

Canadian Artists and Producers  
Professional Relations Tribunal



Tribunal canadien des relations  
professionnelles artistes-producteurs

CANADA

Ottawa, January 16, 1997

File No. 95-0008-A

### Decision No. 019

#### IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND 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:* October 22 - 24, 1996

*Quorum:* David P. Silcox, Presiding Member  
André Fortier, A/Chairperson  
Armand Lavoie, Member

*Appearances:* Cavalluzzo Hayes Shilton McIntyre & Cornish, Michael D. Wright; Ray Petch, Vice President from Canada; and Len Lytwyn, Administrative Assistant for the American Federation of Musicians of the United States and Canada.  
Malo, Dansereau Avocats, Carmelle Marchessault et Luc Martineau; Gisèle Fréchette and Éric Lefebvre for the Guilde des musiciens du Québec  
Stephen A. Waddell for the ACTRA Performers Guild  
Robert Thistle for the Canadian Broadcasting Corporation  
Sylvie Forest for the National Film Board of Canada  
Perley-Robertson, Panet, Hill & McDougall, Lenore Crabb for the Recording Musicians Association of the U.S. and Canada - Toronto Chapter, the Canadian League of Composers, the Guild of Canadian Film Composers, the Canadian Musical Reproduction

Rights Agency Limited and the Canadian Music Publishers  
Association

Donna Murphy for the Songwriters Association of Canada

Marco Dufour for the Union des Artistes.

## REASONS FOR DECISION

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

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### STATEMENT OF FACTS

[1] This decision concerns an application for certification submitted to the Canadian Artists and Producers Professional Relations Tribunal pursuant to section 25 of the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter “the Act”) by the applicant, the American Federation of Musicians of the United States and Canada (hereinafter the “AFM”) on September 25, 1995. The application was heard in Toronto October 22 to 24, 1996.

[2] The AFM applied for certification to represent a sector composed of: all American Federation of Musicians’ members including instrumental musicians, conductors, vocalists, music composers, arrangers, copyists and librarians engaged by any producer subject to the *Status of the Artist Act*.

[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 14, 1995. This notice also appeared in the Canadian Conference of the Arts bulletin (INFO-FAX) of November 1995 and in the December 1995 issues of *Canadian Musician* and *Musicien Québécois*. The public notice set a closing date of December 15, 1995 for the filing of expressions of interest by artists, artists’ associations and producers.

[4] In interim Decision #008 issued March 5, 1996, the Tribunal dealt with the status of numerous applicants for intervenor status. In the time period between the date of that decision and the hearing, the AFM reached agreements with many of the intervenors which will be more fully described below.

[5] The hearing was intended to focus solely on whether the sector proposed by the AFM is suitable for bargaining. However, the agreements reached in the course of the hearing made it possible to address and conclude the Tribunal’s deliberations regarding the applicant’s representativeness as well.

[6] Particular attention was given to the following issues in determining a suitable definition for the sector:

- (a) whether conductors should be included in the sector.
- (b) whether vocalists should be included in the sector;
- (c) whether music composers should be included in the sector;

- (d) whether copyists can be included in the sector; and
- (e) whether librarians and/or music librarians can be included in the sector.

## THE ISSUES

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

[7] The AFM originally proposed a sector composed of all American Federation of Musicians' members including instrumental musicians, conductors, vocalists, music composers, arrangers, copyists and librarians engaged by any producer subject to the *Status of the Artist Act*. During the course of the hearing, the applicant amended the proposed sector definition to read "music librarians" in place of "librarians", and made other amendments to take into account the agreements that were reached before or during the hearing.

[8] When considering an application for certification, the Tribunal is required by subsection 26(1) of the *Act* to 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.

#### *History and Common interests*

[9] The AFM began its operations in Canada in Montreal in 1897 and expanded to Toronto and Vancouver in 1901. Over the years, it has grown until there are today 28 locals across the country.

[10] The purpose of the AFM was and is to maintain standards of hiring of musicians, to provide benefits to its members, and to seek suitable conditions of work for those providing live or recorded music. To this end, the AFM sets certain minimums for its locals and allows them to negotiate with local producers, but retains for itself the power to negotiate national agreements, such as those with the Canadian Broadcasting Corporation and the National Film Board. The primary purpose in negotiating national agreements is to maintain a common standard and to guard against the possibility of undercutting rates in local jurisdictions.

