

Canadian Artists and Producers  
Professional Relations Tribunal



CANADA

Tribunal canadien des relations  
professionnelles artistes-producteurs

Ottawa, April 15, 1997

File No. 96-0016-D

**Decision No. 022**

**IN THE MATTER OF A REFERENCE UNDER SECTION 41 OF THE  
*STATUS OF THE ARTIST ACT* INVOLVING THE UNION DES  
ARTISTES AND TÉLÉ-MÉTROPOLE INC.**

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

The collective agreement between the Union des Artistes and Télé-Métropole Inc. does not apply to Mr. Denis Niquette because in the context of the arrangement existing between his employer, CFGL, and Télé-Métropole, he is not an independent contractor vis-à-vis Télé-Métropole.

***Place of hearing:*** Montreal, Quebec

***Date of hearing:*** March 19, 1997

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

***Appearances:*** Lafortune Leduc, Pierre-Yves Leduc for the Union des  
Artistes  
Heenan Blaikie, Norman Dionne for Télé-Métropole Inc.

## REASONS FOR DECISION

96-0016-D: In the matter of a reference under section 41 of the *Status of the Artist Act* involving the Union des Artistes and Télé-Métropole Inc.

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[1] This decision concerns a reference under section 41 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter “the *Act*”) involving the Union des Artistes (“the UDA”) and Télé-Métropole Inc. (“TM”), submitted to the Canadian Artists and Producers Professional Relations Tribunal (“the Tribunal”) by Arbitrator Marie-France Bich. The hearing of this case took place in Montreal on March 19, 1997.

### BACKGROUND

[2] On December 18, 1992, the Union des Artistes and Télé-Métropole signed a collective agreement for the period September 7, 1992 to September 3, 1995.

[3] On March 16, 1995, the UDA filed a grievance (No. S-012) alleging that TM had not complied with the collective agreement because it had not sent the UDA a contract of employment for Mr. Denis Niquette, as required by the collective agreement.

[4] In July 1996, the UDA and TM filed their collective agreement with the Tribunal pursuant to section 67 of the *Act*. On August 29, 1996, the Tribunal granted the UDA an interim certification to represent a sector composed of performing artists.

[5] The grievance was referred to the Arbitrator on October 20, 1995. At the hearing on October 25, 1996, TM made a preliminary objection on the grounds that:

1. Mr. Niquette’s work on the program *Salut Bonjour!* was not covered by the provisions of the scale agreement;
2. Mr. Niquette was not an artist within the meaning of the scale agreement and accordingly could not rely on its provisions;
3. since the situation complained of in grievance S-012 occurred prior to the filing of the scale agreement and also prior to the proceedings to certify the UDA and the Tribunal’s decision, it could be argued that neither the scale agreement nor the Tribunal’s certification decision applied to the case.

[6] The hearing of the grievance was adjourned to November 18, 1996 and on that date the parties agreed that the questions in dispute should be determined by the Canadian Artists and Producers Professional Relations Tribunal in accordance

with section 41 of the *Act*, which reads as follows:

41. (1) An arbitrator or arbitration board shall refer to the Tribunal for hearing and determination any question that arises in a matter before it as to the existence of a scale agreement, the identification of the parties to it, or the application of the agreement to a particular sector or artist.

(2) Referral of a question to the Tribunal pursuant to subsection (1) does not suspend the proceeding before the arbitrator or arbitration board, unless the Tribunal so orders or the arbitrator or arbitration board decides that the nature of the question warrants suspension of the proceeding.

[7] The Arbitrator suspended her proceedings and the case was referred to the Tribunal on November 25, 1996.

[8] Prior to the hearing, the parties agreed on certain facts and concluded an agreement which was filed at the hearing. Furthermore, the parties also agreed on the question to be determined by the Tribunal. Consequently, the parties indicated that the Tribunal would not have to consider the third argument raised in TM's preliminary objection, as set out in paragraph 5 of these reasons.

#### THE QUESTION TO BE DETERMINED BY THE TRIBUNAL

[9] The parties agreed that the question to be determined by the Tribunal was as follows:

Under the circumstances, does the collective agreement between the UDA and TM, which is comparable to a scale agreement under the *Act*, apply to Mr. Denis Niquette? In other words, pursuant to the *Act*, is Mr. Denis Niquette an independent contractor vis-à-vis TM?

#### EVIDENCE

##### *Facts agreed on by the parties*

[10] The parties agreed on the following facts with respect to the program *Salut Bonjour!* ("SB"):

- it is a daily news magazine program;
- its first season was 1989-90. For some time now, SB has also been broadcast during the summer;
- the original length of the SB program was two (2) hours. This was later increased to three (3) hours;
- SB is broadcast network-wide in Quebec on Télé-Métropole in the early morning from Monday to Friday inclusive.

