

Canadian Artists and Producers
Professional Relations Tribunal



CANADA

Tribunal canadien des relations
professionnelles artistes-producteurs

Ottawa, April 15, 1997

File No. 96-0024-A

Decision No. 021

**IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED
BY THE REGROUPEMENT DES ARTISTES EN ARTS VISUELS 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: March 21, 1997

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

Appearances: Georges Azzaria; Gaëtan Gosselin and Doris Bouffard for
the Regroupement des artistes en arts visuels du Québec.
Sylvie Blanchette for the Union des Artistes.

REASONS FOR DECISION

96-0024-A : In the matter of an application for certification filed by the
Regroupement des artistes en arts visuels du Québec

STATEMENT OF FACTS

[1] This decision concerns an application for certification submitted to the Canadian Artists and Producers Professional Relations Tribunal under section 25 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter the “*Act*”) by the Regroupement des artistes en arts visuels du Québec (the “RAAV”) on July 2, 1996. The application was heard in Montreal on March 21, 1997.

[2] The RAAV applied for certification to represent a sector composed of all independent professional artists in the field of visual arts in Quebec who are authors of original artistic works, either in single copy or a limited number of copies, that are commissioned or distributed by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, engraving, drawing, illustration, photography, textile art, installation, performance art, video art or any other form of expression of the same type; but excluding commercial photographers, commercial illustrators and independent artists working in the fields of arts and crafts, film or audio-visual media.

[3] Public notice of this application was given in the *Canada Gazette* on Saturday, September 28, 1996 and in the *Globe and Mail* and *La Presse* on October 2, 1996. This notice also appeared in the October 1996 issue of the INFO-FAX bulletin of the Canadian Conference of the Arts. The public notice set a closing date of November 8, 1996 for the filing of expressions of interest by artists, 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 before the Tribunal on the issues of determining the sector that is suitable for bargaining and the representativeness of the applicant. In accordance with these provisions, the Canadian Association of Photographers and Illustrators in Communications (“CAPIC”), the Union des Artistes (the “UDA”) and Canadian Artists’ Representation (“CARFAC”) notified the Tribunal of their intention to intervene in the present case.

[5] A producers’ association, Théâtres Associés Inc. (“TAI”), also made known its interest in the application. Subsection 26(2) of the *Act* provides that producers may make representations to the Tribunal regarding the definition of the sector that is suitable for bargaining, but may not intervene on the issue of the

representativeness of an artists' association without the Tribunal's permission. TAI did not ask to intervene on the issue of the applicant's representativeness.

[6] In the intervention it filed with the Tribunal, CARFAC did not specify the nature of its interest in RAAV's application, and it did not send a representative to the hearing.

[7] CAPIC, the UDA and TAI concluded agreements with the applicant prior to the hearing. Copies of the three agreements are attached to these reasons for decision.

[8] RAAV'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 artists whose form of artistic expression is by means of installation be included in the sector?
 - b) should artists whose form of artistic expression is by means of performance art be included in the sector?
 - c) should artists whose form of artistic expression is by means of video art be included in the sector?
- 2) Is the applicant representative of the artists in the sector?

THE ISSUES

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

[9] The sector proposed by RAAV is a sector composed of all independent professional artists in the field of visual arts in Quebec who are authors of original artistic works, either in single copy or a limited number of copies, that are commissioned or distributed by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, engraving, drawing, illustration, photography, textile art, installation, performance art, video art or any other form of expression of the same type; but excluding commercial photographers, commercial illustrators and independent artists working in the fields of arts and crafts, film or audio-visual media.

[10] 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 history of professional relations among the artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; the common interests of the artists in respect of whom the application was made; and any geographic and linguistic criteria that the Tribunal considers relevant.

History of professional relations

[11] The Regroupement des artistes en arts visuels du Québec was founded in 1989 with the grouping together of five associations each representing an artistic discipline: le Conseil de la peinture du Québec, le Conseil de la sculpture du Québec, le Conseil québécois de l'estampe, le Conseil des arts textiles du Québec and l'Association des illustrateurs et illustratrices du Québec.

[12] RAAV became the association representing all creators in the area of visual arts in Quebec following its recognition by the Commission de reconnaissance des associations d'artistes du Québec in 1993, pursuant to the *Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters* (R.S.Q., c. S-32.01).

