

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, May 17, 1996

File No. 95-0011-A

Decision No. 013

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY THE SOCIÉTÉ PROFESSIONNELLE DES AUTEURS ET DES COMPOSITEURS DU QUÉBEC

Decision of the Canadian Artists and Producers Professional Relations Tribunal

The application for certification is granted.

Place of hearing: Montreal, Quebec
Date of hearing: April 11 and 12, 1996

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

Appearances: Brodeur, Matteau, Poirier, Colette Matteau; Francine Bertrand-Venne and Robert Léger for the applicant. Perley-Robertson, Panet, Hill & McDougall, Howard P. Knopf; David Basskin for the Canadian Musical Reproduction Rights Agency Limited and the Canadian Music Publishers Association. Martineau, Walker, Stéphane Gilker for the Society of Composers, Authors and Music Publishers of Canada and the Société des auteurs et compositeurs dramatiques. Brodeur, Matteau, Poirier, Colette Matteau; Claudette Fortier for the Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada inc.

REASONS FOR DECISION

95-0011-A: In the matter of an application for certification filed by the Société professionnelle des auteurs et des compositeurs du Québec (SPACQ)

STATEMENT OF FACTS

[1] This decision relates to an application for certification under section 25 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter "the *Act*") filed with the Canadian Artists and Producers Professional Relations Tribunal (hereinafter referred to as "the Tribunal") by the Société professionnelle des auteurs et des compositeurs du Québec on October 16, 1995. The application was heard in Montreal on April 11 and 12, 1996.

[2] SPACQ applied to represent a sector composed of lyricists, composers and lyricist-composers of songs in the French language, of music intended for French broadcasts or of music composed by an artist resident in Quebec, when such music is commissioned by a producer to whom the *Status of the Artist Act* applies.

[3] 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 16, 1995. The notice also appeared in the Canadian Conference of the Arts *INFO-FAX* of November 1995; in the newsletter of the Fédération culturelle canadienne-française, *Qui-vive*, of December 1995; in the magazine *Musicien québécois* for November/December 1995 and in the December 1995 issue of the magazine *Professional Sound*. The public notice set a deadline of December 15, 1995 for the filing of notices of intervention by artists, artists' associations and producers.

[4] As provided in subsection 26(2) of the *Act*, producers affected by an application for certification may intervene as of right on the issue of determining the sector, without any need for the authorization set out in subsection 19(3). The Tribunal received notices of intervention from the National Film Board of Canada (NFB), the Canadian Broadcasting Corporation (CBC) and Télévision Quatre-Saisons Inc. (TQS). The NFB informed the Tribunal that it wished to intervene only if the proposed sector was amended. The CBC and TQS did not file any written submissions and did not send representatives to the hearing.

[5] Four copyright collectives, namely the Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) inc., the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Société des auteurs et compositeurs dramatiques (SACD) and the Canadian Musical

Reproduction Rights Agency Limited (CMRRA), informed the Tribunal that they wished to intervene in the application. In an interim decision (No. 007) rendered on February 23, 1996, the Tribunal granted limited intervenor status to SODRAC, SOCAN, SACD and the CMRRA pursuant to subsection 19(3) of the *Act*, permitting them to make representations to the Tribunal regarding the appropriateness of the sector for bargaining and the representativity of the applicant.

[6] The Canadian Music Publishers Association (CMPA) also applied to intervene in the application. In interim decision No. 007, the Tribunal held that, contingent upon filing its membership list, the CMPA would have limited intervenor status to make representations regarding the appropriateness of the sector for bargaining. The CMPA filed its membership list, on a confidential basis, on March 5, 1996.

[7] In the weeks preceding the hearing of the application, the Tribunal was informed that the applicant had signed agreements with the SACD, SOCAN and SODRAC.

[8] At the commencement of the hearing on April 11, 1996, the CMPA and the CMRRA jointly made an oral motion to the Tribunal seeking leave to make constitutional arguments to the effect that the *Status of the Artist Act* was *ultra vires* the Parliament of Canada and/or infringed section 2 of the *Canadian Charter of Rights and Freedoms* [Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11]. The Tribunal dismissed the motion on the ground that no notice had been given to the Attorney General of Canada or the attorneys general of the provinces, as required by section 57 of the *Federal Court Act* (R.S.C. 1985, c. F-7). Since the question of the constitutional validity of the *Status of the Artist Act* was not one that was properly before it, the Tribunal could not allow the motion.

