

Canadian Artists and Producers  
Professional Relations Tribunal



Tribunal canadien des relations  
professionnelles artistes-producteurs

CANADA

Ottawa, June 4, 1996

File No. 95-0013-A

### Decision No. 014

#### IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY THE PERIODICAL WRITERS ASSOCIATION OF CANADA

#### Decision of the Canadian Artists and Producers Professional Relations Tribunal

The application for certification is granted in modified form.

*Place of hearing:* Toronto, Ontario  
*Date of hearing:* April 24 and 25, 1996

*Quorum:* Mr. David P. Silcox, Presiding Member  
Mr. André Fortier, Chairperson  
Ms. Meeka Walsh, Member

*Appearances:* Periodical Writers Association of Canada: David Schulze,  
Counsel; Sarah Yates, Past President; John Mason, President; and  
Michael O'Reilly for the applicant.  
Marian Hebb for the Canadian Copyright Licencing Agency  
(CANCOPY).  
John Foy and Stuart Robertson for the Canadian Daily Newspaper  
Association.

REASONS FOR DECISION

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

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STATEMENT OF FACTS

[1] This decision concerns 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 Periodical Writers Association of Canada (hereinafter "PWAC"), on November 9, 1995. The application was heard at Toronto on April 24 and 25, 1996.

[2] PWAC originally applied for certification to represent, throughout Canada, 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.

[3] 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. It also appeared in the December 1995 issue of the Canadian Conference of the Arts bulletin "INFO-FAX". The public notice set a closing date of January 26, 1996 for the filing of notices of intervention by artists, artists' associations and producers.

[4] As provided by subsections 26(2) and 27(2) of the *Act*, other artists' associations have the right to intervene in any application for certification. Accordingly, the Union des écrivaines et écrivains québécois (UNEQ) notified the Tribunal of its interest in the application, asking to be kept informed of any amendment to the sector proposed in the application.

[5] Requests for intervenor status pursuant to subsection 19(3) of the *Act* were received from the Canadian Daily Newspaper Association (CDNA) and the Canadian Copyright Licensing Agency (CANCOPY). In an interim decision dated March 14, 1996 (#009), the Tribunal granted these two organizations limited intervenor status.

[6] Shortly before the hearing for this application, the Tribunal was informed that a memorandum of understanding had been signed by PWAC and CANCOPY. This agreement distinguishes between the functions performed by CANCOPY and PWAC respectively. CANCOPY authorizes users of copyright materials to “copy” published literary and other works. CANCOPY confirmed that its author and publisher affiliates retain all publication rights in and to their copyright works, including republication rights, and that CANCOPY does not license “producers” as defined in section 5 of the *Status of the Artist Act*. The parties are of the view that there is no conflict between CANCOPY’s responsibilities and those which PWAC would have if certified as requested, and the Tribunal agrees with this analysis.

[7] In the course of the hearing, PWAC provided a “clarification” of its sector definition, which reads as follows:

The Periodical Writers Association of Canada is applying to represent professional writers who write in languages other than French and who contribute as independent contractors to magazines and newspapers. The Periodical Writers Association of Canada seeks to bargain on their behalf with all producers who are within the Tribunal's jurisdiction over broadcasting undertakings. These producers include, for example: the electronic editions of newspapers and magazines made available, either on the Internet or through some other electronic Bulletin Board Service (BBS), such as the home page operated by the *London Free Press* which offers a full text version of articles published by that newspaper in print; and commercial on-line databases which make works available electronically across inter-provincial boundaries, the rights to which were previously acquired for publication in print by newspapers and magazines, such as InfoGlobe and InfoMart (which provides material from Southam newspapers; and broadcast carriers which act as distributors for the first or second category of producers, to the extent that the broadcast carriers incur liability for copyright violation when they make the artists' works available electronically.

[8] PWAC’s application for certification raises the following issues:

- (1) Is the sector proposed by PWAC a sector that is suitable for bargaining, and in particular, what producers are within the Tribunal’s constitutional jurisdiction over “broadcasting undertakings” as defined in the *Status of the Artist Act*?
- (2) Is PWAC representative of artists in the sector?

