Canadian Artists and Producers Professional Relations Tribunal

CANADA

Tribunal canadien des relations professionnelles artistes-producteurs

Ottawa, November 17, 1998 **File No. 95-0014-A**

Decision No. 028

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY THE WRITERS' UNION OF CANADA and THE LEAGUE OF CANADIAN POETS

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: September 10 and 11, 1998

Quorum: David P. Silcox (Chairperson)
André T. Fortier
Curtis Barlow
Meeka Walsh

Appearances: For the applicant: Marian D. Hebb, Counsel; Penny Dickens and Christopher Moore for The Writers' Union of Canada; Edita Petrauskaite for the League of Canadian Poets.

For the intervenors: Jan Brongers, Department of Justice Canada; Gilbert Miville-Deschênes, Legal Services - Public Works and Government Services Canada; Christine Hudon and Jeff Richstone, Legal Services - Canadian Heritage

REASONS FOR DECISION

95-0014-A: In the matter of an application for certification filed by The Writers' Union of Canada and the League of Canadian Poets

STATEMENT OF FACTS

[1] This decision concerns an application for certification by 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*") submitted jointly by The Writers' Union of Canada (TWUC) and the League of Canadian Poets (LCP) on November 17, 1995. The application was heard in Toronto, Ontario on September 10 and 11, 1998.

[2] The Writers' Union of Canada and the League of Canadian Poets originally applied for certification to represent a sector composed of :

a) authors of literary works, in languages other than French, initially published in volume or electronic form; and
b) authors of literary works, in languages other than French, initially published in volume or electronic form and offered for performance or adaptation into other media including audio, audiovisual, multimedia and other electronic forms;

for greater clarity, excluding screenwriters in the jurisdiction of the Writers Guild of Canada, playwrights in the jurisdiction of the Playwrights' Union of Canada and journalists in the jurisdiction of the Periodical Writers Association of Canada.

[3] On February 9, 1998, the applicants amended the proposed sector to include all independent contractors engaged by a producer subject to the *Status of the Artist Act* as:

i) authors of literary works, in languages other than French, initially published in volume, electronic or multimedia form; or
ii) authors of literary works, in languages other than French, initially published in volume, electronic or multimedia form and offered for performance or adaptation into other media including audio, audiovisual, multimedia and other electronic forms,

but excluding:

a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1996;
b) authors covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and

c) playwrights covered by the certification granted to the Playwrights' Union of Canada by the Canadian Artists and Producers Professional Relations Tribunal on December 13, 1996.

[4] Public notice of this application was given in the *Canada Gazette* on Saturday, March 7, 1998 and in the *Globe and Mail* and *Le Soleil* on March 11, 1998, in the *Toronto Star* on March 12, 1998 and in *Le Devoir* on March 14, 1998. This notice also appeared in the Canadian Conference of the Arts bulletin *(INFO-FAX*) of April 1, 1998. The public notice set a closing date of April 22, 1998 for the filing of expressions of interest by artists, artists' associations and producers.

[5] As of that date, there were three intervenors: the Departments of Canadian Heritage (PCH) and Public Works and Government Services Canada (PWGSC) and the Union des écrivaines et écrivains québécois (UNEQ). In addition, the Canadian Copyright Licensing Agency (CANCOPY) asked to be kept informed of developments in the file.

[6] As an artists' association, UNEQ is an intervenor as of right with respect to the definition of the sector and the representativeness of the applicants. Pursuant to subsection 26(2) of the *Status of the Artist Act*, the two federal government departments, PCH and PWGSC, are intervenors as of right with respect to the definition of the sector. Neither department sought the Tribunal's permission to make representations regarding the applicants' representativeness.

[7] The TWUC and LCP application for certification raises the following issues:

(1) The nature of the relationship between TWUC and LCP and whether this relationship constitutes a "federation" within the meaning of the *Status of the Artist Act*;

(2) The suitability of the proposed sector for bargaining;

(3) Whether the applicants are representative of the artists in the sector.

THE ISSUES

Issue 1: Does the relationship between TWUC and LCP constitute a "federation" within the meaning of the *Status of the Artist Act*?

[8] Subsection 25(1) of the *Act* provides that "an artists' association" may make an application for certification. While this implies that the application must be made by a single entity, the term "artists' association" is defined in section 5 as including a federation of artists' associations.

[9] In the instant case, the application for certification was filed by The Writers' Union of Canada "representing itself and The League of Canadian Poets". The application for certification contained a copy of a letter dated November 16, 1995 from the Executive Director of The League of Canadian Poets addressed to the Executive Director of The Writers' Union of Canada which stated:

> The League of Canadian Poets would like to formally request that the Writers Union of Canada represent the League while applying for certification at the Canadian Artists and Producers Professional Relations Tribunal.

