

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

REASONS FOR DECISION

95-0017-A : In the matter of an application for certification filed by La Guilde des musiciens du Québec

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”) to the Canadian Artists and Producers Professional Relations Tribunal by La Guilde des musiciens du Québec (the “Guilde”) on December 13, 1995. The application was heard in Montreal on December 10, 1996.

[2] The Guilde applied for certification to represent a sector composed of “all performing musicians, conductors, arrangers, orchestrators, copyists and music librarians practising their art in Quebec, in the fields and disciplines listed in subsection 6(2) of the *Status of the Artist Act*”.

[3] Public notice of this application was given in the *Canada Gazette* on Saturday, January 13, 1996, and in the *Globe and Mail* and *La Presse* on January 16, 1996. This notice also appeared in the January issue of *Qui-vive* and the *Blizzard* bulletin of the Canadian Conference of the Arts. The public notice set a closing date of February 23, 1996 for the filing of expressions of interest by artists’ associations, producers and other interested persons.

[4] As provided in subsections 26(2) and 27(2) of the *Act*, artists’ associations may intervene in application for certification proceedings with respect to any matter related to the determination of the sector that is suitable for bargaining or the representativeness of the applicant. In this regard, the Société professionnelle des auteurs et des compositeurs du Québec (“SPACQ”) filed a notice of intervention.

[5] Pursuant to subsection 19(3) of the *Act*, the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”), the Société des auteurs et compositeurs dramatiques (“SACD”) and the Société du droit de reproduction des auteurs, compositeurs et éditeurs inc. (“SODRAC”) applied for intervenor status.

In a letter dated March 27, 1996, the Tribunal granted these three copyright collectives limited intervenor status to make submissions regarding the suitability of the sector for bargaining and the representativeness of the applicant.

[6] La Guilde des musiciens du Québec is affiliated with the American Federation of Musicians of the United States and Canada (the “AFM”) as local 406. The AFM, which had also submitted an application for certification, opposed the Guilde’s application on the ground that the Guilde lacked the necessary authorization to submit an application for certification.

[7] Before the hearing took place, a number of agreements were concluded. The Guilde and the AFM reached an agreement establishing the respective jurisdiction of each association, and the AFM withdrew its opposition to the Guilde’s application. The agreement is attached to these Reasons for Decision (see Annex “A”).

[8] The three copyright collectives concluded agreements with the Guilde and therefore withdrew their interventions. The Guilde and SPACQ also concluded an agreement. Copies of these agreements are also attached as annexes to these Reasons for Decision.

[9] The Guilde’s application for certification raises the following issues:

- 1) Is the sector proposed by the applicant a sector that is suitable for bargaining and in particular:
 - a) should conductors be included in the sector?
 - b) can copyists be included in the sector?
 - c) can music librarians be included in the sector?
- 2) Is the applicant representative of the artists in the sector?

ISSUES RAISED

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

[10] The sector originally proposed by the applicant was a sector composed of “all performing musicians, conductors, arrangers, orchestrators, copyists and music librarians practising their art in Quebec, in the fields and disciplines listed in subsection 6(2) of the *Status of the Artist Act*”.

[11] When the hearing began, the applicant amended its application for certification by submitting a revised sector description which read as follows:

[TRANSLATION]

All performing musicians, conductors, arrangers, orchestrators, copyists and music librarians practising their art in Quebec, in all the fields and disciplines listed in subsection 6(2) of the Act respecting the status of the artist and professional relations between artists and producers in Canada, for the purposes of section 28 of the said Act, excluding:

- a) independent contractors covered by the certification granted to the Société professionnelle des auteurs et compositeurs du Québec (“SPACQ”) on May 17, 1996 and subject to the agreement concluded between the Guilde and SPACQ on November 25, 1996,
- b) producers who are specifically excluded by the agreement concluded between the American Federation of Musicians of the United States and Canada (the “AFM”) and the Guilde on October 23, 1996 and more particularly by paragraphs 6, 7, 8 and 9 of the said agreement;

Clarification:

The representation rights hereby conferred on the Guilde:

- i) do not cover the copyrights provided for in section 3 of the Copyright Act or the commissioning of musical works from an artist;
- ii) members of the Society for Reproduction Rights in Canada (“SODRAC”), the Société des auteurs et compositeurs dramatiques (“SACD”) and the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) in their capacity as an author of a work covered by the Copyright Act, as confirmed by the Guilde’s agreements with SODRAC, SACD and SOCAN, on November 25, 1996, and subject to the representation rights that may be exercised by the Guilde under the terms of the said agreements.

