

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, December 31, 1998

File No. 96-0027-A

Decision No. 029

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY
THE CANADIAN ARTISTS' REPRESENTATION/ LE FRONT DES
ARTISTES CANADIENS

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 15 and 16, 1998

Quorum: David P. Silcox, Chairperson
André T. Fortier, Vice-chairperson
Robert Bouchard
Meeka Walsh

Appearances:

Barbara Terfloth, Jane Martin and Sharona Plakidas for the applicant, the Canadian Artists Representation / Le Front des artistes canadiens;
Jan Waldorf and Robert Jekyll for the Canadian Crafts Council;
Green Chercover, Joshua Phillips for the Writers Guild of Canada;
Kuretzky Vassos, George Vassos for the Directors Guild of Canada;
Marco Dufour for the Union des Artistes;
Susan Wallace for the Canadian Actors' Equity Association.

REASONS FOR DECISION

96-0027-A: In the matter of an application for certification filed by the Canadian Artists' Representation/Le Front des artistes canadiens

STATEMENT OF FACTS

[1] This decision concerns an application for certification submitted to the Canadian Artists and Producers Professional Relations Tribunal (“the Tribunal”) pursuant to section 25 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter “the Act”) by the applicant, the Canadian Artists' Representation/ Le Front des artistes canadiens (“CARFAC”) on November 7, 1996. The application was heard in Toronto on September 15 and 16, 1998.

[2] CARFAC originally applied for certification to represent a sector composed of “professional independent visual and media artists in Canada (excluding those artists represented by Regroupement des artistes en arts visuels du Québec (“RAAV”) and by the Conseil des Métiers[sic]) and who are the authors of original artistic works of research and expression including painting, sculpture, printmaking, engraving, installation, craft-based media, fine art film and video, performance art, fine art photography, textile art, drawing or any other form of expression of the same type, but excluding commercial photographers and commercial illustrators.”

[3] Consideration of this application was delayed while the Tribunal dealt with the applications of the Regroupement des artistes en arts visuels du Québec (“RAAV”) and the Conseil des métiers d'art du Québec (“CMAQ”). The proposed sector was subsequently redefined so as to apply to independent professional visual and media artists in Canada who are authors of original artistic works of research or expression commissioned by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-based media, textile art, fine art film and video, fine art photography or any other form of expression of the same type, excluding:

- a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997;
- b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;
- c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996.

[4] Public notice of the application was given in the *Canada Gazette* on Saturday, August 30, 1997 and in the *Globe and Mail* and *La Presse* on Wednesday, September 3, 1997. The notice also appeared in the Canadian Conference of the Arts bulletin (INFO-FAX) of October 1997 and in *The First Perspective* of October 1997. The public notice set a closing date of October 10, 1997 for the filing of expressions of interest by artists, artists' associations and producers.

[5] Expressions of interest were received from eight artists' associations and one producer:

- the Canadian Crafts Council ("CCC");
- the Canadian Actors' Equity Association ("CAEA");
- the Union des Artistes ("UDA");
- the Directors Guild of Canada ("DGC");
- the Association des réalisateurs et réalisatrices du Québec ("ARRQ");
- the Writers Guild of Canada ("WGC");
- the Société des auteurs, recherchistes, documentalistes et compositeurs ("SARDeC");
- the Conseil des métiers d'art du Québec ("CMAQ"); and
- the National Film Board of Canada ("NFB").

[6] In the period between October 10, 1997 and the date of the hearing, the concerns of CMAQ, the UDA and SARDeC were resolved. As a result of a review of the CMAQ sector definition conducted by the Tribunal (Decision No. 026, issued June 26, 1998), the CMAQ now represents all craftspeople in the province of Quebec and these artists and artisans are therefore excluded from the scope of CARFAC's proposed sector. CARFAC and the UDA reached an agreement on July 7, 1998 on the matters of concern to UDA regarding performers. CARFAC and SARDeC also reached an agreement on September 11, 1998 on matters of concern to SARDeC regarding authors in film and audio-visual media. The Tribunal hereby takes official notice of the above-mentioned agreements, which are annexed to these Reasons for Decision.

