

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, April 25, 1996

File No. 95-0001-A

DECISION No. 010

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY
THE CANADIAN ACTORS' EQUITY ASSOCIATION

Decision of the Canadian Artists and Producers Professional Relations Tribunal

The application for certification is granted.

Place of hearing: Toronto, Ontario
Date of hearing: March 13 and 14, 1996

Quorum: Mr. David P. Silcox
Mr. J. Armand Lavoie
Mrs. Meeka Walsh

Appearances: Caley and Wray, Harold Caley; and Susan Wallace,
Executive Director, for the applicant, Canadian Actors'
Equity Association.
Len Lytwyn for the American Federation of Musicians of
the United States and Canada
Ellen Busby for the Canadian Association of Professional
Dance Organizations.
Jennifer Watkins for the Canadian Alliance of Dance
Artists.
Pat Bradley for the Professional Association of Canadian
Theatres.
Sandy MacMaster for the Fight Directors of Canada.

REASONS FOR DECISION

95-0001-A: In the matter of an application for certification filed by the Canadian Actors' Equity Association ("Equity")

STATEMENT OF FACTS

[1] This decision relates to 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 Canadian Actors' Equity Association (hereinafter "Equity") on June 22, 1995. The application was heard in Toronto on March 13 and 14, 1996.

[2] Equity applied for certification to represent a sector composed of artists engaged in the preparation and presentation of live theatrical performances and entertainments except where, by specific agreement between the Canadian Actors' Equity Association and l'Union des Artistes, the Canadian Actors' Equity Association recognizes the jurisdiction of l'Union des Artistes in this sector.

[3] Public notice of this application was given in the *Canada Gazette* on Saturday, July 22, 1995 and in the *Globe and Mail* and *La Presse* on August 16, 1995. This notice also appeared in the Canadian Conference of the Arts *INFO-FAX* dated September 1, 1995. The public notice set a closing date of September 30, 1995 for the filing of expressions of interest by artists, artists' associations and producers.

[4] Expressions of interest were filed by the Canadian Association of Professional Dance Organizations, the Canadian Alliance of Dance Artists (Ontario and B.C. chapters), and the Professional Association of Canadian Theatres.

[5] The Tribunal also received an application for certification from the American Federation of Musicians of the United States and Canada which potentially overlapped with that of Equity insofar as singers/vocalists are concerned.

[6] On November 21, 1995, after the close of the notice period, the Canadian Broadcasting Corporation notified the Tribunal of its interest in the Equity application for certification. However, the CBC did not respond to requests for further details of its claim that it was a producer affected by the application, nor did it file any written representations or send a representative to the oral proceeding.

[7] At the commencement of the oral proceeding on March 13, 1996, the Fight Directors of Canada (hereinafter "FDC") requested intervenor status, on the grounds that it was an artists' association affected by the Equity application for certification. After hearing the submissions of both the FDC and Equity on the issue of whether the intervention should be permitted, the Tribunal determined that it would be appropriate to grant intervenor status to FDC.

[8] During the course of the oral proceeding, the applicant provided the Tribunal with additional detail as to the specific professional classifications of performers which it wishes to have included in the sector. These are:

- a) **in theatre**, actors (including principals, chorus, journeymen, apprentice actors, singers, dancers, mimes, narrators, local jobbers, swings/understudies and extras), production stage managers, stage managers, assistant stage managers, stage management apprentices, directors, assistant directors, choreographers, assistant choreographers, dance captains, fight directors, fight captains;
- b) **in opera**, singers, dancers, actors (including soloists, performers, ensemble studio artists, chorus members, apprentices, understudy/covers and extras), stage directors, assistant stage directors, ballet masters and mistresses, production stage managers, stage managers, assistant stage managers, choreographers, assistant choreographers and fight directors;
- c) **in ballet**, dancers, narrators, singers, guest artists, local jobbers, covers, understudy/sharers, student apprentices, apprentice dancers, choreographers, stage managers, assistant stage managers, ballet masters and mistresses, resident choreologists, coaches and repititeurs.

