

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, November 26, 1999

File N° 1350-99-001

Decision No. 030

**IN THE MATTER OF AN APPLICATION FOR REVIEW OF
DECISION NO. 010 (CANADIAN ACTORS' EQUITY ASSOCIATION)
FILED BY THE NATIONAL ARTS CENTRE CORPORATION**

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

The application for review is dismissed.

Place of hearing: Ottawa, Ontario

Date of hearing: November 26, 1999

Decision rendered from the Bench with Reasons to follow.

Quorum: David P. Silcox, presiding member
Moka Case, member
Meeka Walsh, member

REASONS FOR DECISION

1350-99-001: In the matter of an application for review of Decision No. 010 (Canadian Actors' Equity Association) filed by the National Arts Centre Corporation.

BACKGROUND

[1] This decision relates to an application for review filed on June 9, 1999, pursuant to section 20 of the *Status of the Artist Act* (S.C. 1992, c. 33, the "Act") by the National Arts Centre Corporation ("the NAC" or "the Applicant"). The application requests that the Tribunal review Decision No. 010 (issued April 25, 1996) which granted certification to the Canadian Actors' Equity Association ("CAEA") to represent the following sector:

a sector composed of independent contractors engaged to perform the function of actor (including principal, chorus, journeyman, apprentice actor, mime, narrator, local jobber, swing/understudy, or extra), singer (including soloist, performer, ensemble studio artist, chorus member, apprentice, understudy/cover or extra), dancer (including guest artist, apprentice dancer or understudy/sharer), production stage manager, stage manager, assistant stage manager, stage management apprentice, stage director, assistant stage director, fight director, fight captain, choreographer, assistant choreographer, dance captain, ballet master or mistress, resident choreologist, coach or repetiteur in a live performance in theatre, opera, ballet, dance, industrial show, cabaret show or concert performance whether or not such performance or entertainment is presented in a theatre or elsewhere, with the exception of :

- (a) singers covered by the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada; and
- (b) independent contractors in the enumerated categories who are covered by the 1992 agreement between Canadian Actors' Equity Association and the Union des Artistes.

[2] Specifically, the NAC requests that the Tribunal "reconsider or amend [Decision No. 010] or alternatively under section 26 of the *Act*, clarify the scope of the sector determination...".

[3] A panel of the Tribunal convened on November 26, 1999 to consider a motion by the CAEA to dismiss the application.

[4] The application for review arises out of a notice to bargain served on the applicant by the CAEA on April 20, 1999. The CAEA was seeking to enter into negotiations for the purpose of concluding a scale agreement with the applicant in

respect of the NAC's production of the *Gypsy Baron* (the "production") pursuant to section 31 of the *Act*.

[5] On May 12, 1999, the applicant informed the CAEA that the artists on behalf of which it wanted to bargain were not covered by the certification order issued by the Canadian Artists and Producers Professional Relations Tribunal on April 25, 1996. In particular, the NAC stated that it was not a producer engaging independent contractors to perform in the sector covered by Decision No. 010. Furthermore, the production was not a "theatrical performance" but rather a "symphonic performance of the opera in concert", a type of performance not included in the sector definition. On May 19, 1999, the CAEA replied to the NAC and again invited them to engage in negotiations for a scale agreement.

[6] On June 7, 1999, pursuant to section 45 of the *Act*, the CAEA requested the appointment of a mediator. Two mediators were appointed on June 21, 1999. Meanwhile, on June 9, 1999 the NAC formally requested a reconsideration of Decision No. 010 under section 20 of the *Status of the Artist Act* and requested that mediation efforts not commence until the Tribunal rendered its decision in the application for review. On July 2, 1999, the parties were informed by the Federal Mediation and Conciliation Service that mediation efforts would be held in abeyance until the Tribunal rendered its decision.