[7] In the course of the hearing, the Directors Guild of Canada reached an agreement with CARFAC which included a provision that the latter would amend its proposed sector description to read "fine art film and video art", modifying the previous reference to "fine art film and video". The Tribunal hereby takes official notice of this agreement, which is annexed to these Reasons for Decision.

[8] CARFAC's application for certification raises the following issues:

- (1) The suitability, for bargaining purposes, of the sector proposed by CARFAC.
- (2) Whether CARFAC is representative of artists in the sector.

- (3) Whether CARFAC's by-laws comply with subsection 23(1) of the *Status of the Artist Act*.

THE ISSUES

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

[9] The revised sector proposed by CARFAC would be composed of all independent professional visual and media artists in Canada who are authors of original artistic works of research or expression commissioned by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-based media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type, excluding:

- a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997, as amended June 26, 1998;
- b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;
- c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996.

[10] 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. In this case, the Tribunal also wishes to consider certain restrictions on membership contained in the CARFAC Constitution.

Community of interest of the artists

[11] Visual art has traditionally been recognized as including painting, sculpture, printmaking, engraving and drawing. These disciplines constitute the core of the visual arts and it is clearly appropriate to include them in a single sector for bargaining purposes. In Decision No. 021 (Regroupement des artistes en arts visuels du Québec, April 15, 1997) the Tribunal examined the disciplines of performance art, installation and video art and concluded that practitioners of these art forms qualify for coverage under the *Status of the Artist Act* and that it was appropriate to include them in the same sector as traditional visual artists. However, in the instant case, a number of the intervenors have raised concerns about the definition of certain of the disciplines that CARFAC seeks to represent, including the potential for overlap with existing certification orders. The Tribunal therefore considers it necessary to re-examine the definitions in light of these concerns.

Installation art

[12] The Tribunal referred the applicant and the intervenors to the definition of installation art found in the Regroupement des artistes en arts visuels du Québec (“RAAV”) decision:

A form of artistic expression whereby a visual artist 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 two-dimensional and three-dimensional limits of artistic work while incorporating an environment in which the spectator could become an integral part.

CARFAC agreed that this was an appropriate description of this discipline.

[13] None of the intervenors took issue with this description, and the Tribunal hereby confirms that this is its understanding of the reference to “installation” in the applicant’s proposed sector definition.

Performance art

[14] The applicant also agreed that the description of performance art contained in the RAAV decision is accurate:

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.

[15] The Union des Artistes (“UDA”), an artists’ association certified by the Tribunal to represent performing artists, reached an understanding with CARFAC which provides that the author of a performance, an installation or a fine art video may appear in his or her own work without being subject to the UDA’s jurisdiction. A copy of the agreement is appended to these Reasons for Decision.

[16] The Canadian Actors' Equity Association (“CAEA”), expressed a similar concern to that of the UDA regarding the potential overlap with the sector for which they were certified by the Tribunal (Decision No. 010, April 25, 1996). CAEA was particularly concerned with situations in which the creator of a work of performance art, a visual artist, engages an actor to perform or interpret the work. In its presentation to the Tribunal, CAEA indicated that it supported CARFAC's application for certification but requested that the Tribunal take notice of CAEA’S certification. CAEA also indicated that although it had not yet formalized an understanding with CARFAC, it believes that the two organizations will be able to work together in the best interests of artists. For its part, CARFAC stated its full intention of respecting existing certifications.

[17] Performance artists have a background in fine arts and practice an art form which finds its source in painting and sculpture, rather than theatre. It is an art form in which, most often, the artist employs her or his own body as both subject and performance. Performances of such pieces are found usually in art galleries rather than theatres. The Tribunal is satisfied that CARFAC, the UDA and the CAEA have a mutual understanding of the divisions between their respective areas of jurisdiction, as outlined above, and it adopts this understanding.

[18] The Tribunal is of the view that there is a community of interest between those who practice performance art and those engaged in the traditional categories of visual art. This community of interest differs from that of performers within the traditional meaning of this term and it is therefore appropriate to include artists who practice this form of artistic expression in the same sector as visual artists.