[9] The Equity application for certification raises the following issues:

(1) The suitability, for bargaining purposes, of the sector proposed by Equity, and in particular:

- (a) whether singers should be included in the sector;
- (b) whether dancers should be included in the sector;
- (c) whether fight directors should be included in the sector;
- (d) whether the Tribunal has the jurisdiction under the *Status of the Artist Act* to include production stage managers, stage managers and assistant stage managers in the sector;
- (e) whether the Tribunal has the jurisdiction under the *Status of the Artist Act* to include choreographers and assistant choreographers in the sector; and
- (f) whether the Tribunal has the jurisdiction under the *Status of the Artist Act* to include stage directors and assistant stage directors in the sector.

(2) Whether the Canadian Actors' Equity Association is representative of artists in the sector;

(3) Whether section 55 of the *Status of the Artist Act* is in conflict with clause 51 of the Canadian Theatre Agreement.

THE ISSUES

Issue 1: Is the sector proposed by Equity a sector that is suitable for bargaining?

[10] Equity has proposed a sector composed of artists engaged in the preparation and presentation of live theatrical performances and entertainments except where, by specific agreement between the Canadian Actors' Equity Association and l'Union des Artistes, the Canadian Actors' Equity Association recognizes the jurisdiction of l'Union des Artistes in this sector.

[11] Specific concerns were raised with respect to a number of the professional categories which Equity wishes to include within this proposed sector, namely: singers, dancers, fight directors, production stage managers, stage managers and assistant stage managers, choreographers and assistant choreographers, stage directors and assistant stage directors.

[12] In determining whether a sector is suitable for bargaining, subsection 26(1) of the *Act* directs the Tribunal to take 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.

Singers

[13] At the oral proceeding, the Tribunal was informed that Equity and the American Federation of Musicians of the United States and Canada (hereinafter "AFM") had reached an understanding on the issue of their respective jurisdictions over singers. This understanding provides that:

- a) actors who are also required to play musical instruments as a secondary part of the role they are playing fall under Equity jurisdiction;
- b) featured singers without instrumental responsibilities fall under Equity jurisdiction;
- c) members of choirs, on-stage, off-stage or in the pit with no musical responsibilities fall under Equity jurisdiction;
- d) musicians accompanying such choirs fall under AFM jurisdiction;

- e) pit and/or onstage musicians who are required to do choreography and/or deliver lines as a secondary part of their duties as musicians fall under AFM jurisdiction;
- f) self-accompanied singers/vocalists fall under AFM jurisdiction.

[14] The Tribunal was further advised that when an artist is required to perform more or less equally and simultaneously as both an actor and an instrumental musician, jurisdiction will be determined and agreed to between Equity and the AFM on a case by case basis with consideration given to what would be of most benefit to the artist.

[15] As the written understanding reached by Equity and the AFM reflects the historical relationships between singers, their associations and producers, the Tribunal accepts it. Given the community of interest between singers and the other artists that Equity proposes to represent, the Tribunal finds that it is appropriate to include singers in a sector with other live theatrical performers and entertainers, subject to the terms of the above-cited understanding.

Dancers

[16] The applicant described its position and responsibilities in dance primarily as representing the dancers of the Royal Winnipeg Ballet and the National Ballet of Canada, as they have done for about forty years. The Canadian Ballet Agreement, filed with the Tribunal, describes the current terms and conditions of work, definitions of functions, and the responsibilities of management and dance artists in these two companies.

[17] The applicant indicated that “several hundred” Equity members work additionally in musical theatre productions and operas where dance is a component. The applicant also indicated that it represented and wished to represent “only those dancers who are offered opportunities to work under Equity contracts”, and that “management defines the membership of Equity in terms of dance”.