## THE ISSUES

### **Issue 1: Is the sector proposed by PWAC a sector that is suitable for bargaining?**

[9] The sector proposed by PWAC is a nation-wide 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.

[10] At the hearing, the applicant elaborated on a primary concern that had caused it to apply for certification under the *Status of the Artist Act*. As a result of new technologies, works written by PWAC members for publishers of print media (i.e. newspapers and periodicals) are now being made available to the public in electronic media such as commercial on-line databases on the Internet or Bulletin Board Services (“BBS”). PWAC and its members had understood that the sale of their works to a publisher for one time use in a print publication would be honoured even in the absence of a written contract. PWAC members have not received additional compensation for their works when they have been distributed beyond the terms of the original understanding. In essence, PWAC is seeking a mechanism through which this alleged infringement of copyright can be prevented or through which appropriate compensation can be negotiated for its members when their works are used in this manner.

[11] The Tribunal also heard testimony from freelance writers that a number of large corporate publishers are now asking freelance writers to sign contracts that waive all their rights, including moral rights in some cases, and that some writers have been told that either the contracts would have to be signed before any further commissions could be expected.

[12] Undoubtedly the impact of technological convergence is changing the relationship between writers and publishers, especially with respect to electronic distribution of material originally commissioned for a different medium. Some of the issues raised by this changing relationship include matters of copyright, fair dealing, and competition. The Tribunal’s ability to address these issues is restricted by its constitutional jurisdiction.

Constitutional jurisdiction of the Tribunal

[13] The Tribunal is sympathetic to many of the concerns raised by the applicant, but can respond only within the limits of the jurisdiction defined in the *Status of the Artist Act*. A certification issued by the Tribunal to an artists' association entitles that association to enter into negotiations with organizations who qualify as "producers" within the meaning of the *Act*. These producers are defined in clause 6(2)(a) of the *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 is of the opinion that the applicant's proposed sector, insofar as it purports to apply to all publishers and electronic information-distributors who are Canadian entities or who have their principal place of business in Canada or who establish an office in Canada, exceeds the jurisdiction of the Tribunal and therefore cannot be approved. The sector definition has to be limited to producers within the jurisdiction of the *Status of the Artist Act*.

[15] The Canadian Daily Newspaper Association (hereinafter the "CDNA"), an association representing more than eighty daily newspapers in Canada, intervened in this application for certification in order to argue that the activities of its members do not fall within the Tribunal's jurisdiction. It appears to be common ground that newspapers, as newspapers, are within the constitutional authority of the provinces and therefore beyond the jurisdiction of the *Status of the Artist Act*. The applicant made it clear that it was not trying to persuade the Tribunal that it has jurisdiction over the relationships between freelance writers and newspapers. Their concern is over new activities by periodical and magazine publishers that make use of new technologies. The use of these new technologies, the applicant contends, brings these publishers into the federal jurisdiction, notably that of the Canadian Radio-Television and Telecommunications Commission (hereinafter the "CRTC"), and therefore within the Tribunal's jurisdiction. The CDNA contested this argument.

[16] The CDNA also attempted to argue that freelance periodical writers do not meet the criteria set out in ss. 18(b) of the *Status of the Artist Act* and therefore cannot be considered to be "professional" independent contractors within the meaning of the *Act*. In the CDNA's submission, the work of freelance authors who contribute to daily newspapers is not displayed or presented to an audience; the freelancer is paid whether or not the work is used by the newspaper; and the

value of the work is in the information conveyed and not in the form of expression used, since the work is often substantially edited before publication. The Tribunal does not accept the CDNA's argument on this point. In the Tribunal's view, periodical writers are authors of literary works within the meaning of the *Copyright Act*, and the purchase of their works by a publisher or producer with the intent that it be disseminated to the public in some fashion is sufficient to bring the author within the scope of ss. 18(b) of the *Act*.