[10] No further details of the relationship between the two organizations were provided until the hearing of the application on September 10, 1998 and until that date the Tribunal treated the application as being made on behalf of the two organizations. However, for the purposes of certification, it is necessary for the Tribunal to satisfy itself that the applicant is either "an artists' association" or a "federation of artists' associations".

[11] The term "federation of artists' associations" is not defined in the *Status of the Artist Act*. The *Act* does, however, establish prerequisites for certification:

> 23(1) No artists' association may be certified unless it adopts by-laws that
>
> (a) establish membership requirements for artists;
>
> (b) give its regular members the right to take part and vote in the meetings of the association and to participate in a ratification vote on any scale agreement that affects them; and
>
> (c) provide its members with the right of access to a copy of a financial statement of the affairs of the association to the end of the previous fiscal year, certified to be a true copy by the authorized officer of the association.

[12] The Tribunal is satisfied that, independently, the by-laws of TWUC and LCP each comply with these prerequisites. The Tribunal was informed, however, that there is no formal documentation that sets out the relationship between the two organizations. It is thus not clear how membership decisions concerning the

conduct of collective bargaining would be taken, and in particular, how ratification votes would be conducted.

[13] LCP was created in 1966 and TWUC in 1973. There is a history of cooperation between the two organizations. For example, both were active in the creation of CANCOPY and the Writers' Development Trust and they cooperate in preparing and presenting briefs to Parliament on various matters (eg. copyright). TWUC describes itself as representing "book writers in all genres" while LCP represents "book writers in one genre": poetry. Because LCP believes that poets require more assistance in the marketplace, it has at times involved itself in marketing and distribution activities that TWUC does not engage in. TWUC is seen to do more lobbying on matters of interest to book writers than LCP does, and it represents LCP's interests in legal issues generally.

[14] When questioned on the subject, representatives of the two organizations indicated that TWUC would take responsibility for negotiations with producers in the federal jurisdiction. They intended to work together to produce a document that would spell out how ratification would take place; in particular they saw the need to ensure that the 70 writers who are members of both organizations be entitled to only one vote.

[15] From the testimony given, it is clear that the relationship between TWUC and LCP is not at this time sufficiently formal to constitute a "federation of artists' associations" within the meaning of the *Status of the Artist Act*. The Tribunal is of the view that to constitute a federation, the applicants would have to formalize their relationship clearly and develop a constitution that would regulate their activities as a federation.

[16] As noted above, the LCP has effectively requested that TWUC act on its behalf for the purposes of certification. The representatives of the applicants present at the hearing indicated that an acceptable alternative would be for the application for certification to go forward solely in TWUC's name. In the event that TWUC and LCP decided at some future date to create a formal federation, they could seek an amendment to the certification order at that time. The Tribunal accepts this suggestion and will consider the application for certification as being filed solely in the name of The Writers' Union of Canada.

Issue 2: Is the proposed sector suitable for bargaining?

[17] During the hearing, the applicant modified its proposed sector definition to remove the word "initially" in subsection (i) of their application. The sector proposed by the applicant would therefore cover all independent contractors engaged by a producer subject to the *Status of the Artist Act* as:

i) authors of literary works, in languages other than French, published in volume, electronic or multimedia form; or
ii) authors of literary works, in languages other than French, initially published in volume, electronic or multimedia form and offered for performance or adaptation into other media including audio, audiovisual, multimedia and other electronic forms,

but excluding:

a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1996;
b) authors covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and
c) playwrights covered by the certification granted to the Playwrights Union of Canada by the Canadian Artists and Producers Professional Relations Tribunal on December 13, 1996.

[18] Subsection 26(1) of the *Act* requires that, when considering an application for certification, the Tribunal take into account the common interests of the artists in respect of whom the application was made, the history of professional relations among those artists, their associations and producers, concerning bargaining, scale agreements and other agreements relating to the terms of engagement of artists, and any geographic and linguistic criteria the Tribunal considers relevant.

[19] In addition to these standard criteria, there are two other aspects of the proposed sector definition that require consideration: the intervenors' request that it be modified so as to prevent bargaining in respect of already existing literary works, and the effect of certain restrictions on membership contained in the applicant's constitution.

Community of interest of the artists

[20] As proposed, the sector excludes a number of authors already covered by certifications issued by the Canadian Artists and Producers Professional Relations Tribunal: periodical writers, playwrights and those who write for radio, television, film or video. TWUC explained its jurisdiction as applying to "book writers in all genres". While historically the concept of "book writers" meant authors who published in volume form, the advent of new technologies has meant that an author's works may now be published in electronic or multimedia form in

addition to or instead of on paper. The authors contemplated by the applicant include writers of both fiction and non-fiction works as well as poets.