[12] When determining the sector that is suitable for bargaining, 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 that the Tribunal considers relevant.

History of professional relations

[13] La Guilde des musiciens du Québec, incorporated under Quebec’s *Professional Syndicates Act* (R.S.Q. c. S-40), is affiliated with the AFM as local 406. The Guilde is the product of a merger of three locals of the AFM. Within Quebec, there were three musicians’ locals affiliated with the AFM: a local in Montreal, one in Quebec City and one in the Saguenay-Lac St-Jean region. In 1897, musicians in Montreal were the first to join the AFM. A local was established in Quebec City in 1917, and in the Saguenay-Lac St-Jean area

somewhat later. In 1988, these three locals merged and formed La Guilde des musiciens du Québec to represent them.

[14] The purpose of the Guilde is to defend the economic, social, moral and professional interests of its members and of musicians in general, to negotiate collective agreements with producers in Quebec and to establish rates and working conditions applicable to any producer who is not a party to a collective agreement.

[15] As a local of the AFM, the applicant has the authority to negotiate with the so-called “local” producers. The AFM retains for itself authority to negotiate with the so-called “national” producers (e.g. the Canadian Broadcasting Corporation and the National Film Board of Canada) and to establish the minimum standards that apply to all its locals. The Guilde participates in negotiations that affect Quebec musicians nationally and currently administers, within Quebec, agreements negotiated between the AFM and the national producers. Under the jurisdictional agreement, it will continue to administer these agreements in Quebec.

[16] On November 25, 1991, the Commission de reconnaissance des associations d’artistes du Québec granted the Guilde recognition under the *Act respecting the professional status and conditions of engagement of performing, recording and film artists* (R.S.Q., c. S-32.1) to represent:

[TRANSLATION]

All artists who practise the art of instrumental music in all fields of artistic endeavour, in Quebec, including any person who sings while accompanying himself or herself on an instrument for the instrumental part of his or her performance, excluding the entire field of copyright.

[17] The Guilde estimates that the recognition granted it under the provincial status of the artist legislation covers approximately 85 percent of producers in Quebec. The Guilde is seeking, through the present application, to become the bargaining agent certified to negotiate with the remaining 15 percent of producers, primarily private broadcasters, other than those mentioned in its jurisdictional agreement with the AFM.

[18] Since 1991, the applicant has signed more than 45 collective agreements with producers in Quebec and negotiations are continuing with a number of producers and producers’ associations, primarily under provincial jurisdiction. The Guilde has also negotiated voluntary collective agreements with a number of producers under federal jurisdiction including Télé-Métropole, Télévision Quatre-Saisons, TV5, and CIBL FM.

[19] In the light of the foregoing, the Tribunal is satisfied that there is a history of professional relations between the applicant and producers in Quebec.

The common interests of the artists

Performing musicians

[20] In the proposed sector description, the applicant seeks to represent “performing musicians”. In order to avoid any confusion, it explained that these were instrumental musicians and that the proposed sector did not apply to vocalists covered by the certification granted to the Union des Artistes by the Tribunal on August 29, 1996.

[21] The Guilde stated that performing musicians have common interests as a result of the discipline they exercise and form a homogenous group who have been promoting their professional interests through common action since the beginning of the century. Moreover, the musical functions performed by a musician can only be performed by another musician. This interchangeability of functions creates a common interest that cannot be shared by any other group of professionals. It should be noted that performing musicians constitute the largest segment of the proposed sector.

[22] The Tribunal is of the opinion that there is a genuine community of interest among performing musicians and that it is appropriate to include them in the sector proposed by the applicant.

Conductors

[23] The applicant indicated that conductors, generally speaking, lead and coordinate a group of musicians. However, conductors can also select musicians for membership in the group and audition them. In the performance of their duties, conductors could be considered to exercise certain managerial authority over the musicians they lead and the Tribunal must therefore satisfy itself that it is appropriate to include conductors in the same sector with performing musicians.