[17] The urgency in the PWAC application for certification has, in large measure, been dictated by pressure created by the convergence of technologies. The Tribunal was informed that a large proportion of the works created by PWAC members is commissioned by publishers such as Southam Inc., Maclean-Hunter, the Financial Post, Canadian Business, Télémedia and the Globe and Mail. In their capacity as publishers of print media, it is clear that none of these organizations is a producer within the meaning of the *Act*. However, a number of these organizations are making the products of freelance writers available to corporate affiliates and thence to the public via the Internet or through other electronic distribution systems. As well, many are involved in or related to organizations involved in applications currently pending before the CRTC for broadcast licences to offer specialty television services.

[18] The clarification of the sector definition offered by the applicant invited the Tribunal to adopt an expansive definition of the term "broadcasting undertaking" so as to include Internet and "BBS" services, and commercial on-line databases. The applicant argued that the federal jurisdiction over broadcasting and telecommunications, which includes such services as the Internet, meant that as long as these areas were under the generic jurisdiction of the CRTC they would fall automatically under the Tribunal's jurisdiction, whether the CRTC's jurisdiction derived from the *Broadcasting Act* (S.C. 1991, c.11) or the *Telecommunications Act* (S.C. 1993, c.38), and regardless of any more precise definitions that might be used in various aspects of broadcasting or telecommunications. The applicant also argued that the *Canada Labour Code* (S.C. 1985, c.L-2, as am.) applied in the areas of broadcasting and telecommunications, and that this gave further weight to its position that the Tribunal could assume jurisdiction over the matters before it in this application.

[19] The Tribunal is unable to accept the applicant's submission that any organization which may be subject to the CRTC's jurisdiction in either broadcasting or telecommunications is also within the Tribunal's jurisdiction. Subclause 6(2)(a)(ii) makes it clear that the Tribunal's jurisdiction mirrors only the broadcasting portion of the CRTC's jurisdiction and does not include those aspects of the CRTC's jurisdiction which flow from its responsibility for telecommunications. Accordingly, for a producer to come within the Tribunal's jurisdiction, it must be either a government institution or a broadcasting undertaking.

[20] To determine whether a producer is within the Tribunal's jurisdiction over broadcasting undertakings, it is necessary to examine the CRTC's jurisdiction over broadcasting. Since 1991, the *Broadcasting Act* has defined broadcasting as:

... any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place. [(ss. 2(1)).

[21] The key elements of this definition mean that, to be a broadcasting undertaking, the entity must transmit programs via radio waves or other means of telecommunication for receipt by the public by means of a broadcasting receiving apparatus. It appears that the main impediment to the applicant's argument in favour of the Tribunal's jurisdiction over Internet, BBS and commercial on-line database services is whether they can be said to engage in this activity.

[22] The applicant provided the Tribunal with an "on-line" demonstration of the availability of material created by periodical writers on the Internet. A connection to the Southam home page was made using a personal computer with a modem via an ordinary telephone line. This would appear to meet the requirement for transmission by telecommunication for reception by the public. If making this information available indeed constitutes broadcasting, then the personal computer could be characterized as a broadcasting receiving apparatus.

[23] The crucial portion of the definition of broadcasting in this case is whether the information made available on the site is a "program". In the *Broadcasting Act*, the term "program" is defined in such a way as to expressly exclude visual images that consist predominantly of alphanumeric text:

... program means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text. [(ss. 2(1)).

[24] The specific reason for the exclusion of alphanumeric text from the definition of "program", the CDNA informed the Tribunal, was to avoid the regulation of news services, following the tradition in establishing the Canadian Press wire service as an independent service with its own parliamentary act.

[25] The CDNA argued that the CRTC had itself explicitly excluded alphanumeric texts from its definition of a program, and had explored the issue of non-programming services in its Telecom Decision 96-1, ironically in response to an application filed by the CDNA, which was seeking access on cable for non-programming services on a non-discriminatory basis. In other words, the CDNA sought to have the CRTC decide when a broadcasting undertaking became a

telecommunications carrier which must provide equal access. The issue not addressed by the CRTC in Telecom Decision 96-1, which would have had relevance for the issues before this Tribunal, was at what point telecommunications carriers become broadcasting undertakings.