Craft-based media

[19] The applicant explained to the Tribunal that “craft-based media” relies for its definition on the material used. The material could include, for example, clay, glass, wood, leather, metal or fibre which are used by a visual artist in the preparation of a fine art work. The intent of the visual artist is to create a work of art and not a craft piece, using materials such as glass, clay, wood, leather and fibre instead of, or in addition to, traditional materials such as canvas, paper, oil paint, acrylic, watercolour, chalk, etc. CARFAC indicated that a media-based definition may not be suitable in all cases, but that by using this terminology it was seeking to describe the materials already being used by its members. The applicant clarified that in its reference to craft-based media, it was not seeking to

include all craftspeople in the sector, but to identify professional visual artists working with those media in the creation of a fine art work.

[20] The Canadian Crafts Council (“CCC”) and two of its member councils, the Alberta Crafts Council and the Nova Scotia Designer Crafts Council, strongly opposed CARFAC’s application for certification insofar as it might extend to craftspeople. The CCC is an association of provincial crafts councils. It is currently restructuring to become the Canadian Crafts Federation, which may wish to seek certification on behalf of craftspeople at some future date.

[21] In its presentation, the CCC expressed concerns about the lack of consultation between CARFAC and itself and their own present inability, in what they identify as a transitional period, to draw together the necessary resources to address the relationship between CARFAC and the CCC’s members thoroughly. The CCC outlined the differences between a crafts association and CARFAC, indicating that crafts associations play a useful and active role in marketing whereas CARFAC identifies its functions largely in the area of establishing fees and working conditions. They indicated that craftspeople have an expectation that the organization that represents them will play a role in marketing, which CARFAC does not do.

[22] In its submission, the CCC attempted to draw some distinction between crafts and the disciplines that would fall within CARFAC’S purview. The CCC acknowledged that there are a number of ways to distinguish visual artists from craftspeople, including the intention of the artist. The CCC also indicated that craftspeople would seek different venues from those used by visual artists for exhibition or sale of their works. The CCC representatives agreed with a suggestion by CARFAC that artists often identify themselves as either visual artists or craftspeople, but pointed out that third parties such as the Canada Council may impose external definitions for administrative purposes. Thus, artists may adopt the definition that is most advantageous for a particular purpose. However, the CCC admitted that where a work straddles both crafts and visual arts, artists decide for themselves which categorization to use, and thus in fact are self-defining.

[23] The Tribunal is of the opinion that visual artists who express themselves using craft-based media are artists who would fall within the traditionally recognized categories of painting, drawing, engraving, sculpture and print-making. It is their intention to create a fine art work. The Tribunal accepts the applicant’s explanation that it has used the expression “craft-based media” simply to identify the materials used in the making of fine art works, and not for the purpose of including craftspeople in their sector. The Tribunal is of the view that visual artists who express themselves using craft-based media share a community of interest with other visual artists and therefore are appropriately included in this sector.

[24] In its decisions in *Regroupement des artistes en arts visuels du Québec* (Decision No. 021, April 15, 1997) and the *Conseil des métiers d'art du Québec* (Decision No. 023, June 4, 1997), the Tribunal dealt with the potential for overlap between craftspeople and visual artists by recognizing the right of artists to define themselves. Given the apparent agreement of the parties that this is a desirable approach, the Tribunal is of the view that it is appropriate to adopt the same rationale in the instant case. Accordingly, the Tribunal will exclude artists who identify themselves solely as craftspeople from the scope of the visual arts sector sought by CARFAC.

Textile art

[25] On the basis of the applicant's testimony, the Tribunal understands textile art to be a form of artistic expression executed by a visual artist using fibres to create a work of fine art such as a tapestry. In some instances, in the creation of a textile art piece, the visual artist could be using already existing material and not necessarily creating the fibre, as in fine art installations which include previously made garments.

[26] Before including textile artists in a visual arts sector, the Tribunal must satisfy itself that this discipline 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

(...)

[27] 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;

[28] On the basis of the applicant’s explanation of textile art, the Tribunal is satisfied that such works are works of artistic craftsmanship within the meaning of the *Copyright Act*, and that practitioners of this art form can properly be included in the sector.