[21] The proposed sector definition seeks to include representation rights with respect to these authors when they are engaged by a producer to write an original work or to perform a work that they have written, as well as when they are asked to provide one of their works for performance by others or for adaptation into another media. However, the proposed sector would not apply to the author of the adaptation itself when it takes the form of a screen play or script for theatre, as these authors are in the sectors for which the Writers Guild of Canada (WGC) and the Playwrights Union of Canada (PUC) have been certified respectively.

[22] The Tribunal is of the opinion that the authors in the proposed sector have a clear community of interest in that they are all involved in the same artistic discipline, namely the creation of literary works.

History of professional relations

[23] The Writers' Union of Canada was founded in 1973. Its objects are:

- to unite writers for the advancement of their common interests;
- to foster writing in Canada;
- to maintain relations with publishers;
- to exchange information among members;
- to safeguard the freedom to write and publish; and
- to advance good relations with other writers and their organizations in Canada and all parts of the world.

[24] To achieve these objectives, TWUC has developed a number of publications and services that it makes available to members and non-members alike, including a "self-help" package for new writers. TWUC's publications include a model "Trade-Book Contract", a guide to contract clauses entitled "Help Yourself to a Better Contract", advice to writers who are contributing to anthologies, entitled "Anthology Rates and Contracts", and guides to electronic publishing rights and ghost writing.

[25] In conjunction with the Canadian Book Publishers Council and the Association of Canadian Publishers, TWUC has developed a guide to practice for publishers and authors. Although this guide is not binding on the members of the writers' or publishers' associations, it serves as an indication of what a writer and a publisher may expect when dealing with one another.

[26] TWUC has prepared a "Royalty Statement Checklist" intended to assist writers in their dealings with publishers. It has also devised formulas to calculate minimum payments for contributions in various types of anthologies and sample contracts implementing the anthology formulas and suggested fee schedules.

[27] The services offered by TWUC include a contract evaluation service and a contract negotiation service. TWUC performs audits on behalf of writers to ensure that publishers are accounting properly for sales of their works.

[28] Although TWUC has not yet concluded any scale agreements, it is presently in the process of negotiating Minimum Terms Agreements with publishers of volume and electronic works. TWUC has both a contracts committee and a grievance committee that represent members' interests with publishers.

[29] Over and above activities related to representing the direct economic interests of writers, TWUC has a program to send writers into schools to read their works. It also offers a manuscript evaluation service to writers for a fee.

[30] TWUC makes presentations to government on subjects such as the freedom to write and to publish and makes representations on matters of concern to writers such as the Multi-lateral Agreement on Investment and copyright. It lobbied for the creation of the Public Lending Program, which has benefitted all writers in Canada.

[31] TWUC was one of the founding members of the Canadian Copyright Licensing Agency ("CANCOPY"). This organization deals with the reprography and electro copying rights of authors. TWUC and CANCOPY have entered into a Memorandum of Understanding that confirms the latter's sphere of operation. The Tribunal takes official notice of this Agreement, a copy of which is attached to these Reasons for Decision as Annex "A".

[32] TWUC is also a founding member of a second copyright collective, The Electronic Rights Licensing Agency ("TERLA"). This collective was established to assist writers, photographers and illustrators to achieve controlled and fair dealing in electronic use of their creative work, primarily with respect to uses in commercial databases, on the World Wide Web and in multi-media productions.

Geographic and linguistic considerations

[33] The applicant seeks to represent a nation-wide sector of authors who write in languages other than French. It should be noted that authors of French language works are represented by a variety of artists' associations certified by the Tribunal according to genre (for example, the Union des écrivaines et écrivains québécois, the Société des auteurs, recherchistes, documentalistes et compositeurs, the Association québécoise des auteurs dramatiques and the Société professionnelle des auteurs et des compositeurs du Québec). The applicant indicated that it has members who write in languages such as Punjabi. No other

artists' association has come forward seeking to represent the interests of authors who write in these other languages.

[34] The applicant's headquarters is located in Toronto and it has a small office in British Columbia. Although it represents authors all across Canada, some 50% of TWUC's membership is located in Ontario and 22% is in B.C.

[35] TWUC's Constitution provides for five regional representatives on the National Council (a board of twelve directors that manages the association's affairs). The Constitution provides that one National Council representative is to be elected from each of the following areas: British Columbia and the Yukon; the Prairie provinces and the North-West Territories; Ontario; Quebec and Ottawa; and the Atlantic provinces.

[36] The Tribunal is satisfied that the applicant is equipped to serve a national sector and that such a sector is appropriate.