[26] Although certain graphic images were incorporated in the Internet sites which the Tribunal was shown by the applicant, it was apparent that the information was conveyed primarily in text form. To the best of our knowledge, the CRTC has not yet determined that Internet sites of this nature constitute “broadcasting” within the meaning of the *Broadcasting Act*. It is a question, therefore, whether in its earlier decisions the CRTC has considered only the narrow sense of alphanumeric text as being essentially a news or information service, and whether it may someday have a different view in light of the more extensive “non-news” services being increasingly fed into, offered and transmitted and/or sold from electronic databases or other electronic services, and whether such services should be included or excluded from the definition of “program”.

[27] The applicant’s arguments with respect to the constitutional jurisdiction of the Tribunal were certainly attractive, but did not stand up to careful scrutiny. The intent of the *Act*, in the Tribunal’s opinion, is to limit the Tribunal’s jurisdiction to broadcasting undertakings as they are defined by the CRTC. The Tribunal therefore finds that it does not have the jurisdiction to determine that a service constitutes broadcasting if the CRTC has not already made this determination.

[28] Given that the sector definition as proposed by PWAC does not fit within the limits of the Tribunal’s jurisdiction, what would be an appropriate definition? The sector could certainly include freelance periodical writers who create a work in a language other than French for a magazine, newspaper or other periodical published by a government institution or a broadcasting undertaking; this encompasses PWAC’s traditional jurisdiction over writers in the print medium, but limits it to producers within the Tribunal’s jurisdiction.

[29] The Tribunal’s jurisdiction would also extend to these writers when a government institution or a broadcasting undertaking distributes one of their works in another medium. This would include government institutions that put a freelancer’s article on the Internet as well as broadcasting undertakings who use the article in a broadcast, on their Internet site or in a commercial on-line database.

*The community of interest*

[30] Subsection 26(1) of the *Act* requires that, when considering an application for certification, the Tribunal take into account 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 geographic and linguistic criteria the Tribunal considers relevant.

[31] The Tribunal took note of the twenty-year history of PWAC and was impressed by the services provided to its members, for example in the matter of proposing sample contracts, which have been in use for more than ten years.

[32] The representations that PWAC has made to governments on matters relating to the concerns of members has also shown their ability to act on their members' behalf and provide evidence of a community of interest. Such matters as copyright, the electronic highway, professional training and seeking policy clarification in matters relating to technological convergence that affects the use made of its members' works are all further evidence of the fact that PWAC works for a cohesive community.

[33] PWAC has established sixteen chapters of their organization across Canada. Although the membership is not numerous, this infrastructure of members is a further indication that a community of interest exists.

[34] In light of these facts, the Tribunal is of the opinion that freelance authors of articles for magazines, newspapers and other periodicals clearly have a community of interest.

#### *History of professional relations*

[35] The existence of PWAC for the past twenty years has helped to create professional relationships which, while currently strained over some issues raised by technological convergence, have been accepted and have grown in discussions on the matter of convergence, copyright, contractual matters, and other terms and conditions of freelance writers' work. No scale agreements have been adopted as yet, but minimum rates have been established by PWAC and observed by publishers.

[36] The recent proliferation of elaborate contracts prepared by newspapers, magazines and periodicals where informal agreements were previously sufficient is causing some change in the professional relationship. Nevertheless, the growth of the sector in recent years perhaps argues more eloquently that anything else for the need for certification and the right to bargain more effectively for the rights of the artists in this sector.

[37] The issue of unauthorized use of material provided to publishers by the applicant's members is not a matter that can be resolved solely through certification by this Tribunal. The useful and productive relationship between

writers and publishers is being changed by electronic systems of information distribution, with anxiety and economic consequences on both sides. With respect to this aspect of professional relations, the applicant has recourse to protections offered under copyright, competition and contract law, and through representations on appropriate issues to such tribunals as the CRTC.