Fine art film and video art

[29] By “fine art film and video art”, the Tribunal understands the applicant to mean the creation of works conceived, produced and realized by a visual artist herself or himself. In Decision No. 021 (Regroupement des artistes en arts visuels du Québec, April 15, 1997), video art was defined as:

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. [at paragraph 24]

[30] The applicant explained that in fine art film and video art, there is rarely a hierarchical structure of director and producer as in commercially produced films and videos, and the concept, from beginning to end, is with one creator. The producer and the artist are most often the same person and the intent is to create a work of art. The exhibition venues sought for these art productions, namely art houses, art galleries or artist-run centres, distinguish them from commercial film productions.

[31] The concerns expressed by the Union des Artistes with respect to performance artists applied equally to fine art film and video art, and were resolved in the context of the memorandum of understanding signed by the UDA and CARFAC that the Tribunal has already noted.

[32] The Writers Guild of Canada (WGC) expressed concern that there is a potential overlap between their certification and the sector sought by CARFAC in the area of fine art film and video art, and installations that include a film component. The Writers Guild certification covers authors of literary and dramatic works in English written for radio, television, film, video or similar audiovisual production including multimedia and authors who adapt or translate literary or dramatic works originally written in a language other than English, as

an English language script for radio, television, film, video or similar audiovisual production including multimedia.

[33] WGC indicated that in its view, the distinguishing factors between the work done by its members and those CARFAC seeks to represent are the venue of exhibition and the intent of the writer. The specific difference, the Tribunal was told, between the fine art film and video art referred to in CARFAC's application and the film and video which fall within WGC's certification is in the "economic realities of the exploitation of a piece." WGC therefore requested that the artists for which it had been certified by the Tribunal in Decision No. 016 (June 25, 1996), be expressly excluded from any certification granted to CARFAC.

[34] In its reply, CARFAC distinguished between visual art works (i.e. the work of the artists it seeks to represent) and literary art works (those represented by WGC and other writers' associations).

[35] In the Tribunal's opinion, the intention of the artist and the venue of exhibition are appropriate characteristics to use in determining the sector within which an artist works. For example, an artist commissioned to prepare a fine art film or a piece of video art for exhibition in a gallery would be within the visual arts sector, but the same artist, if engaged by a broadcaster to write the script for a fine art film or piece of video art intended for broadcast would fall within the sector represented by WGC. The Tribunal hastens to add that negotiations between a producer and a visual artist for the **right to adapt** one of that artist's existing works for broadcast would not fall within the sector represented by WGC. For the sake of clarity, the Tribunal will modify the sector definition to exclude artists represented by the Writers Guild of Canada from the scope of the visual arts sector sought by CARFAC.

[36] The Directors Guild of Canada had concerns similar to those of WGC in so far as CARFAC's proposed sector might affect the creative and logistical personnel in the film and television industry that it represents, including film directors and editors. During the course of the hearing, the DGC and CARFAC reached an agreement that the visual arts sector sought by CARFAC excludes individuals represented by DGC who work in the fields of television, film, video or similar audiovisual production including multimedia. The Tribunal hereby confirms its understanding and approval of this agreement, which is appended to these Reasons for Decision.

[37] The Association des réalisateurs et réalisatrices du Québec ("ARRQ"), which represents directors of certain audio-visual works, intervened in CARFAC's application to request that the Tribunal take note of its certification (Decision No.024, December 30, 1997). Specifically, ARRQ requested that the Tribunal define video art in the same manner as was done in the RAAV case (Decision No. 021); that it exclude art film from the visual arts sector; that it

specify that video art is generally not intended for broadcast; and that it exclude independent contractors in cinema and audiovisual media, and particularly those covered by the certification granted to ARRQ, from the visual arts sector.

[38] The Tribunal is of the view that the distinguishing features of fine art film and video art, namely the intention of the artist and the venue of exhibition, are adequate to distinguish this form of visual art from the works of artists in the sector represented by ARRQ. However, for the sake of consistency with the certification order issued to the RAAV and to avoid any disputes over this issue in the future, the Tribunal will specify that artists covered by the certification granted to ARRQ are excluded from the visual arts sector.