[24] Subsection 18(a) of the *Act* requires the Tribunal to take into account the applicable principles of labour law. One of these principles is that employees in managerial positions should not be included in the same bargaining unit as those whom they supervise. According to the applicant, in most cases a conductor serves as leader of a group of musicians and has few, if any, administrative duties. In other cases, where a conductor serves as musical director, he or she can have certain administrative duties, but musical directors who are independent contractors are few in number and are also musicians. The applicant also pointed out that, historically, the function of conductor has normally been covered by the collective agreements negotiated with Quebec producers by the Guilde.

[25] The Tribunal accepts the applicant's argument that the conductors who are independent contractors subject to the *Status of the Artist Act* do not, for the most part, perform managerial functions as this expression is commonly understood in the labour relations milieu, and it therefore finds that it is appropriate to include them in the same sector as performing musicians.

Arrangers and orchestrators

[26] The applicant filed the agreement it concluded with SPACQ on November 25, 1996 (see Annex "B"). In its intervention, SPACQ had indicated that there might be some overlap between its application and that of the *Guilde* with respect to arrangers. SPACQ was certified by the Tribunal on May 17, 1996 to represent a sector composed of authors and composers of musical works. The agreement that was concluded defines the function of "arranger" in order to avoid any conflict with the artists represented by SPACQ. The Tribunal takes official notice of this agreement and accepts its definition of arranger, which reads as follows:

[TRANSLATION]

An arranger is a person whose job is to transform an existing musical work so that it can be performed in another form. An arranger's duties include reharmonizing, paraphrasing and/or developing a musical work in order to give full expression to its melody, harmony and rhythm by presenting it as a full score and also includes the timing of recordings and the monitoring of tonality.

[27] Are arrangers authors of musical works within the meaning of the *Copyright Act* (R.S.C. 1985, c. C-42), and therefore covered by subparagraph 6(2)(b)(i) of the *Status of the Artist Act*? The *Copyright Act* defines a musical work as "any work of music or musical composition, with or without words, and includes any *compilation* thereof." The expression "compilation" includes "a work resulting from the selection or *arrangement* of ... musical ... works or of parts thereof". In the light of the foregoing, the Tribunal finds that arrangers are covered by subparagraph 6(2)(b)(i) of the *Status of the Artist Act* and that they can be included in the sector.

[28] The applicant defines an orchestrator as someone who writes a musical score and does the instrumentation, i.e., chooses the instruments and indicates the music to be played on each. This function is similar to that of an arranger and, according to the applicant, with the use of computers in the field of music, these two functions tend increasingly to overlap. For the reasons given in the preceding paragraph, the Tribunal finds that orchestrators are covered by subparagraph 6(2)(b)(i) of the *Status of the Artist Act* and that they can be included in the sector.

[29] Arrangers and orchestrators are also musicians and therefore have interests in common with the latter. Moreover, the applicant has historically represented arrangers and orchestrators in its negotiations with producers. The

Tribunal therefore finds that it is appropriate to include these professionals in the proposed sector.

Copyists and music librarians

[30] Copyists are musicians who transcribe individual scores from a master score. Because copyists do not create or arrange musical works, the Tribunal is of the opinion that copyists are not authors of musical works within the meaning of the *Copyright Act*. Similarly, copyists, functioning in this capacity, are not performers. The function of copyist is therefore not covered by the terms of subparagraphs 6(2)(b)(i) or (ii) of the *Status of the Artist Act*.

[31] With respect to the bargaining sectors it can certify, the Tribunal is, for the time being, limited to the categories of artists listed in subparagraphs 6(2)(b)(i) and (ii) of the *Act* and the function of copyist is not included in either of these categories. Although copyists clearly contribute to the creation and production of artistic works as contemplated by subparagraph 6(2)(b)(iii) of the *Act*, regulations prescribing the other categories of artists who may be covered by the *Status of the Artist Act* have not yet been adopted. The Tribunal therefore cannot, for the time being, include copyists in the sector proposed by the applicant.

[32] Music librarians are musicians whose function is to manage musical scores. This function can be compared with that of the librarian who deals with books. As a rule, music librarians are instrumentalists who assume the additional task of music librarian, for which they receive extra pay in addition to their regular musician's pay. In large orchestras, however, music librarians sometimes perform this function full time and do not play. Although music librarians are usually musicians, when they act in their capacity as music librarians they are neither performers nor authors of artistic or musical works. The Tribunal is of the view that it cannot include music librarians in the proposed sector for the same reasons given in the preceding paragraph with respect to the copyists.