[11] In addition to the local organizations, which have substantial independence to negotiate terms with local producers, the AFM embraces various player conferences. These may be geographic, as in Toronto and Western Canada

or discipline-oriented, as for example symphonic players or functionally-oriented, as for recording musicians. Individuals must be members of the AFM to belong to a player conference; a conference may express its particular concerns at general meetings, but does not have a separate right to vote.

[12] The Canadian locals now are represented on the nine-member International Executive Board by a full time Vice-President from Canada, a person elected only by the Canadian delegates. The number of delegates chosen by each local to attend the biennial conventions varies depending upon the size of the local, from a minimum of one to a maximum of three.

[13] The AFM in Canada also provides services to its members in the matter of securing visas or work permits in the United States. Approximately 4000 visas are processed every year now. In addition, agreements are being worked out in the area of television films and videos that would ensure a reasonable evenness in rates on both sides of the border.

[14] Although the AFM has had formal and informal understandings with other artists' associations over the years regarding respective jurisdictions over artists, the passage of the *Status of the Artist Act* and the ensuing applications for certification filed with the Tribunal caused a number of these understandings to be updated and formalized in writing. Thus, before and during the hearing, the Tribunal was provided with written details of the jurisdictional agreements between the AFM and:

- 1) the ACTRA Performers Guild ("APG");
- 2) the Canadian Actors' Equity Association ("CAEA");
- 3) the *Guilde des musiciens du Québec* ("the *Guilde*");
- 4) the Recording Musicians Association (Toronto) ("RMA");
- 5) the *Société professionnelle des auteurs et compositeurs du Québec* ("SPACQ"); and
- 6) the *Union des Artistes* ("UDA").

[15] Prior to the hearing, the AFM also submitted to the Tribunal the details of their agreements with the following copyright collectives:

- 1) Canadian Musical Reproduction Rights Agency ("CMRRA") and its parent, the Canadian Music Publishers Association ("CMPA");
- 2) the *Société des auteurs et compositeurs dramatiques* ("SACD");
- 3) the *Société canadienne des auteurs, compositeurs et éditeurs de musique* ("SOCAN"); and
- 4) the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada inc.* ("SODRAC").

[16] These various agreements, some of which were reached in the course of the hearing, naturally changed somewhat the description of the sector for which certification was being sought and these changes are discussed below. Copies of each of the agreements are appended to these Reasons for ease of reference.

#### *Instrumental musicians*

[17] These musicians play an instrument either for a live performance or for a recording. They have traditionally been represented by the AFM, and the Tribunal finds that they constitute the core group in the sector.

#### *Conductors*

[18] Conductors are persons who lead or co-ordinate a group of musicians, and who may also select or audition individual players. The AFM has historically represented conductors. Its scale agreement with the CBC, for example, contains terms and conditions relative to these professionals. The Tribunal raised a concern regarding the managerial functions performed by conductors. This concern arose from the direction contained in subsection 18(a) of the *Act*, which requires that the Tribunal take into account the applicable principles of labour law. One of these principles is that supervisors should not be included in the same bargaining unit as those whom they supervise.

[19] The applicant has persuaded the Tribunal that the freelance conductors who are subject to the *Status of the Artist Act* do not perform managerial functions in the sense that this term is commonly understood in the labour relations milieu. For example, freelance conductors do not have responsibility for the discipline of musicians; this responsibility rests with symphony management. Accordingly, the Tribunal finds that it is appropriate to include conductors in the same sector with instrumental musicians.

#### *Vocalists*

[20] Vocalists, for the purposes of this application, are those musicians who both play an instrument and sing. The AFM informed the Tribunal that it is seeking to represent only those singers who accompany themselves on a musical instrument. It has entered into agreements with the Canadian Actors' Equity Association, ACTRA Performers Guild and Union des Artistes that describe the respective jurisdictions of these organizations in this regard. The Tribunal is of the view that musicians who may sing while playing a musical instrument have a community of interest with other instrumental musicians, and therefore, to the extent that these professionals are not already represented by an artists' association certified by the Tribunal, they should be included in the same sector as other musicians.

*Music composers*

[21] The AFM described to the Tribunal how and to what extent it came to represent music composers. Performing musicians represented by the AFM were sometimes asked or commissioned to compose music for a producer with whom the AFM had a scale agreement. These members requested the AFM to negotiate a provision in the scale agreements to allow composing fees to count for pension purposes and the AFM has succeeded in doing this. The scale agreement with the Canadian Broadcasting Corporation (“CBC”), for example, contains such a provision. The AFM indicated that it wishes to continue to represent those of its members who also compose music, for the purpose of supplementing their musicians’ pension benefit with additional income derived from composing. The AFM has not represented the interests of music composers in any other way nor does it wish to take on any greater role, it informed the Tribunal.