[11] The parties agreed on the following facts concerning traffic reports during SB:

- they consist of sixty (60)-second reports about the traffic situation in Greater Montreal and the surrounding areas;
- the number of traffic reports on each program was increased from three (3) to five (5) when the length of the program itself was extended from two (2) to three (3) hours;
- each report is given by means of a telephone hook-up between Télé-Métropole and CFGL. During each report, a video panel reading "Circulation CFGL" ["CFGL Traffic"] appears on the screen;
- the person responsible for these reports is the traffic reporter employed by CFGL. In 1989-90 this was Alain Cadieux whom CFGL subsequently replaced on its own initiative with Denis Niquette;
- the reports on TM are scheduled at precise times in light of the expected availability of the traffic reporter and his scheduled reports on CFGL;
- since approximately the fall of 1990, TM no longer broadcasts the "Circulation CFGL" report outside the Greater Montreal area but substitutes other news. In other words, "Circulation CFGL" is broadcast only in the Greater Montreal area. Outside this area, TM broadcasts news instead;
- from his desk at CFGL, in the minutes preceding the report on TM's program, the traffic reporter contacts the computer graphics designer at TM by telephone so that, from a technical point of view, the latter can prepare the appropriate charts. Then, a few seconds before going on air, the traffic reporter calls Télé-Métropole again and waits until it is time for him to go on air;
- sometimes, the traffic reporter is not available at the precise time scheduled for his report on TM. When this happens, there is no report and it is not rescheduled;
- in all cases, when the regular CFGL traffic reporter is absent, another person appointed by CFGL replaces him on the TM broadcast. Sometimes, TM is informed of this only a few seconds before the first traffic report of the day.

[12] The parties agreed on the following facts concerning the agreement between CFGL and TM:

- in the weeks preceding the first broadcast of SB in the fall of 1989, the General Manager of CFGL contacted TM's General Manager and made the following proposition, which was accepted:
  - in consideration for advertising radio station CFGL, the traffic reporter employed by CFGL would provide three (3) telephone reports for the SB program;
  - the advertising for radio station CFGL would include a sign stating "Circulation CFGL" and promoting programs broadcast by CFGL in the form of statements made by the traffic reporter;
  - the number of reports was increased to five (5) when SB was extended

- by one (1) hour to a total of three (3) hours;
- this oral agreement has been renewed from year to year until the present time.

[13] The parties agreed on the following facts concerning the relationship between CFGL and Denis Niquette:

- Denis Niquette is an employee within the meaning of the *Canada Labour Code*, in the employ of CFGL as a traffic reporter;
- as part of his employment, CFGL orders him to give the reports on the SB program broadcast by TM.

[14] The parties agreed on the following facts concerning various points:

- Mr. Denis Niquette, his predecessor, Mr. Alain Cadieux, and their occasional replacements:
  - never had any discussion or agreement of any kind whatsoever with TM concerning the provision or retention of their services. Communications between these individuals and TM were solely for the purpose of technical co-ordination so that they could deliver the "Circulation CFGL" report during the SB program;
  - never received any remuneration or benefits of any kind from TM;
  - did not take part in the production meetings of the SB team at TM.

#### *Witnesses*

[15] The Tribunal heard three witnesses: Denis Niquette, traffic reporter for radio station CFGL in Montreal, Stéphane Raymond, Director of Programming and Promotion at COGECO-CFGL, and Daniel Rancourt, producer of the *Salut Bonjour!* program.

[16] The testimony heard did not contradict the facts agreed to by the parties to the effect that Mr. Niquette is a full-time employee of radio station CFGL in Montreal; that he holds the position of traffic reporter and that five times a day between 6:00 a.m. and 9:00 p.m. he prepares and delivers a report on the traffic conditions in Greater Montreal as part of a program called *Salut Bonjour!*, which is produced by TM and broadcast over the TVA television network.

[17] Mr. Niquette explained that he now works in the CFGL studios although previously his *Circulation CFGL* report was delivered from a vehicle or an aircraft. In order to know when he has to make his report, he uses a television monitor to follow the progress of the *Salut Bonjour!* program and, at the scheduled time, he telephones the television station and provides his report. The television monitor used by Mr. Niquette is currently provided by his employer, CFGL, although in the past it had been provided by the TVA network. Mr. Niquette stated that he does not receive any benefits or remuneration from TM for these reports and that there is no contract between himself and TM.