[9] The Tribunal also noted that the CMPA and the CMRRA were participating in this matter as intervenors pursuant to subsection 19(3) of the *Act*. Under this provision, the Tribunal may give any "interested" person permission to intervene. Intervenor status is granted if the Tribunal feels that the intervenor's participation would assist it in resolving the issues before it. Procedural order No. 0011-1, issued on February 23, 1996, set out the issues with respect to which the CMPA and the CMRRA could make submissions (see paragraphs 5 and 6 above). The intervenors were not granted intervenor status in order to allow them to raise issues that the applicant had not itself raised. In this regard, the Tribunal relied on the decision of the Supreme Court of Canada in *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 446.

[10] Also at the commencement of the hearing, the applicant filed a new description of the proposed sector, which read as follows:

[TRANSLATION]

Lyricists, composers and lyricist-composers:

- of a song in the French language commissioned by a producer subject to the *Status of the Artist Act*;
- of music without words commissioned by a French broadcaster;
- of music without words commissioned from an artist domiciled or residing in Quebec by a producer subject to the *Status of the Artist Act*.

The applicant stated that the amendment was being made in order to clarify its application as a result of the concerns raised by the Songwriters Association of Canada, the CMPA and the CMRRA.

[11] The CMPA and the CMRRA alleged that the wording of the sector proposed by the applicant had become a "moving target". They asked the Tribunal to adjourn the hearing for a period of three or four weeks so that they could consider the "scope" of the sector. In refusing to accede to this request, the Tribunal noted that the CMPA and the CMRRA had had an opportunity to ascertain the scope of the proposed sector since at least February 23, 1996, the date on which they were granted intervenor status. The Tribunal felt that the amendment to the wording of the proposed sector filed by the applicant merely limited and clarified the proposed sector. Although the Tribunal encourages co-operation and negotiation among parties with an interest in a proposed sector, the Tribunal is nevertheless responsible for the final determination of a sector. Having held that an adjournment would not serve any useful purpose, the Tribunal refused to postpone the hearing and accordingly decided to hear the submissions of the participants in order to assist it in reaching its decision.

[12] SPACQ's application for certification raises the following questions:

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

STATUS OF THE ARTIST ACT

[13] The provisions of the *Status of the Artist Act* regarding certification are found in sections 25 to 28:

25. (1) An artists' association may, if duly authorized by its members, apply to the Tribunal in writing for certification in respect of one or more sectors

- (a) at any time, in respect of a sector for which no artists' association is certified and no other application for certification is pending before the Tribunal;
- (b) in the three months immediately preceding the date that the certification or a renewed certification is to expire, where at least one scale agreement is in force in respect of the sector; or
- (c) after one year, or such shorter period as the Tribunal may fix on application, after the date of the certification or a renewed certification, where no scale agreement is in force in respect of the sector.

(2) An application for certification must include the membership list of the artists' association, a certified copy of its by-laws, and any other information required by the Tribunal.

(3) The Tribunal shall give public notice of any application for certification in respect of any sector without delay, indicating any period in which another application may be made by any other artists' association, notwithstanding subsection (1), for certification in respect of that sector or any part of it.

(4) No application for certification in respect of a sector may be made, except with the consent of the Tribunal, after expiration of the period indicated by the Tribunal in any public notice given pursuant to subsection (3).

26. (1) After the application period referred to in subsection 25(3) has expired, the Tribunal shall determine the sector or sectors that are suitable for bargaining, taking into account

- (a) the common interests of the artists in respect of whom the application was made;
- (b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; and
- (c) any geographic and linguistic criteria that the Tribunal considers relevant.

(2) Notwithstanding subsection 19(3), only the artists in respect of whom the application was made, artists' associations and producers may intervene as of right on the issue of determining the sector that is suitable for bargaining.

(3) The Tribunal shall give the artists' association concerned and any intervenors notice of its determination under subsection (1) without delay, and that determination is deemed to be interlocutory, notwithstanding section 21.

27. (1) After determining the sector pursuant to subsection 26(1), the Tribunal shall determine the representativity of the artists' association, as of the date of filing of the application for certification or as of any other date that the Tribunal considers appropriate.

(2) Notwithstanding subsection 19(3), only artists in respect of whom the application was made and artists' associations may intervene as of right on the issue of determining the representativity of an artists' association.

28. (1) Where the Tribunal is satisfied that an artists' association that has applied for certification in respect of a sector is the most representative of artists in that sector, the Tribunal shall certify the association.