[38] The Tribunal is satisfied that there has been a history of professional relations between freelance periodical writers, the applicant and the producers who engage their services.

#### Linguistic considerations

[39] The Tribunal has already granted certification to the Union des écrivaines et écrivains québécois (UNEQ), a national sector composed of authors of original French language literary and dramatic works intended for publication. The application by PWAC was noted by this organization, which elected not to intervene unless the sector definition was modified in a manner that affected its interests.

[40] Nearly all of the freelance writers that PWAC represents write in English. The number of writers in languages other than English (and other than French) is very small, but PWAC was prepared to offer them whatever services it offered to its English-language members. The Tribunal therefore considers it appropriate to include in the proposed sector all freelance periodical writers who write in languages other than French.

#### Conclusion regarding the sector

[41] After considering all of the oral and written representations of the applicant and the intervenor, the Tribunal has determined that the sector that is suitable for bargaining has to be circumscribed by the limits of the *Status of the Artist Act* and by the definitions that are currently applied to such terms as “broadcasting undertaking”. In the Tribunal’s view, the sector definition proposed by the applicant exceeds the jurisdiction of the Tribunal as set out in clause 6(2)(a) of the *Act*, and therefore cannot be granted. Similarly, the examples of broadcasting undertakings proposed by the applicant in its clarification of its proposed definition lead to difficulties of definition and into modes of distribution that are either beyond the jurisdiction of this Tribunal or are more properly considered under other legislation.

[42] However, the Tribunal is of the view that there exists within the federal jurisdiction an important sector of freelance periodical writers, and that to the degree permitted by the *Status of the Artist Act*, this sector should be certified. Although many of the concerns raised by the applicant will not be addressed due to the limitations on the sector which the Tribunal is capable of granting, the

Tribunal hopes at least to offer some encouragement to their efforts to represent the interests of freelance periodical writers.

[43] The Tribunal therefore finds that the sector that is suitable for bargaining is a sector composed of:

- a) professional freelance writers who are authors of works in a language other than French commissioned by a producer to whom the *Status of the Artist Act* applies for use in a magazine, newspaper or other periodical; and
- b) professional freelance writers who are authors of works in a language other than French originally published in a magazine, newspaper or periodical with respect to the subsequent distribution of the work in another medium by a producer to whom the *Status of the Artist Act* applies.

[44] As the sector which the Tribunal has found to be suitable for collective bargaining is significantly smaller than that for which the applicant sought certification, it was in fact subsumed in the original application. The Tribunal is therefore of the view that it is not necessary to publish another public notice of the revised sector description, and that it has the authority to proceed to consider the representativeness of the applicant with respect to the smaller sector.

## **Issue 2: Is PWAC representative of artists in the sector?**

[45] The applicant's own estimate of the number of artists engaged in this sector is 2500, of which PWAC represents about 400. Although this is not a large percentage of the total, no other organization exists for writers in languages other than French. The applicant informed the Tribunal that it often provided services to non-members.

[46] The Tribunal is also persuaded by the representations of the applicant, and by its own knowledge of the area, that freelance writers are often independent of any organizations and that the generally low level of income might affect the rate at which eligible members might join. The history of PWAC over twenty years was also taken into account in determining that the applicant is indeed representative of the artists in the sector.

DECISION

[47] 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:

- a) professional freelance writers who are authors of works in a language other than French commissioned by a producer to whom the *Status of the Artist Act* applies for use in a magazine, newspaper or other periodical; and
- b) professional freelance writers who are authors of works in a language other than French originally published in a magazine, newspaper or periodical with respect to the subsequent distribution of the work in another medium by a producer to whom the *Status of the Artist Act* applies.

**Declares** that the Periodical Writers Association of Canada is the organization most representative of artists in the sector.

An order will issue to confirm the certification of the Periodical Writers Association of Canada to represent the said sector.

Ottawa, June 4, 1996

David P. Silcox, Presiding member

André Fortier, A/Chairperson

Meeka Walsh, Member