[22] The AFM’s proposal to include music composers in its sector was initially opposed by the Songwriters Association of Canada, the Guild of Canadian Film Composers, the Canadian League of Composers, the Canadian Music Publishers Association (CMPA), the Canadian Musical Reproduction Rights Agency (CMRRA), the Société des auteurs et compositeurs dramatiques (SACD), the Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) and the Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada Inc. (SODRAC).

[23] The Songwriters Association of Canada, made up of approximately 775 members, appeared and made oral representations to the Tribunal strongly opposing the inclusion of music composers in the sector. The SAC spokesperson claimed that its members did not ask for and did not want the pension benefits negotiated by the AFM. However, no witnesses were called to substantiate this claim and no evidence was provided upon which the Tribunal could make an assessment of the degree of support among the songwriters represented by this association for such pension benefits.

[24] The Guild of Canadian Film Composers and the Canadian League of Composers, along with the CMPA and CMRRA, withdrew their intervention after agreements were concluded between the AFM and the latter two organizations. These agreements confirmed that the AFM wished to represent only the pension interests of music composers, and not any of their other interests, including those related to copyright.

[25] In agreements with SACD, SOCAN and SODRAC, the AFM again confirmed that representation by the AFM would not interfere with or include the copyright rights of its members and would not interfere with or include the commission agreements or the minimum fees negotiated by members of the CMPA, CMRRA, SACD, SOCAN or SODRAC.

[26] The Tribunal has previously taken official notice of agreements between applicants for certification and copyright collectives (see, for example, Decisions #004 [SARDeC] and #011 [AQAD]). In the Tribunal's view, such agreements are an effort to harmonize the operation of the *Copyright Act* and the *Status of the Artist Act*. Although the artists' association is, in effect, ceding the right to represent its members with respect to one of their interests (i.e., copyright), that interest is adequately protected by the copyright collectives under other federal legislation. The Tribunal accordingly takes official notice of the agreements between the AFM and the copyright collectives to the extent that those agreements deal with matters related to copyright.

[27] The agreement between the AFM and the CMPA/CMRRA, and the expressed desire of the AFM to represent only the pension interests of music composers, gives the Tribunal some difficulty, however, because the issue here is not directly parallel to the copyright issue. Once granted, certification vests an artists' association with the exclusive right to bargain on behalf of artists in the sector. The purpose of bargaining is to conclude a scale agreement with a producer that sets out the minimum terms and conditions for the provision of artists' services and other related matters. In this case, the AFM is making it clear that if music composers are included in its sector, it has no intention of negotiating any minimum terms and conditions for their services.

[28] To date, the Tribunal has refused to limit the exclusive authority to bargain which flows from certification (see Decision #005, [UNEQ]). In its intervention, the CBC expressed the concern that certifying the AFM for a limited purpose would create the possibility that producers might have to deal with more than one organization acting on behalf of composers.

[29] The AFM made it clear to the Tribunal that should another organization come along that wishes to represent music composers in all respects, including their pension interests, it would gladly and willingly give up any representation rights granted by the Tribunal. The AFM described its practice in this matter as providing a benefit without impacting on anyone else's jurisdiction. The Tribunal takes the AFM at its word, and is prepared to devise a means by which the AFM can continue, for the time being, to represent those of its members who are music composers for the limited purposes of their pension interests.

#### *Arrangers*

[30] Arrangers, also called orchestrators, score the music required for each member of an ensemble. The AFM has negotiated scale agreements that provide for payments to instrumentalists who also arrange or orchestrate music, according to rates established by the amount of work done. Usually, this work is in addition to their performance. The Tribunal is prepared to accept the applicant's



submission that arrangers qualify as authors of artistic or musical works within the meaning of the *Copyright Act*. Since the AFM has historically represented this aspect of musical work, the Tribunal finds it appropriate to include these artists in the proposed sector.

### *Copyists*

[31] Copyists are persons with musical training who copy out the instrumental parts of a score. The work of a copyist is neither a performance nor is it a function that is subject to copyright. The Tribunal is, at present, entitled to include in a sector only those artists defined by subclauses 6(2)(b)(i) and (ii) of the *Status of the Artist Act*, and the work of copyists does not fall within either of these categories. While these individuals clearly contribute to the creation of a production, as envisioned by subclause 6(2)(b)(iii) of the *Act*, regulations under that subclause have not yet been promulgated. Consequently, the Tribunal is unable to deal with this aspect of the application now.

