preliminary ruling that there is no conflict between the operation of CANCOPY and the certification of organizations representing writers and visual artists who are entering into contracts with publishers or other producers to publish or otherwise produce copyright material. In order to obtain clarification on this point, CANCOPY requested intervenor status in the PWAC application for certification.

[6] Copies of the requests for intervenor status were sent to the applicant in order to provide it with an opportunity to comment. By letter dated February 16, 1996, the applicant made its views on these requests known to the Tribunal. It is the applicant’s position that the Tribunal is well able to hear and decide the merits of its application with or without the assistance of newspaper publishers (CDNA); and that CANCOPY’s intervention is not relevant to the case.

THE ISSUES

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

- 1) Should intervenor status be granted to the CDNA;
- 2) Should intervenor status be granted to CANCOPY.

[8] The relevant portion of the *Status of the Artist Act* reads 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.

[9] In a number of previous decisions (#001 [UNEQ], #002 [SARDeC] and #003 [WGC], all issued 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”. In the same decisions, 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.

[10] The factors which the Tribunal will consider when determining whether someone has a genuine interest in the proceeding and thus should be granted intervenor status 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 Daily Newspaper Association

[11] The Canadian Daily Newspaper Association (CDNA) is a national organization which represents the interests of more than 80 English and French language daily newspapers throughout Canada in dealing with important developments that affect either the newspapers themselves or more generally the institution or role of the press in the Canadian community. Members of the CDNA purchase copy from freelance writers as part of their newsgathering and information activities. The output of the freelancers is used by the CDNA's members to produce copy for newspapers and, in some cases, the newspapers make their content available in electronic form as well as print. By offering these electronic versions, public access from remote locations is made possible.

[12] The CDNA opposes PWAC's application on the grounds that the *Status of the Artist Act* was not intended to apply to daily newspapers in Canada, and that daily newspapers do not fall within the categories of producers to which the *Act* applies. CDNA submits that if the *Status of the Artist Act* were to be applied by the Tribunal in the manner that PWAC has requested in its application for certification, such application would be unconstitutional.

[13] Pursuant to the *Status of the Artist Act*, the Tribunal has jurisdiction over federal government institutions and broadcasting undertakings described in paragraph 6(2)(a) of that *Act*:

6(2) This Part applies

(a) to the following organizations that engage one or more artists to provide an artistic production, namely,

(i) government institutions listed in Schedule I to the Access to Information Act or the schedule to the Privacy Act, or prescribed by regulation, and

(ii) broadcasting undertakings, including a distribution or programming undertaking, under the jurisdiction of the Canadian Radio-television and Telecommunications Commission;

[14] The Tribunal has been informed by PWAC that new forms of electronic publishing are bringing about rapid change in the periodical publishing sector. In its submissions, the CDNA indicated to the Tribunal that some of its members do make the content of their newspapers available in electronic form, thereby enabling remote access. The extent to which this activity could bring these organizations within the definition of a “broadcast undertaking”, and thus within the jurisdiction of the *Act*, is one which the Tribunal feels merits inquiry.

[15] Clearly, the interests of CDNA’s members could be affected by the outcome of the Tribunal’s proceedings on the PWAC application. These interests are not represented by any other participant in the proceeding and its contribution would be very helpful in assisting the Tribunal in coming to a conclusion on the suitability of the proposed sector. It is the Tribunal’s view that the public interest and the interests of justice would be served by granting intervenor status to the CDNA with respect to this matter.

[16] In an effort to give effect to the statutory direction contained in paragraph 19(1)(a) of the *Act*, the Tribunal has adopted a practice of setting a fixed time period for representations by intervenors during the oral proceedings. Given the nature of the points raised by the CDNA, the Tribunal Secretariat will be directed to consult with the CDNA in order to determine an appropriate time period for any oral presentation it may wish to make.

Canadian Copyright Licensing Agency (CANCOPY)

[17] CANCOPY is a licensing body within the meaning of section 70.1 of the *Copyright Act* (R.S.C. 1985, c.C-42). It was established in 1988 as a non-profit organization under the *Canada Corporations Act* (R.S.C. 1970, c.C-32) 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.

[18] 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 for electronic information distribution. While CANCOPY does not license first production or publication of materials, it does authorize the distribution of previously published works (i.e., it deals with secondary rather than primary rights). CANCOPY has indicated that it has an interest in the

description of the sector which PWAC is seeking to represent in order to ensure that its own ability to license electronic information distributors is not impaired.

[19] In order to ensure that there is no conflict between the rights obtained by PWAC as a result of certification under the *Status of the Artist Act* and the activities of CANCOPY as a licensing body under the *Copyright Act*, CANCOPY has requested that the Tribunal make a general, preliminary ruling that there is no conflict between the operation of CANCOPY and the certification of organizations representing writers and visual artists who are entering into contracts with publishers and other producers to publish or otherwise produce copyright material.

[20] In Decision #005 (UNEQ, January 30, 1996), the Tribunal expressed its conviction 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. CANCOPY did not participate in those proceedings and it is possible that this organization may have a new perspective to contribute to the subject.

[21] The Tribunal recognizes that CANCOPY has an interest in the determination which the Tribunal will make regarding PWAC's application for certification. These interests are not represented by any other party to the proceeding and CANCOPY's contribution could be of assistance to the Tribunal in dealing with the specific case before it. 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 the harmonization.

[22] 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.

André Fortier, A/Chairperson

David P. Silcox, Member

Meeka Walsh, Member