[13] RAAV's objectives are as follows:

- to uphold the honour of the artistic profession in the visual arts sector, the freedom to practice the profession and respect for the ethical principles governing the practice of visual arts;
- to promote the development of conditions favouring the creation and distribution of works;
- to defend and promote the economic, social, moral and professional interests of professional artists;
- to represent professional artists each time it is in the general interest to do so.

[14] Since 1994, the applicant has maintained a permanent secretariat and has engaged in four principal activities: communication, education, cooperation and representation, all with a view to improving the well-being of artists and protecting their rights. According to the applicant, its major achievements include the establishment and publication of exhibition fee schedules, the development of standard contracts, the presentation of training seminars on copyright, and initiatives to secure improvements in the tax status of artists from the Ministry of Revenue.

[15] On behalf of visual artists, RAAV participates in the activities of various organizations and structures in the cultural field such as the Government of Canada's Cultural Human Resources Council, la Table des créateurs pour la

défense des droits d'auteur sur l'infouroute, the International Association of Art-Painting, Sculpture, Print-making (UNESCO), Mercure (Réseau québécois de l'art et de la culture voué à la circulation des contenus culturels québécois sur l'infouroute) and la Table regroupant auteurs, compositeurs et interprètes au Québec.

The common interests of the artists

[16] RAAV submits that the professional artists in the proposed sector have common interests because they are producers of original artistic works of research or expression, are self-employed professionals who have to position themselves within the distribution networks available to them and are, when they can qualify, recipients of funding.

[17] Like other artists, visual artists must negotiate distribution agreements, agreements for the management of their copyrights, contracts for the production of public works and group insurance agreements. They have common needs in terms of collective representation to improve relations between artists and producers, negotiating tools, information, furthering the management of their careers and the practice of their art. They must also know and apply the principles of professional conduct specific to the visual arts. The Tribunal recognizes that the common interests of visual artists are all the more significant in these respects because RAAV is in its infancy as an association representing their interests.

[18] Visual artists eligible for membership in RAAV have a number of common interests: they are professional artists who create works for their own account in the disciplines identified in the proposed sector; their works are exhibited, produced, published, performed in public or marketed by a distributor; and they have received recognition as professionals from their peers in the form of an honourable mention, prize, award, grant, appointment to a jury, invitation to show their work or other similar form of recognition.

[19] In its by-laws, the applicant defines the field of visual arts as the production of original works of research or expression, either in single copy or a limited number of copies, and expressed in the form of painting, sculpture, engraving, drawing, illustration, photography, textile art, installation, performance art, video art or any other form of expression of the same nature.

[20] Before defining the sector, the Tribunal must ensure that all the disciplines covered by RAAV's application can be included in the sector. At the present time, the Tribunal can define sectors that include artists referred to in subparagraphs 6(2)(b)(i) and (ii) of the *Status of the Artist Act*, which read as follows:

6(2) This Part applies:

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

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

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

[21] Section 2 of the *Copyright Act* (R.S.C. 1985, c. C-42) defines "artistic work" as follows:

"artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works;

[22] The Tribunal is of the view that it can include in the sector proposed by the applicant artists whose form of expression is painting, sculpture, engraving, drawing, illustration, photography and textile art, because all these forms of expression are covered by section 2 of the *Copyright Act* and can be subject to copyright. For the reasons stated above, the Tribunal is of the view that the artists that practice these disciplines have common interests and constitute a sector that is suitable for bargaining.

Performance art, installation and video art

[23] These forms of artistic production or disciplines are not specifically enumerated in the definition of artistic work contained in the *Copyright Act* and cannot be readily equated with one of the definitions enumerated. The Tribunal must therefore decide if it can include them in the sector proposed by the applicant.

[24] In support of its application, the applicant argued that these art forms are related to the other disciplines included in the proposed sector and specifically mentioned in the *Copyright Act*. To clarify this matter, the applicant provided the Tribunal with the following definitions:

[TRANSLATION]

"performance art"

an aesthetic phenomenon in which a creator of visual art places himself or herself into the work, as visual material that is an integral part of the work. It is often an individual act that is not meant to be reproduced. This corporal presence is not an interpretation; it stimulates the viewer's interest spatially by relying on the visual impact of the corporal material instead of a discourse or a narration, as is the case with dramatic works.