Geographic and linguistic criteria

[33] The *Guilde* represents professional musicians in Quebec. It is not aware of any other professional association of musicians operating in Quebec that pursues the same objectives. Ninety-one percent of its members are francophone. It provides service to musicians in Quebec in both official languages. The *Guilde* has also developed business relations with other artists' associations whose members work primarily in Quebec, including the *Union des Artistes* (the "UdA"), the *Groupe Québec de coalition des créateurs* and the *Groupe d'action musique* which includes the UdA, the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ), *SOCAN* (Quebec), *SODRAC* and *SPACQ*.

A national sector

[34] Generally speaking, the Tribunal believes that national sectors are more suitable for bargaining with producers who are under federal jurisdiction when language is not a part of the artistic expression, as is the case with music, dance and the visual arts. This holds true especially when there is a national artists' association with the infrastructure necessary to serve its membership in both official languages. The Tribunal believes that it is preferable to limit the number of sectors to avoid overlap and conflict.

[35] The Tribunal asked the applicant to explain its reasons for applying to represent a sector covering Quebec when, as a local of the AFM, it could just as effectively have represented Quebec musicians in bargaining with federal producers operating exclusively in Quebec. In reply, the Guilde argued that it had already been granted recognition by the Commission de reconnaissance des associations d'artistes du Québec to bargain with 85 percent of producers under provincial jurisdiction and that it was perfectly natural and more effective that it should be the bargaining agent to bargain with the 15 percent of producers under federal jurisdiction who operate solely in Quebec.

[36] Although the Tribunal is not fully convinced by the applicant's arguments, it recognizes that there is a jurisdictional agreement between the AFM and the Guilde that reflects a factual situation in the operations of these two organizations. Moreover, the Tribunal recognizes that the Guilde's application covers all musicians in Quebec, whereas the AFM's application covers only its members. In order to allow as many artists as possible to enjoy the benefits of the *Status of the Artist Act*, the Tribunal prefers sector definitions that include all artists in a given discipline, as opposed to definitions that include only the members of an association. The Tribunal therefore concludes, having regard to the facts of the instant case, that a separate sector covering all musicians in Quebec is acceptable.

[37] It should be noted that the jurisdictional agreement concluded between the Guilde and the AFM provides that, in the event the Guilde disaffiliates from the AFM, a new application for certification may be submitted to the Tribunal by either party. Paragraph 14 of the agreement specifically provides that should the Guilde disaffiliate, the Tribunal may abridge the time limits prescribed for the filing of an application for certification or review. The Tribunal wishes to point out to the parties that it is the Tribunal's responsibility to interpret the *Act* and that it is therefore not bound by this provision of their agreement.

Agreements with the copyright collectives

[38] The applicant filed three agreements that it concluded with the copyright collectives: SODRAC, SACD and SOCAN (see Annexes “C”, “D” and “E”). In these agreements, which are all very similar, the applicant recognizes that its application does not involve copyright rights provided for in section 3 of the *Copyright Act*, but reserves to itself the ability to negotiate neighbouring rights for performers.

[39] In previous decisions such as those concerning the Société des auteurs, recherchistes, documentalistes et compositeurs (SARDeC, Decision #004) and that concerning the Association des auteurs dramatiques (AQAD, Decision #011), the Tribunal has recognized agreements between artists’ associations and copyright collectives. The Tribunal is of the opinion that these agreements have the effect of harmonizing the operation of the *Status of the Artist Act* and the operation of the *Copyright Act*. The Tribunal therefore takes official notice of the agreements concluded between the applicant and the three copyright collectives.

Proposed sector definition

[40] The Tribunal is of the opinion that the new wording proposed by the applicant poses problems because in some respects it is ambiguous while in others it is too explicit. The applicant proposes that the Tribunal define a sector covering “all the fields and disciplines listed in subsection 6(2) of the *Status of the Artist Act*”. Subsection 6(2) defines, at paragraph (a), producers under federal jurisdiction, and, at paragraph (b), the artists covered by the *Act* (professional independent contractors who are authors, directors, performers and persons in disciplines which have yet to be prescribed by regulation who contribute to an artistic creation). The applicant suggests that this wording has the advantage of being all-inclusive – encompassing both producers with whom bargaining will take place and the artistic disciplines that will apply. The Tribunal notes, just as the applicant did during the hearing, that at least one artistic discipline must be excluded from the proposed sector, namely, vocalists. The Tribunal is of the view that a simpler wording would be more appropriate and would not limit the applicant’s ability to bargain with producers under federal jurisdiction in the artistic domains in which the functions of musicians are exercised.