[39] The National Film Board of Canada (“NFB”) also expressed concern about the inclusion of fine art film and video art in the proposed sector. The NFB’s concern was in the area of possible confusion during the production of an audiovisual work. It asked how a producer would distinguish a visual artist covered by the proposed sector definition, whose creativity is expressed in the form of fine art film or video art, from the director of an experimental film. The NFB requested that specific professions be listed in the sector definition in order to ensure that directors of audiovisual works are excluded from the visual arts sector. The Tribunal is of the view that the explanations, exclusions and memoranda of agreement referred to in these Reasons for Decision should be sufficient to satisfy the concern raised by the NFB, and therefore declines to identify specific professions in the definition of the visual arts sector.

Fine art photography

[40] In using the term “fine art photography”, the Tribunal understands the applicant to mean an art form in which the visual artist is a photographer who makes images as a means of artistic expression. These works are produced as signed single art prints or in limited editions for exhibition in art galleries or portfolio format. Fine art photography is distinguished from commercial photography in that it is created at the artist’s behest and not for a commercial client for the purposes of advertising or marketing a product.

[41] To avoid any possible confusion with the commercial photographers represented by the Canadian Association of Photographers and Illustrators in Communications (“CAPIC”), which was certified by the Tribunal on April 26, 1996 (Decision No. 012), the proposed sector definition contains a specific exclusion recognizing CAPIC’s certification.

Conclusion regarding community of interest

[42] In summary, the Tribunal is of the view that installation art works are works produced by artists who have a background in fine arts. While not

necessarily permanent, these art pieces can be subject to copyright. Fine art film and video art, textile art and fine art photography are also art works produced by artists who have fine arts backgrounds and whose intent in production is a visual art work. These works can also be subject to copyright. Consequently, the Tribunal is of the opinion that installation art, fine art film and video art, textile art and fine art photography are artistic works within the meaning of the *Copyright Act* and therefore the authors of such works are subject to the *Status of the Artist Act* and can appropriately be included in a sector with visual artists. The Tribunal is also of the view that there is a community of interest between those who practice performance art and those engaged in the traditional categories of visual art, and that visual artists who express themselves using craft-based media share a community of interest with other visual artists and are also appropriately included in this sector.

History of professional relations

[43] The applicant indicated that CARFAC was founded in 1967 with the objective of promoting visual arts and the status of visual artists in Canada. In lobbying for professional conditions for artists, CARFAC has addressed issues of copyright, rental fees for artists, freedom of expression, health hazards, income tax, arms-length funding, contract negotiations and arts policies. CARFAC drew up a standard contract for public commissions and lobbied successfully with the Canada Council to make payment of fees a requirement for eligibility to the Program of Assistance to Art Galleries. As well, CARFAC made representations on copyright reform during the process leading up to the 1988 amendments to the *Copyright Act*.

[44] In 1990, CARFAC established the CARfac©Collective to create opportunities for increased income for visual and media artists. This collective offers services to affiliated artists which include negotiating terms for copyright use and issuing appropriate licenses to the user. The applicant indicated that membership in the collective is not mandatory, and that the copyright Fee Schedules it has established represent minimum payments for the use of the various copyrights of visual and media artists. When authorized to do so by a member, the Collective negotiates fees, issues licences to users and/or administers reprography royalty payments to visual artists.

[45] The applicant provided the Tribunal with details of the services it offers to members. These include providing documentation such as the “Certificate of Canadian Origin” for use when art-works are temporarily exported for exhibition, and the “International Association of Artists Card” which allows artists free access to a number of museums in Canada and abroad. The organization establishes Fee Schedules recommending the minimum fees to be paid to artists for use of their copyrights, for example, for exhibition or reproduction. It

provides Standard Licenses for Temporary Exhibition, Permanent Collection Exhibition, Reproduction and Digital Reproduction, which were developed by the Copyright Collective. It also provides national links for artists through its referral services and through its membership in the Canadian Conference of the Arts.

[46] The applicant indicated that CARFAC and RAAV have established a working relationship. They cooperate with respect to the exchange of documents and services, synchronizing French/English services to "fill in the gaps" in both organizations. For example, RAAV represents CARFAC on copyright matters in Belgium, France and Germany.

[47] CARFAC provides its members with a number of publications and documents. These include its semi-annual publication, *Calendar*; a 1989 retrospective entitled "The Power of Association"; a Public Commissions Contract and Artist-Gallery Exhibition Contract; Guidelines for Professional Standards in the Organization of Juried Exhibitions; and Taxation Information for Canadian Visual Artists.