Existing literary works

[37] Two of the intervenors, the Department of Canadian Heritage ("PCH") and the Department of Public Works and Government Services Canada ("PWGSC") have expressed concern regarding the suitability of the proposed sector for collective bargaining. Although they are not opposed to the granting of certification to TWUC, they take the position that the sector must be defined in a manner that will not empower an artists' association to represent authors for the purpose of assigning and granting rights or licences under the *Copyright Act* (R.S.C. 1985, c. C-42, as am.) with respect to literary works already in existence and in respect of which assignments or licences will subsequently be negotiated with producers.

[38] PCH and PWGSC have requested that the sector definition be modified to add the words "but not in respect of any work created before and independently of a contract for services entered into between the author and a producer".

[39] In support of their position, PCH and PWGSC claim that the *Status of the Artist Act* is essentially labour/professional relations legislation that sets out the framework for collective bargaining between artists and producers over the minimal working conditions and remuneration of artists for their services. They contrast this with the *Copyright Act*, which they characterize as property legislation, that recognizes the existence of proprietary rights in the intellectual property known as copyright and governs such matters as the assignment and licensing of these rights.

[40] In PCH and PWGSC's view, there is an issue with respect to the degree to which each statute governs the remuneration of authorship of literary, dramatic,

musical or artistic works. The issue arises, they say, because the authorship of such works necessarily involves both a labour component (the creative talent to create an original work) and a property component (the final product). They directed the Tribunal's attention to a January 30, 1998 decision of the Copyright Board (*Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication, in Canada, of Musical or Dramatico-Musical Works [Tariff 2.A - Commercial Television Stations in 1994, 1995, 1996 and 1997]*, reported at (QL) [1998] C.B.D. No. 1), in which Vice-chair Hétu, writing in dissent, stated at footnote 22:

> CAB [the Canadian Association of Broadcasters] is incorrect in stating that the SAA [*Status of the Artist Act*] "contemplates setting the terms and conditions for composers qua copyright owners": CAB Reply, paragraph 100. Copyright is a good, not a service.

The intervenors' argument in this regard is that because copyright is a good, not a service, it is outside the permissible purview of bargaining under the *Status of the Artist Act*.

[41] PCH and PWGSC submit that the rights that flow from certification would permit an artists' association to represent only the interests of authors retained to create new works or works specifically adapted under a contract with the producer. It cannot represent authors of existing literary works for the assignment of or the granting of licences to their copyrights in these already existing literary works, as the appropriate framework for this activity is the *Copyright Act*, which allows only authors, their agents, representatives and collectives specifically mandated by them to carry out negotiations.

[42] Further, PCH and PWGSC submit that to allow an artists' association to represent authors with respect to negotiating the assignment or granting of licences to their copyrights in existing literary works would result in "logical inconsistencies", such as the right to negotiate agreements with respect to copyright in works created prior to the coming into force of the *Act* or the certification of the artists' association.

[43] The applicant considers it particularly important that the scope of collective bargaining include the right for it to represent the interests of authors with respect to their pre-existing works, for example when a producer subject to the *Status of the Artist Act* wishes to contract with these authors for the right to adapt one of their works that already exists in one form (volume, electronic or multimedia) into another medium (for example, film or television). TWUC made it clear that what it is seeking is not the right to represent the author who does the actual adaptation, but the right to continue to represent the interests of the original author when that person decides that he or she wishes to enter into negotiations with a producer over adaptation rights.

[44] TWUC presently advises its members on matters related to copyright, and in particular it is TWUC's policy to recommend that authors retain as many rights as possible when they first sell a work, so that they will be able to negotiate compensation for future exploitation of the work. As an example of the services to members it provides in this area, the applicant directed the Tribunal's attention to Exhibit 8, TWUC's publication entitled "Anthology Rates and Contracts". In TWUC's view, the advent of the *Status of the Artist Act* should not operate so as to prevent it from continuing to provide this service to its members. They submit that the intent of the *Act* was to strengthen the cultural sector; but limiting the scope of bargaining as the intervenor requests would disenfranchise a large number of artists.

[45] TWUC further points out that the definition of "scale agreement" in section 5 of the *Act* permits an artists' association to bargain not only minimum terms and conditions for the provision of artists' services, but "other related matters" as well. In their view, writing is a service that authors provide to producers, and allowing the use of an existing written work is either a service or a related matter. In TWUC's submission, the inclusion of provisions in a scale agreement setting the minimum terms and conditions that would apply if an author decides to licence or assign certain of his or her rights does not amount to licencing the rights themselves.