(2) Certification is valid for a period of three years after the date that the Tribunal issues the certificate and, subject to subsection (3), is automatically renewed for additional three year periods.

(3) Where, in the three months immediately before the date that the certification or renewed certification of an artists' association is to expire, an application for certification in respect of the same or substantially the same sector, or an application for revocation of certification, is filed, the period of validity of the association's certification is extended until the date that the application is accepted or rejected and, where it is rejected, renewal of the association's certification takes effect from that date.

(4) The Tribunal shall keep a register of all certificates that it issues and of their dates of issue.

(5) After certification of an artists' association in respect of a sector,

- (a) the association has exclusive authority to bargain on behalf of artists in the sector;
- (b) the certification of any association that previously represented artists in the sector is revoked in so far as it relates to them; and
- (c) the association is substituted as a party to any scale agreement that affects artists in the sector, to the extent that it relates to them, in place of the association named in the scale agreement or its successor.

THE ISSUES

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

[14] The new wording of the sector proposed by the applicant applies to lyricists, composers and lyricist-composers:

- of a song in the French language commissioned by a producer subject to the *Status of the Artist Act*;
- of music without words commissioned by a French broadcaster;
- of music without words commissioned from an artist domiciled or residing in Quebec by a producer subject to the *Status of the Artist Act*.

[15] The applicant asked the Tribunal to take notice of two agreements. The first was concluded with SACD and the second with SOCAN. Both agreements contain the following provisions regarding the applicant's application:

[TRANSLATION]

1. . . . the certification it is requesting under the *Status of the Artist Act* ("the SAA"):
 - 1.1 applies only to the provision of services by a lyricist, composer or lyricist-composer included in the sector to a producer subject to the SAA, and
 - 1.2 does not include the right to bargain or conclude any assignment, licence or other authorization relating to copyright in works created by the lyricists, composers and lyricist-composers included in this sector for a producer subject to the SAA or the payments or other conditions relating to such assignments, licences or other authorizations.
2. This agreement does not interfere with and presents no obstacle to bargaining by SPACQ for deferred fees or residuals relating to the provision of services covered by the bargaining sector as long as payment of these deferred fees or residuals does not constitute consideration for the grant of an assignment, licence or other authorization covered by paragraph 1.2.

[16] Similarly, the applicant asked the Tribunal to take note of the agreement between it and SODRAC, which states that SPACQ's application for certification "does not relate to the collective administration of copyright in which SODRAC is involved".

[17] When determining whether a sector is suitable for bargaining, subsection 26(1) of the *Act* directs the Tribunal to consider the common interests of the artists in respect of whom the application was made, the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists, and any linguistic and geographic criteria it considers relevant.

Common interests of the artists and linguistic and geographic criteria

[18] The applicant noted the common interest of lyricist-composers of French-language songs when the same person writes the lyrics and the music, but also when two persons, lyric writer and composer, work closely together to produce a work in which the parts cannot be separated.

[19] According to the applicant, its primary goal is to defend creators and promote Quebec songwriters. However, it informed the Tribunal of its intention to amend its by-laws so that lyricists, composers and lyricist-composers of French-language songs residing anywhere in Canada could become members of SPACQ.

[20] The applicant also noted two facts: the vast majority of Francophone creators of musical works live in Quebec and the vast majority of creators of musical works living in Quebec are Francophones. Accordingly, the applicant

was of the opinion that among these artists there should not be any sub-groups whose interests in terms of professional relations would not be represented. SPACQ also maintained that it was necessary to establish a viable, functioning bargaining unit given the structure of producers within federal jurisdiction.

[21] In support of the portion of its application relating to music without words, the applicant indicated that it had obtained recognition from the Commission de reconnaissance des associations d'artistes of Quebec to represent [TRANSLATION] "lyricists, composers and lyricist-composers of musical works commissioned by one or more producers in all areas of artistic production in Quebec".

[22] The Tribunal heard arguments from the CMRRA and the CMPA regarding the common interests of artists and the relevant linguistic and geographic criteria. The CMPA was founded in 1949 and represents most music publishers carrying on business in Canada. The CMPA's main activities centre on copyright reform, matters involving the Canadian Radio-Television and Telecommunications Commission (CRTC) and the interaction between Canada's cultural industries and new and developing technologies. The CMPA intervened on behalf of composers, arrangers, lyricists, writers and authors of words and music in songs or musical works.