[18] The Canadian Alliance of Dance Artists (CADA) and the Canadian Association of Professional Dance Organizations (CAPDO) jointly addressed the Tribunal and stated that Equity represents a small proportion of professional dancers in Canada, which they estimate at between 11-14%, and that this sector should not be so defined as to expand Equity’s responsibilities. These intervenors also argued that the present conditions in dance were, in a large majority of cases, not of the traditional management/artist type described in the Canadian Ballet Agreement, and that the management/artist relationship existed only in a most fluid and informal way for most contemporary dance groups and dancers.

[19] The applicant’s assertion that it represents only its members, and has no

wish to represent independent modern dancers, *per se*, is taken by the Tribunal at face value. The applicant, who has 138 dance members, chiefly in the Royal Winnipeg Ballet and the National Ballet of Canada, did not contest or object to CADA and CAPDO's description of the contemporary independent dance sector as representing 84 - 89% of Canada's dance community; nor did it disagree with the description of that community as being one in which the producer/engager/choreographer/artist roles are frequently interchangeable. The traditional management/artists relationship seems, from the description of those in it, not to be appropriate in this area and the Tribunal is sympathetic to the case put forward by CADA and CAPDO. However, to restrict the applicant's sphere of representation would continue to leave a large number of dancers who work for producers in the federal jurisdiction without bargaining protection.

[20] The Tribunal is of the opinion that there is indeed a community of interest between dancers and other professionals who engage in live theatrical performances. The *Status of the Artist Act* also directs the Tribunal to take into account the history of professional relations among the artists, their associations and producers when determining the suitability of a sector for bargaining. However, the Tribunal is also mindful that if progress is to be made in achieving the objectives of this new *Act*, and particularly in improving the compensation paid to artists for their work, it may sometimes be necessary to go beyond the limits of historical professional relations. The applicant has demonstrated that it has experience in representing dancers, although in a somewhat more limited sphere than they are seeking in this application. The Tribunal therefore finds it is appropriate to include dancers engaged by producers subject to the *Status of the Artist Act* within the scope of the sector.

Fight Directors

[21] The applicant indicated that fight directors and fight captains traditionally had been and still were included in the sector described in the application. Further, the applicant believed that contention between Fight Directors, Canada and the Society of Fight Directors of Canada to represent all fight directors was the cause of the intervention. The applicant contended that a scale agreement covering fight directors had long been in place and that the issues of safety had been and were continuing to be addressed with the appropriate authorities, with the involvement of the fight directors.

[22] FDC argued that since not all fight directors or fight captains were required to be Equity members, and since no standards of qualification to be a fight director existed or were enforced, Equity was not well-equipped to represent fight directors and fight captains. Safety issues and pay scales in particular were a matter of concern that the intervenor believed could be better dealt with if the FDC were to represent their one hundred members in these professional

categories.

[23] The Tribunal was informed that fight directors and fight captains have traditionally been part of the sector which the applicant represents. Nevertheless, the Tribunal has carefully considered whether it would be appropriate to contemplate a separate bargaining unit for this particular craft. The special concern of the FDC with respect to safety was an important consideration, and the Tribunal was pleased to learn that discussions on this matter are ongoing between Equity and the appropriate provincial authorities, and that improved conditions had been worked out and were expected to be confirmed. With respect to the issues of qualifications and scale, it is the Tribunal's view that these are essentially internal matters that the applicant and the representatives of the fight directors and fight captains need to discuss and determine among themselves.

[24] Given the historical relationship between the applicant, fight directors and fight captains and producers, and the community of interest between these professional categories and the other performing artists in the proposed sector, the Tribunal is of the opinion that it is appropriate to include fight directors and fight captains in the sector.

Production stage managers, stage managers and assistant stage managers

[25] The inclusion of these professionals within the proposed sector raises two sub-questions:

a) whether production stage managers, stage managers and assistant stage managers are employees or self-employed independent contractors;

b) whether production stage managers, stage managers and assistant stage managers fall within the categories of professional artists contemplated by paragraph 6(2)(b)(ii) of the *Status of the Artist Act* or whether regulations to include them within the scope of the *Act* are required pursuant to paragraph 6(2)(b)(iii).