[46] TWUC submits that the effect of accepting the limitation sought by PCH and PWGSC would severely curtail what an artists' association could do to represent the interests of authors. It would create a gap between the regimes established by the *Status of the Artist Act* and the *Copyright Act*, by denying access to a mechanism to deal with certain types of copyright (for example, negotiation of the minimum terms that would apply to contracts for the right to adapt a written work for film or television - the so-called "grands droits" - for which no copyright collective presently exists). Where copyright collectives exist, potential areas of overlap can be resolved by means of Memoranda of Understanding such as the one agreed to between TWUC and CANCOPY.

[47] Finally, TWUC argues that artists should have the choice as to how they will deal with the rights to their works, be it through individual negotiation, agents, copyright collectives, scale agreements or a combination of these tools.

[48] The Union des écrivaines et écrivains québécois (UNEQ) also submitted representations to the Tribunal on this issue. They note that Parliament expressly included the authors of literary and dramatic works within the categories of independent contractors to whom the *Act* applies (subparagraph 6(2)(*b*)(i)). The artistic "service" that an author provides is the writing of a text and the use of the text that he or she has written. UNEQ states that in the case of authors, in the majority of, if not in almost all, cases, the contracting party will use a work that the author has already created. In UNEQ's submission, the fact that the text was

created before the federal producer contracted with the author, or after, in no way alters the fact that the federal producer contracts for this service, namely, the use of the literary and dramatic work that the author writes. They suggest that to interpret the word "service" narrowly to limit the scope of the *Act* to the commissioning of works that have yet to be created would mean that the *Act* would cease to have any application to authors and would be contrary to Parliament's clearly expressed intent that it apply to them.

[49] The Tribunal agrees with the PCH and PWGSC characterization of the *Act* as labour/professional relations legislation: subsection 18(a) of the *Act* directs the Tribunal to take into account the applicable principles of labour law when determining any question under Part II. However, the Tribunal rejects the implication that this characterization puts the legislation in some "watertight compartment" that limits the subject matter that can be bargained under its aegis. While matters related to copyright have not traditionally been a subject of negotiation in collective agreements found in the labour-management sector, this can perhaps be explained by the presumption in the *Copyright Act* that copyright in works made in the course of employment are owned by the employer[1].

[50] On the broadest level, the *Status of the Artist Act* is a form of human rights legislation: it recognizes and establishes certain basic rights for a discrete group of individuals in our society. In section 2 of the *Act*, the Government of Canada recognizes:

> (a) the importance of the contribution of artists to the cultural, social, economic and political enrichment of Canada;
> (b) the importance to Canadian society of conferring on artists a status that reflects their primary role in developing and enhancing Canada's artistic and cultural life, and in sustaining Canada's quality of life;
> (c) the role of the artist, in particular to express the diverse nature of the Canadian way of life and the individual and collective aspirations of Canadians;
> (d) that artistic creativity is the engine for the growth and prosperity of dynamic cultural industries in Canada; and
> (e) **the importance to artists that they be compensated for the use of their works**, including the public lending of them.

At section 3, Canada's policy on the professional status of the artist, is set out:

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[1] *Copyright Act* (R.S.C. 1985, c.C-42 as am.) ss.13(3). The Tribunal notes in passing that a number of the collective agreements between the Treasury Board of Canada (the federal government itself) and various employee bargaining agents (the Public Service Alliance of Canada, the Professional Institute of the Public Service and the Social Science Employees Association) contain provisions relating to authorship, including title page credit for authorship of original publications written by employees. The issue of copyright is thus not totally foreign to the collective bargaining sphere.

> Canada's policy on the professional status of the artist, as implemented by the Minister of Communications, is based on the following rights:
> (a) the right of artists and producers to freedom of association and expression;
> (b) **the right of associations representing artists to be recognized in law and to promote the professional and socio-economic interests of their members**; and
> (c) the right of artists to have access to advisory forums in which they may express their views on their status and on any other questions concerning them.

At section 7, the purpose of Part II of the *Act* (Professional Relations) is expressed:

> The purpose of this Part is to establish a framework to govern professional relations between artists and producers that guarantees their freedom of association, recognizes the importance of their respective contributions to the cultural life of Canada **and ensures the protection of their rights.**
>
> (Emphasis added)

[51] The *Act* gives effect to many of the provisions contained in the UNESCO *Recommendation Concerning the Status of the Artist* (Belgrade, 27 October 1980), to which Canada is a signatory. The Guiding Principles enunciated in this document include the following:

> 3. Member States, recognizing the essential role of art in the life and development of the individual and of society, accordingly have a duty to protect, defend and assist artists and their freedom of creation. For this purpose, they should take all necessary steps to stimulate artistic creativity and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission, and **to improve their status by acknowledging their right to enjoy the fruits of their work**. Member States should endeavour by all appropriate means to secure increased participation by artists in decisions concerning the quality of life. By all means at their disposal, Member States should demonstrate and confirm that artistic activities have a part to play in the nations' global development effort to build a juster and more humane society and to live together in circumstances of peace and spiritual enrichment.
> 4. Member States should ensure, through appropriate legislative means when necessary, that artists have the freedom and the right to establish trade unions and professional organizations of their choosing and to become members of such organizations, if they so wish, and should make it possible for organizations representing artists to participate in the formulation of cultural policies and employment policies, including the professional training of artists, **and in the determination of artists' conditions of work.** (Emphasis added)

[52] It is also worth noting that the most important human rights instrument of our time, *The Universal Declaration of Human Rights* (Paris, France, 10 December 1948), to which Canada is a signatory, sets out the following freedoms:

> Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. **Everyone has the right to form and to join trade unions for the protection of his interests.**

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. **Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**

(Emphasis added)

[53] From these various documents, the Tribunal concludes that the Government of Canada subscribes to two key principles: that artists have the right to be compensated for the use of their works and that artists' associations have the right to represent the interests of artists in obtaining such compensation.

[54] The *Status of the Artist Act* must be given an interpretation that is consistent with the purpose for which it was enacted. The rationale behind the development of the legislation was described by the then Minister of Communications, the Honourable Marcel Masse, in a presentation to the Standing Committee on Communications and Culture on November 7, 1989:

> In Canada, the complex subject of the status of the artist has been studied by any number of commissions and task forces. In 1951, the Royal Commission on National Development in the Arts, Letters and Sciences made the following observation:
>
> > No novelist, poet, short story writer, historian, biographer or other writer of non-technical books can make even a modestly comfortable living by selling his work in Canada. No composer of music can live at all on what Canada pays him for his compositions. Apart from radio drama, no playwright, and few actors and producers, can live by the sale of their work in Canada.
>
> This, in my opinion is about as damning a statement as you can make about the understanding and appreciation of the role of art. The commission was also concerned about the lack of specifically Canadian symbols, the absence of Canadians from our broadcasting and school systems, and the paucity of our own cultural products.
>
> Unhappily, the 1982 report of the federal Cultural Policy Review Committee, the Applebaum-Hébert committee, concluded that in 30 years, despite their overwhelming contribution to Canadian life, artists' living conditions were virtually unchanged. To quote the committee:
>
> > The income of many, if not most, of these artists classifies them as highly specialized, working poor.

> The Siren-Gélinas task force on the status of the artist, which I commissioned in 1986, stated that it was:
>
> > ... both remarkable and unfair that Canadian artists have been unable to garner national and international recognition for their work while labouring below the poverty line.
>
> If income is the standard by which we judge the value of a contribution to society, then the situation of our artists is totally unfair. On top of that, their incomes are entirely inconsistent with their long years of education and training and their rigorous, self-imposed discipline.
>
> (...)
>
> Clearly, then, improving the status of the artist will be one of the most important actions of this government in its current term in office. The socio-economic situation of professional artists in Canada is, to put it bluntly, grim.
>
> > *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture*, Second Session of the Thirty-fourth Parliament, 1989, Issue No. 2 at 2:7

[55] This situation existed despite the fact that Canada has had its own copyright legislation in place since 1924. Clearly, copyright legislation alone was not enough to protect the socio-economic interests of Canadian artists and Parliament believed that something more was required.

[56] However, the Tribunal also agrees with PCH and PWGSC's contention that Parliament's intention in passing the *Status of the Artist Act* was not to replace or modify the *Copyright Act*, and with their proposition that artists alone should have the right to decide how their works should be used or exploited. There is no doubt that the regime established by the *Copyright Act* continues to be the only practical avenue available to artists to protect their copyrights internationally and with respect to users not subject to the *Status of the Artist Act*.

[57] In the Tribunal's view, the *Status of the Artist Act* was intended to complement and supplement the regime provided in the *Copyright Act*. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work, thereby enhancing and promoting artists' freedom of choice as to how they will exploit the fruits of their creative talents.

[58] The statute must be given an interpretation that will fulfill Parliament's intention of improving the socio-economic status of artists in Canada. The *Act* mandates certified artists' associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the *Act*. Parliament did not expressly exclude matters

related to copyright from the ambit of collective bargaining. Indeed, the *Act* contains no express limitation on an artists' association's right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[59] Copyright is often referred to as a "bundle of rights". It involves an **interest** in a particular type of property (the work itself); for example, one person may own a work of art while another person owns the copyright to that work. Copyright embodies both a moral and an economic interest; indeed copyright is the fundamental socio-economic right of creators of artistic, dramatic, literary and musical works. Therefore, with the greatest of respect for our colleague at the Copyright Board, the Tribunal is of the view that copyright is not merely a good.