[23] The CMRRA, a subsidiary of the CMPA, was founded in 1975 and carries on business on behalf of more than 30,000 music publishers and copyright owners. It issues licences to users for the reproduction of music, including 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 in Canada, including Quebec, with respect to key aspects of copyright in their works.

[24] In their initial written submissions, these two intervenors objected to the sector proposed by the applicant because, in their opinion, composers of French-language songs domiciled or residing in Quebec would be forced to belong to SPACQ and to be represented by it with respect to the exploitation of copyright in their compositions, including reproduction rights.

[25] Moreover, in the opinion of the CMRRA and the CMPA, the sector proposed by the applicant would affect composers regardless of their residence or domicile if their music is "intended" or "destined" for broadcast on French media. They maintain that such a situation is unacceptable to thousands of composers in Canada and elsewhere. They argued that there is no basis or need for any artists' association to have exclusive jurisdiction in respect of composers in Canada or Quebec.

[26] At the hearing, the intervenors pointed out that they had no objection to the applicant's bargaining for the benefit of its members, but they reiterated their opposition to the proposed sector because of the consequences this certification would have. They alleged that the consequences of certifying the applicant would be to oblige composers and copyright owners who are not members of SPACQ to join the organization, pay dues to it and sign contracts of engagement with producers containing conditions SPACQ had negotiated, and that it would force them to deal with a copyright collective licensing body with which they had no dealings or with which they did not wish to associate and to which they did not wish to pay royalties. In their submissions, the CMRRA and the CMPA also pointed out the problems that could occur in cases where an Anglophone composer living outside Quebec associated with a composer from Quebec in a co-production.

[27] In order to assist the Tribunal in determining a suitable sector, the CMRRA and the CMPA filed a new description for the proposed sector which reads as follows:

Composers and lyricists domiciled in Quebec of songs (which, for greater certainty, does not include operas, oratorios, musicals or other examples of works to which "grand rights" may apply or any instrumental music without words) predominately in the French language for the sole purpose of negotiating fees for the commissioning of said songs at the behest of French producers who are directly subject to the *Status of the Artist Act* and not for any purposes related to any rights as set forth in the *Copyright Act*, R.S.C. 1985, c. 42 as amended.

[28] In reply to the intervenors, the applicant stated that the vast majority of Francophone lyricists and composers live in Quebec and that there is a community of interest among them in Quebec, as well as with Francophones who live elsewhere in Canada. The applicant also asserted that this community of interest exists for the creation of songs in French or for musical works without words commissioned by French broadcasters.

[29] The applicant also noted that the modification to the proposed sector that it had filed at the hearing clearly shows that the sector relates to commissioned works and not to works intended to be broadcast in French. It stated that the likelihood that French broadcasters in Canada would commission works from anyone other than Francophones is very limited.

[30] With respect to the other issues raised by the intervenors, the applicant noted that section 8 of the *Status of the Artist Act* provides that an artist is free to join an artists' association and that the Canadian and Quebec Charters also provide for freedom of association. Concerning the dues that an artist might have to pay to a certified association, the applicant submitted that this is a normal incident of collective bargaining, since the association represents all artists in the sector, whether or not they are members. It noted that the conditions to be

negotiated between a certified artists' association and a producer subject to the *Act* are minimum terms and do not in any way limit the possibility that a lyricist or a composer could negotiate a higher rate, or that the creator of the work would retain his or her own copyright, which could be assigned to the collective licensing body of his or her choice. As an example, the applicant indicated that the contract it is currently negotiating with the Association des producteurs de films et de télévision du Québec does not contain any provision to the effect that the artist must assign copyright to a specific collective licensing body. Lastly, the applicant pointed out that section 55 of the *Act* sets out the procedure to be followed when dealing with co-productions.

[31] Although an artist in a given sector is bound by a scale agreement negotiated by a certified association, the *Act* provides that any artist may benefit from an individual contract that is more favourable. Subsection 33(4) provides that:

A scale agreement applies notwithstanding any inconsistency with a contract between an artist and a producer, *but it shall not be applied so as to deprive an artist of a right or benefit unless the contract is more favourable to the artist than is provided for under the agreement.* [Our emphasis]

[32] Since the intervenors did not adduce any evidence to the contrary, the Tribunal accepts the applicant's evidence that any certification granted to it would not have the effect of forcing an artist to assign his or her copyright to either SPACQ or SODRAC.