[48] With respect to scale agreements or other agreements relating to the terms of engagement of artists, CARFAC indicated that as well as the agreement with RAAV on copyright matters, they currently have an agreement with CANCOPY to distribute reprography payments to visual artists. The applicant also indicated that when the Canada Council Art Bank began to sell its holdings, CARFAC members were protected due to the contracts CARFAC had helped negotiate.

Geographic and linguistic considerations

[49] The applicant indicated that its membership is national. It has a national office in Toronto and provincial secretariats in Vancouver, Winnipeg, Regina, Saskatoon, Toronto and St. Johns. The National Executive and representatives from each province constitute the National Council.

[50] As noted above, the Tribunal has previously certified RAAV to represent visual artists in the province of Quebec. As a result the scope of the sector for which CARFAC could be certified is limited to artists working elsewhere in Canada. The applicant informed the Tribunal that its language of operation is English but that it works cooperatively with RAAV in providing services to visual artists in both official languages.

Membership Limitation: Canadian citizens and landed immigrants

[51] Subsection 23(2) of the *Status of the Artist Act* provides:

(2) No by-laws of the association may have the effect of discriminating unfairly against an artist so as to prevent the artist from becoming or continuing as a member of the association.

[52] Article 1.1(a)(i) of the CARFAC Constitution establishes the conditions for regular voting membership in the association. Among other things, this section provides that visual artists are eligible for membership if they “hold Canadian citizenship or landed immigrant status and are resident in Canada”.

[53] In a line of cases commencing with the Playwrights Union of Canada (Decision No. 018, December 13, 1996) and culminating most recently in The Writers’ Union of Canada (Decision No. 028, November 17, 1998), the Tribunal developed its policy with respect to the definition of bargaining sectors when the constitution and/or by-laws of the only applicant for certification contains limitations on eligibility for membership based on an artist’s status in Canada.

[54] The Tribunal explained its concern regarding this issue 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)

[55] The limitation on membership eligibility in CARFAC's Constitution would, if enforced, have the effect of preventing artists who are not Canadian citizens or landed immigrants from joining the association.

[56] Paragraph 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:

18. The Tribunal shall take into account
 - (a) In deciding any question under this Part, the applicable principles of labour law; and
 - (. . .)

[57] One such principle of labour law is the “Past Practice Rule” which allows labour relations boards to look behind the bare words of a trade union's constitution and by-laws. An applicant trade union can be certified, despite the presence of a discriminatory by-law, if it can provide evidence to show that the discriminatory by-law is not enforced. It is not enough for an applicant to state

that such a by-law will not or has never been applied. Evidence must be adduced of specific examples demonstrating that the discriminatory by-law is not enforced.

[58] When the Constitution or by-laws of an artists' association contain limitations on membership that are unrelated to the individual's artistic or professional qualifications and could have the effect of discriminating unfairly against the artist, the Tribunal has three choices. It can require, as a pre-condition to certification, that the discriminatory provision be removed; it can fashion the sector definition so as to remove artists who are not eligible for membership from the scope of the exclusive right to bargain that the artists' association obtains upon certification; or it can accept evidence that the artists' association has a past practice of not enforcing the discriminatory provision in its Constitution or by-law.

[59] In the instant case, the applicant has provided evidence that satisfies the Tribunal that it routinely waives the provisions of its Constitution limiting membership to Canadian citizens and landed immigrants. Accordingly, on the facts of this case, the Tribunal has determined that it would not be appropriate to impose a status-based limitation on the scope of the sector.

Conclusion regarding the sector

[60] 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 all independent professional visual and media artists in Canada who are authors of original artistic works of research or expression commissioned by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-based media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type, excluding:

- a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997 as amended June 26, 1998;
- b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;
- c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996;
- d) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997;

- e) artists 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
- f) artists who identify themselves as craftspeople rather than visual artists.

Issue 2: Is CARFAC representative of the artists in the sector?