[26] Pursuant to paragraph 6(2)(b), Part II of the *Act* applies to

... *independent contractors* determined to be professionals according to the criteria set out in paragraph 18(b), and who

(i) are authors of artistic, dramatic, literary or musical works within the meaning of the Copyright Act, or directors responsible for the overall direction of audiovisual works,

(ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or

(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-

recording, dubbing or the recording of commercials, arts and crafts, or visual arts, *and fall within a professional category prescribed by regulation.*
(emphasis added)

[27] Regulations prescribing the categories of professionals who contribute to the creation of a production have not yet been promulgated. Accordingly, the Tribunal at present has authority only to certify sectors comprised of professional independent contractors who fall with the categories described in paragraphs 6(2)(b)(i) and (ii).

Are production stage managers, stage managers and assistant stage managers employees or self-employed independent contractors?

[28] The Professional Association of Canadian Theatres informed the Tribunal that the positions of stage manager, production stage manager and assistant stage manager are, in some ways, anomalies in the Canadian Theatre Agreement (“the CTA”). Under the *Income Tax Act* they are considered to be employees, but in the CTA they are defined as artists and PACT has recognized Equity as the bargaining agent on their behalf.

[29] For a variety of legal purposes, the law has had to distinguish between employees who work under contracts of service and contractors who perform work for another person on an independent basis in the context of contracts for service. A number of tests have been developed by the courts to determine when independent contractor status exists. The common feature of these tests is that each particular situation must be looked at on its own merits and that no blanket determination can be made on the basis of job title alone.

[30] Given that PACT and Equity have historically treated production stage managers, stage managers and assistant stage managers as independent contractors for the purposes of bargaining the CTA, the Tribunal suggests that an appropriate approach is for Equity and producers in the federal jurisdiction to continue to endeavour to agree on the status of these professionals on a case by case basis. If a dispute arises in a particular case, an application can be made to the Tribunal under ss. 17(p) of the *Status of the Artist Act* for a determination as to whether a particular person is an independent contractor bound by the scale agreement.

Do production stage managers, stage managers and assistant stage managers fall within the categories of professional artists contemplated by paragraph 6(2)(b)(ii) of the Status of the Artist Act or are regulations to include them within the scope of the Act required pursuant to paragraph 6(2)(b)(iii)?

[31] Production stage managers, stage managers and assistant stage managers are required by the terms of the Canadian Theatre Agreement to carry out a

number of functions that relate to the creation of a production: although they chiefly coordinate the technical requirements for a production and ensure that the right people, sets and props are all at the right place at the right time to rehearse and to perform, they are also called upon to direct aspects of the performance. Whether this direction merely involves carrying out the artistic vision of the director or requires a degree of interpretation by the production stage manager, stage manager or assistant stage manager may vary from director to director and from production to production. The PACT reading of the legislation leads it to emphasize the “manage” part of the job titles and functions, and to suggest that these occupational categories should be prescribed by regulation.

[32] Since these professions are part of the process of shaping and refining a production, they are to some degree artistic; they are not, clearly, wholly managerial. The Tribunal’s reading of the CTA left it with little doubt that the functions of these professionals include “directing...in any manner” a work contemplated by paragraph 6(2)(b)(ii). Accordingly, the Tribunal finds that it does have the jurisdiction to include the professions of production stage manager, stage manager and assistant stage manager as described in the CTA, in a sector for bargaining.

[33] Given that the applicant has historically represented production stage managers, stage managers and assistant stage managers and that these professionals have a community of interest with the performance artists in the sector, the Tribunal finds it appropriate to include them in the sector sought by the applicant.

Choreographers and assistant choreographers

[34] This issue requires the Tribunal to determine whether choreographers and assistant choreographers fall within the categories of professional artists contemplated by paragraph 6(2)(b)(i) or (ii) of the *Status of the Artist Act*, or whether regulations to include them within the scope of the *Act* are required pursuant to paragraph 6(2)(b)(iii).