[18] Mr. Rancourt testified that, to the best of his knowledge, there is no corporate relationship between radio station CFGL and TM. He also stated that, as the producer of *Salut Bonjour!*, he does not supervise Mr. Niquette's work – Mr. Niquette knows when he is supposed to call TM and is responsible for organizing his schedule at CFGL in order to be able to deliver his report on the TM broadcast.

### ANALYSIS

[19] In the Reasons for Decision given in the Canadian Actors' Equity Association case (Decision No. 010), the Tribunal made the following observation:

[29] For a variety of legal purposes, the law has had to distinguish between employees who work under contracts of service and contractors who perform work for another person on an independent basis in the context of contracts for service. A number of tests have been developed by the courts to determine when independent contractor status exists. *The common feature of these tests is that each particular situation must be looked at on its own merits and that no blanket determination can be made on the basis of job title alone.* [Emphasis added]

[20] In order for an individual to be considered an independent contractor vis-à-vis TM, it must first be established that there some nexus between the producer, TM, and the individual providing the services, Mr. Niquette.

[21] Article 1-1.04 of the collective agreement between the UDA and TM refers to [TRANSLATION] “any person *engaged* in one of the positions . . .” and article 2-1.01 refers to [TRANSLATION] “any person whom the producer *engages* to fulfill. . . .” The many definitions of the terms “engage” and “hire” filed with the Tribunal by TM suggest that what is involved is the “retention” of an individual's services. Consequently, it must first be determined whether TM “retained” Mr. Niquette's services in any way.

[22] In the facts agreed to by the parties and in the testimony given to the Tribunal, there was nothing to indicate that a contractual relationship exists between Mr. Niquette and TM at this time. The parties admitted that Mr. Niquette, his predecessor and their occasional replacements have not had any discussion or agreement of any kind whatsoever with TM for the purpose of offering or retaining their services. The parties admitted that the reports presented by Mr. Niquette are provided as part of his employment: CFGL orders him to provide the reports on the *Salut Bonjour!* program broadcast on TM. Mr. Niquette does the work assigned by his employer, CFGL, which then makes the arrangements necessary for distribution of the product, not only for its own purposes but also for broadcast on television. CFGL, and not Mr. Niquette on his own behalf, benefits from the arrangement with TM; by “trading” information

about traffic that it is already collecting for itself, CFGL obtains advertising and air time for which it would otherwise have to pay.

[23] The main argument raised by the UDA is based on the claim that TM should have concluded a contract with Mr. Niquette for the following reasons: TM is a producer; this producer produces a program on which several reports are broadcast, including Mr. Niquette's; Mr. Niquette is an artist (although he is not a member of the UDA) and he performs a function covered by the collective agreement between the UDA and TM. Furthermore, according to the UDA, Mr. Niquette is not an employee of TM and the work he does for TM does not earn anything for his employer, CFGL. Similarly, the traffic charts prepared by Mr. Niquette are not used in his employment but rather solely for the purpose of his report on the *Salut Bonjour!* program for TM. Mr. Niquette participates in the program and his report is regarded as programming rather than advertising time. Essentially, the UDA asked the Tribunal to determine that, since Mr. Niquette's report is broadcast by TM and Mr. Niquette is not an employee of TM, he must by default be considered to be an independent contractor covered by the collective agreement between TM and the UDA. The UDA argued that an "arrangement" between two producers should not defeat a collective agreement by excluding the artists' association or the artist.

[24] The Tribunal shares the concerns expressed by the UDA with respect to the arrangement between CFGL and TM. If taken to an extreme, such an arrangement would in theory allow a broadcaster to produce programs without itself having to hire employees or freelance workers. Since one of the purposes of the *Act* is to protect the interests of artists, the Tribunal would look unfavourably on a producer who concluded a series of contracts, the principal purpose of which is to avoid the application of the *Act*. In this case, however, there is no evidence to show that this was the purpose of the arrangement between CFGL and TM.

[25] The evidence submitted to the Tribunal did not show that there was a nexus between Mr. Niquette and TM such that it could be said that TM had retained Mr. Niquette's services. Consequently, the Tribunal cannot find that Mr. Niquette is an independent contractor vis-à-vis TM.

DECISION

[26] For all these reasons, the Tribunal is of the opinion that the question must be answered in the negative: the collective agreement between the UDA and TM does not apply to Denis Niquette because, in the context of the arrangement between his employer, CFGL, and TM, he is not an independent contractor vis-à-vis TM.

Ottawa, April 15, 1997

“André Fortier”  
Chairperson

“J. Armand Lavoie”  
Member

“David P. Silcox”  
Member