[33] Having considered all the relevant oral and written submissions, the Tribunal concludes that there is a community of interest among lyricists, composers and lyricist-composers domiciled or residing in Quebec.

[34] Moreover, the Tribunal finds that there is also a community of interest for lyricists, composers and lyricist-composers of French-language songs throughout Canada.

[35] However, with respect to commissions for music without words, the sector definition proposed by the applicant would have the effect of including all composers of music without words, regardless of where they live, when they compose music without words for a French broadcaster. Having considered the submissions of the applicant and the intervenors on this issue, the Tribunal finds that this would give an overly broad scope to the sector. The Tribunal therefore finds that it is appropriate to limit the scope of the sector to those artists domiciled or residing in Quebec who compose works commissioned by a French broadcaster in Canada.

[36] A second effect of the sector proposed by the applicant would be to include artists domiciled or residing in Quebec who compose music without

words commissioned by any producer in Canada subject to the *Status of the Artist Act*. In the Tribunal's opinion, such a sector would be a difficult one to manage. The Tribunal therefore finds that it is appropriate to limit the scope of the sector to artists domiciled or residing in Quebec who compose music without words commissioned by any producer subject to the *Status of the Artist Act* located within the geographic boundaries of the province of Quebec.

History of professional relations

[37] SPACQ was established in 1981 to defend the interests of creators and promote Quebec songwriters before legislators, governments and the users of their works. The applicant is not a copyright collective licensing body but is particularly active in the area of copyright by virtue of numerous interventions it has made to the federal government and the Copyright Board. It intervenes before the CRTC to defend Canadian and Francophone content, and collaborates with many organizations involved in the field of song, music and copyright.

[38] The applicant's activities relative to professional relations are more recent and are the result of the recognition it received from the Quebec Commission de reconnaissance des associations d'artistes. In this capacity, it is currently negotiating with the Association des producteurs de films et télévision du Québec in order to establish a collective agreement applicable to the creation of sound tracks for films intended for cinemas and videoclubs.

Conclusion regarding the sector

[39] After considering all the oral and written submissions of the applicant and the intervenors, the Tribunal finds that the sector that is suitable for bargaining is one that includes lyricists, composers and lyricist-composers:

- (a) of songs in the French language commissioned by a producer to whom the *Status of the Artist Act* applies;
- (b) of music without words commissioned by a French broadcaster anywhere in Canada to whom the *Status of the Artist Act* applies, when the composer is a resident of Quebec;
- (c) of music without words commissioned by any producer in Quebec to whom the *Status of the Artist Act* applies, when the composer is a resident of Quebec.

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

[40] The applicant stated that its membership numbers about one hundred persons. On the basis of Statistics Canada data from 1991, it reported that there are 235 persons in Quebec in a category of artists that includes, among others, the titles of professions covered by SPACQ. However, these statistics do not provide a break-down by language of creation. Since no artist and no other artists'

association intervened to dispute the representativity of SPACQ at the time of its 1991 application for recognition by the Quebec commission or in its current application to the Tribunal, the applicant submitted that it is completely representative of lyricists, composers and lyricist-composers in Quebec for the proposed sector.

[41] As far as lyricists, composers and lyricist-composers of songs in the French language residing outside Quebec are concerned, the applicant stated that it has represented these interests in its many interventions to the government of Canada, the Copyright Board, the CRTC and other organizations. It pointed out that no artists' association outside Quebec intervened, as was the case in other applications for certification heard by the Tribunal. The applicant believes that these lyricists and composers are not represented. In order to develop its Canada-wide role and enable lyricist-composers outside Quebec to join, the applicant stated that it would make changes to its by-laws.

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

DECISION

[43] 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 that includes lyricists, composers and lyricist-composers:

- (a) of songs in the French language commissioned by a producer to whom the *Status of the Artist Act* applies;
- (b) of music without words commissioned by a French broadcaster anywhere in Canada to whom the *Status of the Artist Act* applies, when the composer is a resident of Quebec;
- (c) of music without words commissioned by any producer in Quebec to whom the *Status of the Artist Act* applies, when the composer is a resident of Quebec.

Declares that the Société professionnelle des auteurs et des compositeurs du Québec is most representative of artists in the sector.

An order shall issue to confirm the certification of the Société professionnelle des auteurs et des compositeurs du Québec for this sector.

Ottawa, May 17, 1996

“André Fortier”
Acting Chairperson

“J.A. Lavoie”
Member

“David P. Silcox”
Member