“installation”

a form of artistic expression whereby a creator of visual art produces an artistic work that occupies a particular space, and involves the presence of visitors in that space. It consists of aesthetic forms that go beyond the bidimensional and tridimensional limits of artistic works while incorporating an environment in which the spectator can become an integral part.

“video art”

a form of expression through which a creator of visual art produces, using electronic recording technology, an original work of research that has aesthetic purposes specific to contemporary art and is not intended, as a rule, for broadcast. Creators of video art define themselves as visual artists, perform all the creative functions and retain complete control over the content of the work at all stages of production.

[25] The applicant submits that performance art does not have a commercial purpose per se, but consists instead of an original work of research and expression. The artist is the author of his or her work. The artist uses his or her body as an adjunct of expression, as visual matter and not as a character to be played. The artist does not act in a “role” that is played or repeated a number of times.

[26] The Tribunal is of the opinion that an artist who practices performance art can be akin to a performer, a category of artists covered by subparagraph 6(2)(b)(ii) of the *Act*. An artist who practices performance art “performs” before a public. The Tribunal must therefore consider whether these artists have a community of interest with the visual artists in the sector proposed by the applicant or with performers covered by the certification granted to the UDA by the Tribunal on August 29, 1996.

[27] Ordinarily, artists who express themselves through performance art, as defined above, have a background in fine arts, which are traditionally associated with painting and sculpture, not theatre. Although there is not necessarily a specifically designated location for performances, they will take place more often in an art gallery than on the stage of a theatre. For these reasons, the Tribunal believes that there is a community of interest between the other categories of visual artists and those who practice performance art. This community of interest differs from that of performers, within the traditional meaning of this term, and it is therefore more appropriate to include artists who practice this form of artistic expression in the same sector as visual artists.

[28] As for the artists who practice installation, the Tribunal is of the view that although an installation is a work that is not necessarily permanent, it can be fixed

and could therefore be subject to copyright. Video art is a work that can be permanent and can be fixed and thus subject to copyright. Consequently, the Tribunal is of the opinion that installation and video art are artistic works akin to those enumerated in section 2 of the *Copyright Act* and that it can include them in the proposed sector.

[29] In light of the foregoing, the Tribunal concludes that installation and video art are forms of artistic expression that it can include in the sector and that it is appropriate to do so.

[30] The Tribunal wishes to point out that, in the field of visual arts, the forms of artistic expression are many, varied and evolving. Painting and sculpture are readily identifiable visual art forms, but certain forms of artistic works have existed for only a few decades and others will be invented in the future, and will not necessarily be easy to define. One particular trend we are witnessing is the intermingling of art forms: artistic works are often the product of the association of a number of visual art forms, or even the association of forms from different fields of art such as literature and music. New technologies such as the computer, reprography, telecommunications and the laser are also being used to create works that may be classified within the known categories of artistic works.

Agreements

[31] At the hearing, the applicant filed the agreement concluded with Theatres Associés Inc. Essentially, the agreement specifies that the sector proposed by RAAV excludes the design of sets and costumes for theatrical use.

[32] The applicant also filed the agreement concluded with the Canadian Association of Photographers and Illustrators in Communications. The parties clarified the limits of the sector proposed by RAAV in relation to the sector already defined by the Tribunal in the certification granted to CAPIC on May 15, 1996. The agreement stipulates who will be the bargaining agent to deal with producers under federal jurisdiction in various circumstances.

[33] The Union des Artistes filed the agreement it concluded with the applicant and asked the Tribunal to take official notice of it. On August 29, 1996, in an interim decision, the UDA was certified to represent a sector composed of performers. The UDA was of the opinion that there could be overlap between the sector defined by the Tribunal and the sector proposed by RAAV with respect to performance art, installation, video art or forms of expression of the same nature. The UDA and RAAV have agreed that a member in good standing of RAAV or the author of a performance, an installation, a video art work or a form of expression of the same nature may personally perform, in these artistic works, one of the functions for which the UDA was certified, without being covered by the certification granted to the UDA by the Tribunal.

Geographic and linguistic criteria

[34] RAAV wishes to represent all professional independent contractors in Quebec who work in the disciplines identified in the proposed sector with respect to all producers subject to the *Status of the Artist Act*. There are no residency requirements in the section on membership contained in RAAV's by-laws. The applicant indicated that even though some of its members may reside outside the province for a few years, they can generally continue to be members of RAAV and to be represented by it.