[41] The new wording proposed by the applicant suggests two exclusions to reflect the agreements between the AFM and SPACQ, and a clarification concerning the agreements with the copyright collectives. The Tribunal is of the opinion that it is sufficient in the instant case that the definition of the sector reflect the jurisdictional agreement concluded with the AFM because these were originally competing applications to represent musicians in Quebec. As for the other agreements, the Tribunal believes that the fact that they have been recognized in these Reasons for Decision is sufficient.

Conclusion regarding the sector

[42] Having considered all the oral and written submissions of the applicant and the intervenors, the Tribunal finds that the sector that is suitable for bargaining is a sector composed of all independent contractors engaged within the province of Quebec by a producer subject to the *Status of the Artist Act* to perform the function of performing musician, conductor, arranger or orchestrator, except when these artists are represented by the American Federation of Musicians of the United States and Canada (AFM) under the terms of the jurisdictional agreement between La Guilde des musiciens du Québec and the AFM dated October 23, 1996.

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

[43] In its application, the applicant estimates the number of its members who are musicians in Quebec to be 4000. At the hearing, it revised this figure downward to 3500 and indicated that the number of members fluctuates from year to year between 3500 and 4000 depending on working conditions. Musicians who are unemployed during a given year do not pay their dues. Although the applicant is unable to determine precisely the number of musicians in Quebec who are not members of the Guilde, it claims to represent the majority of musicians in Quebec and especially the vast majority of those who work regularly.

[44] The applicant estimates that its members sign 6000 contracts in a given year, representing some 9000 engagements in Quebec; to this must be added engagements outside Quebec, which account for less than 10 percent of the volume of work in Quebec. It is estimated that producers under federal jurisdiction account for some 15 percent of engagements. The applicant believes that a certain number of engagements with private broadcasters are concluded without its knowledge and that the certification for which it has applied will have the effect of guaranteeing complete representation.

[45] The applicant states that it does not know of any other musicians' association in Quebec pursuing the objectives it is pursuing. No other artists' association in Quebec intervened to challenge the representativity of the applicant.

[46] The Tribunal therefore accepts the applicant's claim that it is the association most representative of the artists in the above-described sector.

DECISION

[47] 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:

Declares that the sector that is suitable for bargaining is a sector composed of all independent contractors engaged within the province of Quebec by a producer subject to the *Status of the Artist Act* to perform the function of performing musician, conductor, arranger or orchestrator, except when these artists are represented by the American Federation of Musicians of the United States and Canada (AFM) under the terms of the jurisdictional agreement between La Guilde des musiciens du Québec and the AFM dated October 23, 1996.

Declares that La Guilde des musiciens du Québec is the association most representative of the artists in the sector.

An order will be issued to confirm the certification of La Guilde des musiciens du Québec to represent this sector.

Ottawa, January 16, 1997

“André Fortier”
A/Chairperson

“J. Armand Lavoie”
Member

“David P. Silcox”
Member

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LIST OF ANNEXES

Agreements between La Guilde des musiciens du Québec and:

- A) American Federation of Musicians of the United States and Canada (AFM)
- B) La Société professionnelle des auteurs et des compositeurs du Québec (SPACQ)
- C) La Société du droit de reproduction des auteurs, compositeurs et éditeurs inc. (SODRAC)
- D) La Société des auteurs et compositeurs dramatiques (SACD)
- E) Society of Composers, Authors and Music Publishers of Canada (SOCAN)

Ottawa, January 16, 1997

File No. 95-0017-A

Decision No. 020

**IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED
BY LA GUILDE DES MUSICIENS DU QUÉBEC**

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

The application for certification is granted in modified form.

Place of hearing: Montreal, Quebec
Date of hearing: December 10, 1996

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

Appearances: Malo, Dansereau, Avocats, Luc Martineau; Gisèle Fréchette and Éric Lefebvre for La Guilde des musiciens du Québec.
Cavalluzzo Hayes Shilton McIntyre & Cornish, Michael D. Wright; Ray Petch for the American Federation of Musicians of the United States and Canada.
Brodeur, Matteau, Poirier, Colette Matteau and Éric Lemieux for the Société du droit de reproduction des auteurs, compositeurs et éditeurs (SODRAC) inc. and the Société professionnelle des auteurs et des compositeurs du Québec.