### *Music Librarians*

[32] The National Film Board of Canada (“NFB”) raised a concern regarding the AFM’s original sector description, which sought representation rights for “librarians”. In a letter dated 28 March 1996 to the NFB which was copied to the Tribunal, the AFM clarified that it was seeking to represent only music librarians, who are covered in many of their collective agreements.

[33] At the hearing, the AFM confirmed that its use of the term “librarian” meant “music librarians” and described the functions of the music librarian as one who keeps, catalogues, sorts, repairs and maintains the written scores for a musical group. Usually this function is performed by one of the instrumentalists as an additional task for which additional pay is given (“playing librarians”). Full-time, or non-playing, music librarians are only found with large organizations like symphony orchestras. The inclusion of music librarians in the AFM’s proposed sector is not an expansion of responsibility but a reflection of the status quo, the AFM assured the Tribunal. Regular librarians (of books) are not in the music business, and were not part of the sector being sought.

[34] The Tribunal is of the view that the functions of a music librarian are not covered by the provisions of subclauses 6(2)(b)(i) or (ii) of the *Status of the Artist Act*. Thus, unless regulations are promulgated under subclause 6(2)(b)(iii) to make it possible, the Tribunal does not have the authority to include music librarians in the sector, despite the fact that they clearly have a community of interest with musicians.

### *Geographic and linguistic criteria*

[35] The AFM is seeking certification for a national sector. This proposal was at first opposed by a group of recording musicians in Toronto and by the AFM local which represents musicians in most of Quebec.

[36] Prior to the hearing, the Recording Musicians Association (Toronto) withdrew its intervention on the basis of a formal agreement with the AFM that, among other things, provides it with the right to have a voting representative on certain AFM negotiating committees and to submit proposals in respect of negotiations regarding the Television and Radio Commercial Announcement Agreement for Canada, the CBC Television and Radio agreements and any other national electronic media agreements.

[37] During the course of the Tribunal's proceeding, the AFM and the *Guilde des musiciens du Québec* came to an agreement that will allow the *Guilde*, in its capacity as Local 406 of the AFM, to continue to represent musicians in relations with producers in the province of Quebec, other than national producers such as the CBC, the NFB and the National Arts Centre, for which the AFM will retain responsibility. The agreement recognizes the jurisdiction of AFM Local 180 (Ottawa-Hull) and makes provision for cooperation between the two locals. The parties also agreed that the *Guilde* will continue to administer, within the province of Quebec, all AFM national agreements, including those with the CBC and the NFB, and that the *Guilde* will have the right to have at least one representative at the bargaining table in any AFM negotiations affecting Quebec musicians. In the event that the *Guilde* disaffiliates from the AFM, the agreement becomes void and either party may apply to the Tribunal for a review of their respective sectors. The Tribunal pointed out to the parties that their agreement regarding the timeliness of such applications (para. 14d) is not binding on the Tribunal. The agreement between the AFM and the *Guilde* was presented to the Tribunal in both the French and English languages, and the Tribunal was informed that both languages are to have equal weight in the event that interpretation is required.

[38] The AFM expressed concern regarding the possible fragmentation of the music industry if a pan-Canadian sector was not granted. In its view, this is an industry in which a "level playing field" is crucial to support and advance the interests of musicians. The music industry is extremely fluid and mobile. Without consistent scale agreements across the country, the AFM fears that compensation for musicians could be undercut by producers and musicians in other regions. The AFM pointed to the "Industry Equatability" article in the AFM-CBC agreement as an example of how important a level playing field is to musicians and producers alike.

[39] The AFM has 28 locals throughout Canada. The locals are in every province and operate where and as opportunity permits. The size of the membership varies with the size of the community and the work opportunities.

[40] Agreements with federal producers, such as the CBC and the NFB, are available in English and French, thus respecting the bilingual character of the country and providing a further element of community of interest that allows the music to be foremost a shared language of expression. The Quebec local of the AFM operates primarily in French and agreements concluded by that local are in French and/or English depending on the nature of the agreement and the producer.

[41] Subject to the agreement between the AFM and the *Guilde des musiciens*, the Tribunal believes that a nation-wide sector for musicians is appropriate.

*Conclusions regarding the sector*

[42] After considering all of the oral and written evidence, the representations of the applicant and the intervenors, and the various agreements which were filed, the Tribunal has determined that two sectors would be suitable for bargaining: one grouping instrumental musicians, conductors, vocalists and arrangers and a separate one for music composers. The purpose of creating a separate sector for music composers is to ease consideration of any future application by an artists' association that wishes to represent all the interests of these professionals in collective bargaining with federal producers.