[35] The applicant confirmed that it serves its members in the French and English languages, as required. In the decision it rendered on January 16, 1997 concerning the *Guilde des musiciens du Québec* (Decision No. 020), the Tribunal expressed its preference for national sectors to conduct bargaining with producers under federal jurisdiction when language is not a part of the artistic expression and provided there is a national artists' association with an infrastructure capable of serving its members in both official languages. In the certification proceedings involving RAAV, no national association of visual artists made submissions to the Tribunal, and to date, the Tribunal has not been seized with a fully completed application for certification to represent visual artists nationally. The Tribunal must therefore limit itself to a geographic sector in the instant case.

Conclusion regarding the sector

[36] 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 professional independent contractors in the field of visual arts in Quebec who are authors of original artistic works of research or expression, either in single copy or a limited number of copies, that are commissioned or distributed by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, engraving, drawing, illustration, photography, textile art, installation, performance art, video art or any other form of expression of the same nature, excluding:

- a) independent contractors working in the fields of arts and crafts, film and audio-visual media;
- b) commercial photographers and commercial illustrators covered by the certification granted by the Canadian Artists and Producers Professional Relations Tribunal to the Canadian Association of Photographers and Illustrators in Communications on April 26, 1996 and in accordance with the terms of the agreement concluded between the Regroupement des artistes en arts visuels du Québec and the Canadian Association of Photographers and Illustrators in Communications on March 20, 1997;
- c) artists covered by the certification granted to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996 and in accordance with the terms of the agreement concluded between the Regroupement des artistes en arts visuels du Québec and the Union des Artistes on March 20, 1997;
- d) artists who practice the art of set design and costume design for theatrical use.

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

[37] In its application for certification, the applicant indicated that the association had 661 members and that there were some 2,000 independent professional artists in the sector. At the hearing, RAAV provided a more accurate membership figure, indicating that its membership now stood at 800 and had been climbing steadily since 1994. RAAV expects this figure to reach 1000 in the near future.

[38] RAAV explained that the estimate of 2,000 independent professional artists in the sector is based on a study done for le Conseil des arts et des lettres du Québec. The applicant admitted that, while this figure is realistic, it exceeds the potential membership that it could recruit because RAAV's membership criteria are different from those used in the study. RAAV believes that when its

membership reaches 1000, it will have recruited more than half of all potential members.

[39] Although the applicant informed the Tribunal that at one time there was another association of visual artists in Quebec, RAAV is now the only association that represents visual artists in the province. The applicant also stated that it is a genuine artists' association and not a grouping of associations. The various councils within RAAV each have a code of ethics specific to the discipline practised. No other association applied to the Tribunal to represent independent professional visual artists in Quebec.

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

DECISION

[41] 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 professional independent contractors in the field of visual arts in Quebec who are authors of original artistic works of research or expression, either in single copy or a limited number of copies, that are commissioned or distributed by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, engraving, drawing, illustration, photography, textile art, installation, performance art, video art or any other form of expression of the same nature, excluding:

- a) independent contractors working in the fields of arts and crafts, film and audio-visual media;
- b) commercial photographers and commercial illustrators covered by the certification granted by the Canadian Artists and Producers Professional Relations Tribunal to the Canadian Association of Photographers and Illustrators in Communications on April 26, 1996 and in accordance with the terms of the agreement concluded between the Regroupement des artistes en arts visuels du Québec and the Canadian Association of Photographers and Illustrators in Communications on March 20, 1997;
- c) artists covered by the certification granted to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996 and in accordance with the terms of the agreement concluded between the Regroupement des artistes en arts visuels du Québec and the Union des Artistes on March 20, 1997;
- d) artists who practice the art of set design and costume design for theatrical use.

Declares that the Regroupement des artistes en arts visuels du Québec is the association most representative of the artists in the above-described sector.

An order will be issued to confirm the certification of the applicant to represent this sector.

Ottawa, April 15, 1997

“André Fortier”
Chairperson

“J. Armand Lavoie”
Member

“David P. Silcox”
Member

ANNEXES

Agreements between the Regroupement des artistes en arts visuels du Québec
and:

- (A) Théâtres Associés Inc. (TAI)
- (B) Canadian Association of Photographers and Illustrators in
Communications (CAPIC)
- (C) Union des Artistes (UDA)