[60] Historically, self-employed artists have had two options when dealing with their copyrights: self management or collective administration through a copyright collective within the regime established by the *Copyright Act*. Artists who decide to manage their own rights maintain complete control: they decide who will be permitted to use their works and the fee for such use. To take advantage of the *Copyright Act* regime, artists assign their copyright to a collective society, thereby ceding control over the use of their work and the ability to negotiate individual fees. The collective society manages the copyright on behalf of the artist, sets the tariff for the use of works in its repertoire and collects and remits payment to the artist.

[61] The advent of the *Status of the Artist Act* provides a third option for certain artists. The *Act* enables certified artists' associations to negotiate with producers in the federal jurisdiction for the purpose of entering into scale agreements that establish the minimum terms and conditions that will apply to the provision of artists' services and other related matters. In the Tribunal's view, the right to use an existing work is a service that the artist who holds the copyright in that work may provide to a producer, and representing artists' interests in this fundamental socio-economic right is an appropriate activity for a certified artists' association. As an example, the artists' association may seek to negotiate with a producer provisions regarding the minimum fee to be offered to an artist in the sector for the use of one of his or her works in a new medium or as the basis for an adaptation.

[62] Under the *Status of the Artist Act* regime, artists retain control over the decision whether to accept a commission from a producer or to allow a particular producer to use one of their works. The artist remains free to negotiate individual contracts above the minimum, but no producer may offer less than the terms set out in the scale agreement to which the producer and the artists' association have agreed. For the use of the work, the artist receives, directly from the producer,

either the remuneration prescribed by the scale agreement or whatever greater amount the artist has been able to negotiate. To enforce the right to payment under the scale agreement, the artist has recourse to the dispute resolution procedure provided in the agreement and the resources of the certified artists' association.

[63] Artists' associations are democratic organizations. Before an artists' association can be certified to represent a particular artistic sector, section 23(1) of the *Act* obliges the Tribunal to assure itself that the association has adopted bylaws that, *inter alia*, give regular members the right to take part and vote in meetings and to participate in a ratification vote on any scale agreement that affects them. It is the members of an association who decide on the subjects that they wish their association to bargain on their behalf. In sectors where copyright collectives are functioning effectively, the members may very well decide not to mandate their association to bargain on any matters related to copyright; the choice is theirs.

[64] In certain sectors, the members of an artists' association may decide that it is appropriate for their association to seek to include matters related to their copyright in pre-existing works in a scale agreement. This collective bargaining activity does not make the artists' association the agent of the artist for the purpose of granting licenses or assignments of copyright for those works, but merely seeks to establish the minimum terms and conditions that would apply when an artist decides to licence or assign a particular copyright to a producer who is a party to the scale agreement. In the example given above, if the artist has already assigned his or her copyrights to a collective society for administration, then the artist would instruct the producer to deal with that organization; otherwise the artist can enter into individual negotiation with the producer, with the terms of the scale agreement setting the floor for the negotiations.

[65] The Tribunal hopes that this explanation of the manner in which the regimes created by the *Status of the Artist Act* and the *Copyright Act* can complement one another will clarify matters for the community. It therefore declines the government intervenors' request to modify the sector definition so as to prohibit collective bargaining in respect of the use of pre-existing works.

Membership restriction: Canadian citizens or landed immigrants

[66] In the course of its proceedings on the Playwrights Union of Canada ("PUC") application for certification (Decision No. 018, December 13, 1996), the Tribunal became aware of a potential for unintentional discrimination in the by-laws of certain artists' associations. In that case, the applicant had restricted its application for certification to a sector composed of "**Canadian citizens or landed immigrants**, with respect to works created in any language other than French for theatres subject to the *Status of the Artist Act*" (emphasis added). This self-imposed limitation was due to the fact that the PUC Constitution contained a restriction on membership based on status in Canada. The Tribunal accordingly limited the sector definition to mirror the composition of the group of artists eligible for membership in the association.

[67] The Tribunal explained its thinking in this regard in Decision No. 023 (Conseil des métiers d'art du Québec, June 4, 1997):

> [35] There are two aspects of CMAQ's application that are of concern to the Tribunal. First, although the applicant indicated that it wished to represent "all artists and artisans. . .", it also advised the Tribunal that at the annual general meeting scheduled for June 14, 1997, an amendment to the association's general by-laws will be proposed that would have the effect of restricting membership to artists and artisans who are Canadian citizens or landed immigrants living in Quebec. **The Tribunal's first concern stems from the fact that, once certified, the applicant would obtain the exclusive right to bargain on behalf of artists and artisans who would not be entitled to join the association, to vote on decisions affecting them or to participate in the activities of the association.** (Emphasis added)

[68] The *Status of the Artist Act* requires that, to be certified, an artists' association must have by-laws that give regular members the right to take part and vote in the meetings of the association and to participate in ratification votes on scale agreements that affect them (para. 23(1)*(b)*). However, if the by-laws of the association prevent an artist from becoming a member on the basis of their status in Canada, then an individual in the sector who is not a Canadian citizen or landed immigrant (and who therefore cannot join the association) is effectively disenfranchised.