**Issue 2: Is the AFM representative of artists working in these sectors?**

[43] The AFM provided evidence that it has a Canadian membership of about 17,000, of whom approximately 6,000 to 7,000 would be performing under the jurisdiction of the *Status of the Artist Act* at any one time. The largest single federal engager of musicians is the Canadian Broadcasting Corporation: some 4,000 musicians performed under the terms of the 1992-1994 scale agreement between the AFM and the CBC.

[44] In relation to Canada's music performing industry as a whole, it is difficult to find accurate, detailed national statistics. The AFM estimated that it represents about 75% of all professional musicians in Canada, and 95% of those who are engaged by producers subject to the *Status of the Artist Act*. As well, when a producer with whom the AFM has a scale agreement wishes to engage a non-AFM member, provision has been made for temporary membership to be granted.

[45] The Tribunal is persuaded that the AFM has the capacity to provide service to a national sector. The applicant's nation-wide organization of locals serve members in every province, and the division between local and national responsibilities is reasonably well-defined.

[46] Given the history of the AFM's representation of performing musicians, the description of its activities, the acknowledgement of its jurisdiction by producers such as the CBC and the NFB and other artists' associations, and in the absence of any challenge to the representativeness of the AFM, the Tribunal accepts the evidence presented and finds the AFM to be the association most representative of the sector composed of instrumental musicians, conductors, vocalists and arrangers.

[47] With respect to the sector comprised of music composers, the Tribunal is persuaded that the AFM has historically represented the pension interests of musicians who are AFM members when they are engaged as music composers. While the Tribunal would prefer to see an organization come forward that is willing to represent all of the collective bargaining interests of music composers in English Canada, as the Société professionnelle des auteurs et des compositeurs du Québec has done in Quebec, it does not wish to deprive music composers of the pension benefits that the AFM is capable of negotiating for them in the interim. Accordingly, the AFM will be granted the right to continue to represent music composers for pension purposes until such time as an artists' association is certified to represent all of the collective bargaining interests of this sector.

DECISION

[48] For all these reasons, and in view of the fact that the applicant is in compliance with the requirements of subsection 23(1) of the *Status of the Artist Act*, the Tribunal:

**Certifies** the American Federation of Musicians of the United States and Canada to represent a sector composed of all members of the American Federation of Musicians of the United States and Canada who are independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of instrumental musician, conductor, vocalist or arranger, with the exception of:

- a) artists within the scope of the certification issued to the Canadian Actors' Equity Association by the Canadian Artists and Producers Professional Relations Tribunal on April 25, 1996 and subject to the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada;
- b) artists within the scope of the certification issued to the ACTRA Performers Guild by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996 and subject to the agreement between the ACTRA Performers Guild and the American Federation of Musicians of the United States and Canada dated May 14, 1996;
- c) artists within the scope of the certification issued to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996;
- d) artists when represented by Local 406 of the American Federation of Musicians of the United States and Canada, known as the *Guilde des musiciens du Québec*, under the terms of the agreement dated October 23, 1996 between the American Federation of Musicians of the United States and Canada and the *Guilde des musiciens du Québec*.

**Certifies** the American Federation of Musicians of the United States and Canada to represent, for pension purposes only, those members of the American Federation of Musicians of the United States and Canada who are independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of music composer, with the exception of music composers within the scope of the certification issued to the *Société professionnelle des auteurs et des compositeurs du Québec* by the Canadian Artists and Producers Professional Relations Tribunal on May 17, 1996.

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Orders will be issued to confirm the certification of the American Federation of Musicians of the United States and Canada to represent the said sectors.

Ottawa, January 16, 1997

David P. Silcox, Presiding Member

André Fortier, A/Chairperson

J. Armand Lavoie, Member

LIST OF ATTACHMENTS

Agreements or written understandings between the American Federation of Musicians of the United States and Canada and:

- A) ACTRA Performers Guild
- B) Canadian Actors' Equity Association
- C) Guilde des musiciens du Québec
- D) Recording Musicians Association (Toronto)
- E) Société professionnelle des auteurs et compositeurs du Québec
- F) Union des Artistes
- G) Canadian Musical Reproduction Rights Agency and the Canadian Music Publishers Association
- H) Société des auteurs et compositeurs dramatiques
- I) Société canadienne des auteurs, compositeurs et éditeurs de musique
- J) Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada Inc.