[61] The *Status of the Artist Act* applies only to independent professional artists. In admitting visual and media artists to regular voting membership, CARFAC applies the International Association of Artists' definition of a professional artist, which is:

One who earns a living through artmaking; or possesses a diploma in an area considered to be within the domain of the fine arts; or teaches art in a school of art or applied art; or whose work is often seen by the public or is frequently or regularly exhibited; or is recognized as an artist by consensus of opinion among professional artists.

The Tribunal is satisfied that this definition is consistent with the requirements of the *Status of the Artist Act*.

[62] The applicant provided the Tribunal with an extract from a Cultural Human Resources Council sub-sectoral committee report on Visual Art and Craft that stated:

According to the 1991 Census data ... Canada's visual arts and crafts sub-sector then encompassed approximately 26,000 visual artists and craftspeople (10,800 and 15,500 respectively), working in drawing, painting, carving, sculpture, metalsmithing, printmaking, tapestry, video and performance art and "design".

[63] Following the 1996 Census, Statistics Canada reported that there were 13,200 creative and performing artists in Canada and 18,685 craftspeople and artisans. The former number includes painters, sculptors and other visual artists, but no further information is available as to the number who meet the criteria to be considered a "professional". The applicant also pointed out that it is difficult to determine how many of these artists are self-employed and therefore eligible for coverage under the *Status of the Artist Act*.

[64] In its application for certification the applicant indicated that its membership totals 2,060. Of these, 78 are located in Quebec and therefore fall within another sector (RAAV or CMAQ).

[65] The applicant indicated its membership is distributed across Canada and reported to the Tribunal that there is a strong network of support between regional and national organizations which together provide the applicant with volunteer resources for its operations.

[66] No other artists' associations have come forward to represent visual artists in the sector the Tribunal has found suitable for collective bargaining.

[67] The Tribunal therefore finds that the applicant is the organization most representative of artists in the above-described sector.

Issue 3: Subsection 23(1) of the *Status of the Artist Act*

[68] Subsection 23(1) of the *Status of the Artist Act* provides:

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.

[69] Section 2.6 of CARFAC's Constitution and by-laws sets out meeting procedures and the right of regular members to vote on questions submitted at a member's meeting. However, the by-laws do not specifically grant regular members the right to participate in a ratification vote on scale agreements affecting them. Accordingly, the Tribunal informed CARFAC that its by-laws were not in compliance with the mandatory prerequisites to certification.

[70] On December 29, 1998, the applicant informed the Tribunal that its membership had voted to amend the Constitution to add the following by-law:

Every regular voting member of CARFAC shall have the right to participate in a ratification vote on any scale agreement or schedule that affects them. The Board of Directors shall determine the means by which the ratification vote will be conducted in each case. A scale agreement shall be considered to be approved if passed by a majority of the votes cast.

[71] The Tribunal is of the opinion that the by-laws, as amended, comply with the requirements of paragraph 23(1)(b) of the *Status of the Artist Act*.

[72] The Tribunal notes with concern the current circumstances of both CARFAC and the CCC, as expressed in the oral evidence of both parties. These are national organizations of artists and craftspeople and both groups find themselves understaffed and relying primarily on the support of volunteers for their operations since neither national body receives government funding. One of the primary mandates of the Tribunal is to certify artists' associations as bargaining agents to secure, for artists, fair working conditions and adequate fees for their labour. Without adequate financial support, these artists' associations are unable to function on behalf of the artists for whom the *Status of the Artist Act* was established.

DECISION

[74] For all these reasons, and in view of the fact that the applicant is now 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 all independent professional visual and media artists in Canada who are authors of original artistic works of research or expression commissioned by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-based media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type, excluding:

- a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997 as amended June 26, 1998;
- b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;
- c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996;

- d) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and
- e) artists 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
- f) artists who identify themselves as craftspeople rather than visual artists.

Declares that the Canadian Artists' Representation/Le Front des artistes canadiens is the association most representative of artists in the sector.

An order will be issued to confirm the certification of the Canadian Artists Representation/Le Front des artistes canadiens to represent the said sector.

Ottawa, December , 1998

David P. Silcox

André T. Fortier

Robert Bouchard

Meeka Walsh

Agreement between CARFAC and UDA

Agreement between CARFAC and SARDEC

Agreement between CARFAC and DGC