[69] There are a number of types of status recognized in Canada other than citizenship: persons registered under the *Indian Act*, permanent residents, Convention refugees, visitors and Minister's permit holders may all lawfully be in Canada. The term "landed immigrant" is often used in lay terms to refer to those who have permanent resident status; to be "landed" is to have lawful permission to establish permanent residence in Canada.

[70] The Tribunal understands that the reason why some artists' associations have included a restriction on membership in their by-laws has to do with a

program that the Canada Council once provided to contribute to the operating expenses of associations that represented the interests of Canadian artists. This program was phased out after 1995, but the restrictions continue to exist in the by-laws of some associations. In the case of the CMAQ, mentioned above, the association chose to remove the restriction and thereby to open membership to professional artists regardless of their status in Canada and the Tribunal then removed the restriction on the sector definition (see Decision No. 026, June 26, 1998).

[71] The Tribunal does not intend to require all artists' associations to remove from their by-laws restrictions on membership based on citizenship or status in Canada. However, where such restrictions exist and are enforced by the association, the Tribunal may limit the scope of the sector so as to ensure that the association is not given the exclusive right to represent individuals who are prevented from joining and voting on matters affecting their interests.

[72] Because the applicant's by-laws contain a restriction on membership to citizens and landed immigrants, and the association was not able to demonstrate to the Tribunal's satisfaction that it habitually waives this condition for membership, the Tribunal will limit the sector definition to include only those authors of literary works who are Canadian citizens or landed immigrants.

Conclusion regarding the sector

[73] After considering all of the oral and written representations of the applicant and the intervenors, the Tribunal has determined that the sector suitable for bargaining is a sector composed of independent contractors who are Canadian citizens or landed immigrants, engaged by a producer subject to the *Status of the Artist Act* as:

i) authors of literary works in languages other than French, intended for publication in volume, electronic or multimedia form; or
ii) authors of literary works in languages other than French, initially published in volume, electronic or multimedia form, offered for performance or adaptation into other media including audio, audiovisual, multimedia and other electronic forms,

but excluding:

a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1996;
b) authors covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and
c) playwrights covered by the certification granted to the Playwrights Union of Canada by the Canadian Artists and Producers Professional Relations Tribunal on December 13, 1996.

Issue 3: Is the applicant representative of artists working in the sector?

[74] There are some 6,000 writers who benefit from the Public Lending Rights program. Not all of these individuals would necessarily be in the sector affected by TWUC's application, but this number gives some indication as to the potential size of the sector.

[75] TWUC's membership totals 1,212. Seventy of these members are also members of the LCP, which represents a total of 300 published poets. As TWUC has been mandated by LCP to represent it for the purpose of seeking certification, the Tribunal finds that as of the date of the application, TWUC was representative of some 1,442 writers in the proposed sector. We note that TWUC is presently engaged in an organizing campaign in an effort to increase its membership.

[76] No other artists' association has come forward seeking to represent the interests of the artists in the sector that the Tribunal has found to be suitable for collective bargaining. The Tribunal therefore finds that The Writers' Union of Canada is the artists' association most representative of artists working in the sector.

DECISION

[77] For all these reasons, and in view of the fact that the applicant is in compliance with the requirements of section 23 of the *Status of the Artist Act*, the Tribunal:

Declares that the sector suitable for bargaining is a sector composed of independent contractors who are Canadian citizens or landed immigrants, engaged by a producer subject to the *Status of the Artist Act* as:

i) authors of literary works in languages other than French, intended for publication in volume, electronic or multimedia form; or
ii) authors of literary works in languages other than French, initially published in volume, electronic or multimedia form, offered for performance or adaptation into other media including audio, audiovisual, multimedia and other electronic forms,

but excluding:

a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1996;
b) authors covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and
c) playwrights covered by the certification granted to the Playwrights Union of Canada by the Canadian Artists and Producers Professional Relations Tribunal on December 13, 1996.

Declares that The Writers' Union of Canada is the association most representative of artists in the sector.

An order will be issued to confirm the certification of The Writers' Union of Canada to represent the said sector.

Ottawa, November 17, 1998

David P. Silcox

André T. Fortier

Curtis Barlow

Meeka Walsh

ANNEX A