[35] Choreographers and assistant choreographers are required by the terms of the Canadian Theatre Agreement to carry out a number of functions that relate to the creation of a production: they rehearse and direct all dance sequences. Whether this direction merely involves carrying out the artistic vision of a director or requires a degree of interpretation by the choreographer or assistant choreographer may vary from time to time. The Tribunal’s reading of the CTA left it with little doubt that the functions of these professionals include

“directing...in any manner” a work contemplated by paragraph 6(2)(b)(ii). Accordingly, the Tribunal finds that it does have the jurisdiction to include the professions of choreographer and assistant choreographer, as described in the CTA, in a sector for bargaining.

[36] Furthermore, the Tribunal is of the opinion that choreographers would also qualify for inclusion in a sector by virtue of paragraph 6(2)(b)(i) of the *Act*. This paragraph provides that Part II of the *Status of the Artist Act* applies to independent contractors who are authors of dramatic works within the meaning of the *Copyright Act*. The *Copyright Act* (R.S.C. 1985, c. C-42, as am.) defines a dramatic work as including choreographic work that is fixed in writing or otherwise.

[37] Given that the applicant has historically represented choreographers and assistant choreographers and that these professionals have a community of interest with the performance artists in the sector, the Tribunal finds it appropriate to include them in the sector sought by the applicant.

Stage directors and assistant stage directors

[38] This issue requires the Tribunal to determine whether stage directors and assistant stage directors fall within the categories of professional artists contemplated by paragraph 6(2)(b)(i) or (ii) of the *Status of the Artist Act*, or whether regulations to include them within the scope of the *Act* are required pursuant to paragraph 6(2)(b)(iii).

[39] Paragraph 6(2)(b)(i) provides that the *Act* applies to “directors responsible for the overall direction of audiovisual works”. The term “audiovisual” is not defined in the *Status of the Artist Act*. Paragraph 6(2)(b)(ii) provides that the *Act* applies, *inter alia*, to independent professional contractors who “... direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show.” The Tribunal is of the view that stage directors can be included in a sector by virtue of both paragraph 6(2)(b)(i) and (ii), depending on the nature of the production which is being directed; and that assistant directors can be included in a sector by virtue of paragraph 6(2)(b)(ii) in that their function includes directing, although it may be under the supervision of the Director of the production.

[40] Given that the applicant has historically represented directors and assistant directors and that these professionals have a community of interest with the performance artists in the sector, the Tribunal finds it appropriate to include them in the sector sought by the applicant.

Conclusion regarding the sector

[41] After considering all of the oral and written representations of the applicant and the intervenors, the Tribunal has reached the conclusion that the suitable sector for bargaining is a sector composed of:

independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of actor (including principal, chorus, journeyman, apprentice actor, mime, narrator, local jobber, swing/understudy, or extra), singer (including soloist, performer, ensemble studio artist, chorus member, apprentice, understudy/cover or extra), dancer (including guest artist, apprentice dancer or understudy/sharer), production stage manager, stage manager, assistant stage manager, stage management apprentice, stage director, assistant stage director, fight director, fight captain, choreographer, assistant choreographer, dance captain, ballet master or mistress, resident choreologist, coach or repetiteur in a live performance in theatre, opera, ballet, dance, industrial show, cabaret show or concert performance whether or not such performance or entertainment is presented in a theatre or elsewhere, with the exception of :

- (a) singers covered by the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada; and
- (b) independent contractors in the enumerated categories who are covered by the 1992 agreement between Canadian Actors' Equity Association and the Union des Artistes.

Issue 2: Is the Canadian Actors' Equity Association representative of artists in the sector?

[42] According to the documents filed by the applicant, it currently represents 5,038 active members engaged as performers, stage managers, directors or choreographers in theatre, opera and dance. Although it is difficult to assess the size of the sector, it would appear that the applicant represents a majority of independent professional contractors working in the sector as a whole which the Tribunal has found to be suitable for bargaining. The only representations made to the Tribunal disputing the representativeness of the applicant for the proposed sector were those of CADA and CAPDO relative to Equity's representation of dancers, as outlined in paragraphs 18 and 19 above.

[43] Given that no other artists' association has come forward seeking to represent any of the professional categories which the Tribunal has found to be appropriate for inclusion in the sector, the Tribunal accepts the applicant's submission that it is the organization most representative of artists in the above-

described sector.

Issue 3: Is there a conflict between section 55 of the *Status of the Artist Act* and clause 51 of the Canadian Theatre Agreement?

[44] Section 55 of the *Status of the Artist Act* provides:

55. (1) Where a producer enters into a co-production agreement, the producer shall ensure that the agreement designates the person who will actually engage the artists for the co-production.

(2) This Part does not apply in respect of a co-production unless the person designated pursuant to subsection (1) is a producer within the meaning of this Part.

[45] The relevant portions of clause 51 of the CTA provides:

5101. Before engaging any Artist for a Joint Production, the two (2) Theatres involved in presenting the Joint Production must provide Equity and PACT with a co-signed letter giving information about the Joint Production, i.e. title, rehearsal schedule, performance dates, hiatus dates (if applicable), travel days, security arrangements and the proposed category for the production.

5110. In the event that a breach of this Agreement arises out of the Joint Production by one or more Theatres, all Theatres, as signatories to the engagement, shall be held equally responsible, and all Theatres shall deal with the consequences.

[46] Clearly, the purpose of clause 51 is to protect the interests of the individual artist and the Canadian Actors' Equity Association in the event that a problem arises with a joint production. By the terms of the contract, all of the engagers are jointly and severally liable for ensuring that the terms of the Canadian Theatre Agreement are upheld.

[47] Section 55 of the *Status of the Artist Act* applies to co-productions in which at least one of the producers is a producer within the meaning of that *Act* (i.e., those enumerated in paragraphs 6(2)(a)(i) and (ii) of the *Act*). In such cases, section 55 requires that the co-producers designate which of them is to be considered the actual "engager" of the artists. This designation takes on greatest significance when one of the co-producers is not a producer under the jurisdiction of the *Status of the Artist Act*. If the co-producers designate the federal jurisdiction producer to be the engager of the artists, then the co-production will be governed by the terms of the *Act*. In this regard, section 55 essentially provides for an arrangement *as between the co-producers* regarding the legislative jurisdiction that will apply to the co-production. As such, it does not and should not have any effect on the obligations and liabilities that each assumes towards the artists and the Canadian Actors' Equity Association pursuant to the terms of

the Canadian Theatre Agreement.

[48] Accordingly, the Tribunal finds that there is no conflict between section 55 of the *Status of the Artist Act* and clause 51 of the Canadian Theatre Agreement.

DECISION

[49] 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 bargaining is a sector composed of: independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of actor (including principal, chorus, journeyman, apprentice actor, mime, narrator, local jobber, swing/understudy, or extra), singer (including soloist, performer, ensemble studio artist, chorus member, apprentice, understudy/cover or extra), dancer (including guest artist, apprentice dancer or understudy/sharer), production stage manager, stage manager, assistant stage manager, stage management apprentice, stage director, assistant stage director, fight director, fight captain, choreographer, assistant choreographer, dance captain, ballet master or mistress, resident choreologist, coach or repetiteur in a live performance in theatre, opera, ballet, dance, industrial show, cabaret show or concert performance whether or not such performance or entertainment is presented in a theatre or elsewhere, with the exception of :

(a) singers covered by the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada; and

(b) independent contractors in the enumerated categories who are covered by the 1992 agreement between Canadian Actors' Equity Association and the Union des Artistes.

Declares that the Canadian Actors' Equity Association is the organization most representative of professional independent contractors in the above-described sector.

Declares that there is no conflict between section 55 of the Act and clause 51 of the Canadian Theatre Agreement.

An order will issue to confirm the certification of the Canadian Actors Equity Association to represent the said sector for the purposes of professional relations with producers in the federal jurisdiction.

Ottawa, April 25, 1996

David P. Silcox, Panel Chairperson

J. A. Lavoie, Member

Meeka Walsh, Member