[7] The CAEA was asked to provide representations with respect to the NAC's request for reconsideration. In its response, the CAEA took the position that the application should be dismissed as untimely and inappropriate. To support its position, the CAEA stated that the certification order covered singers engaged in concert performances, the relevant portions of the sector definition follow:

A sector composed of independent contractors engaged to perform the function of (...) *singer* (including soloist, performer, ensemble studio artist, chorus member, apprentice, understudy/cover or extra), (...) in a live performance in theatre, opera, ballet, dance, industrial show, cabaret show or *concert performance* whether or not such performance or entertainment is presented in a theatre or elsewhere (...)[Emphasis added]

The CAEA also maintained that if the NAC required clarification of the sector, it should have done so at the hearing or, alternatively, requested a reconsideration of the decision within the 30-day period set out in the *Tribunal Procedures*.

[8] In its reply, the NAC addressed the issues of timeliness and appropriateness of the application. The NAC submitted that the Tribunal should extend the 30-day limit for a reconsideration on the grounds that it was not aware a reconsideration was necessary until it received the CAEA's notice to bargain dated April 20, 1999.

[9] The NAC further submitted that the public notice announcing the CAEA's application for certification did not indicate that the proposed sector could apply to singers in a symphonic performance. As a result, the Applicant alleged that there had been a failure to provide "due process" to properly advise those potentially affected by the decision, should it apply to symphonic performances.

[10] The NAC also submitted that the term "concert performances" should be interpreted and restricted to its meaning within the industry and that these performances are limited to performances within a theatrical context.

[11] The CAEA requested, by way of a motion, that the NAC provide particulars and material facts in support of its proposition regarding the definition of a symphonic performance of an opera in concert. On October 27, 1999, the Tribunal issued an order requiring the parties to make submissions in this respect.

PARTICULARS OF SUBMISSIONS

NAC's submissions

[12] The NAC asserts that the intention of the CAEA was to be certified only for a sector consisting of "theatrical performances" or performances comprised of "staged events" involving "elements of theatrical staging, direction, lighting and costuming". The NAC relies on the public notice and the sector description provided by the CAEA in its application for certification.

[13] In addition, the NAC argues that the inclusion of these performers would expand the sector with the result that a public notice would have to be issued pursuant to section 25 of the *Act*.

[14] Moreover, the NAC alleges that the terms "concert performance" and "theatrical performances and entertainments" can be distinguished from a "symphonic performance of opera in concert". The NAC relies on dictionary definitions of the terms "theatrical", "symphonic" and "concert" in support of its proposition that the *Gypsy Baron* was a symphonic performance of an opera in concert and not a theatrical event, as it did not include the elements of staging, direction, costumes and lighting usually found in theatrical events. The definitions follow:

theatrical (...) Of or pertaining to a theater, or to the scenic representations; resembling the manner of dramatic performers; histrionic; hence, artificial; as, theatrical performances; theatrical gestures (...)

(...)

symphonic (...) 1. Symphonious. 2. (Mus.) Relating to, or in the manner of, symphony; as, the symphonic form or style of composition

(...)

concert (...) a performance of music by players or singers not involving theatrical staging
v 1: contrive by mutual agreement, as of a plan 2: settle by agreement; “concert one’s
differences”
(...)

CAEA’s submissions

[15] The CAEA asserts that the sector definition includes and was always intended to include symphonic performances of opera in concert and relies on the reciprocal agreement between the CAEA and the American Federation of Musicians of the United States and Canada (AFM) which provides that singers performing on stage, in the pit or off stage come under the jurisdiction of the CAEA.

[16] Furthermore, the CAEA contends that the *Gypsy Baron* was a concert performance and thus falls within the sector definition. According to the CAEA’s submissions, a concert performance is distinguished from a theatrical or operatic performance by the lack of indicia of theatrical performance including the fact that the performers appear as themselves, dressed in their own clothes. In support of this, the CAEA provides examples of two of its Opera Agreements: the Professional Opera Companies of Canada Agreement (POCC) and the Vancouver Opera Agreement to demonstrate the use of the term “concert” within the industry as meaning a performance in which there are no elements of theatrical staging. The term concert is defined as follows in these agreements:

5001. A concert is defined as a performance which involves no elements of theatrical staging (Director and/or Choreographer), sets, props or costumes. [POCC Agreement]

4901. A “Concert” is as a performance in which there are no sets, props, costumes or elements of theatrical staging. A “Concert” may be a performance of part or all of an Opera, Operetta or Musical. [Vancouver Opera Agreement]

THE ISSUES

[17] The issues to be determined by the Tribunal are:

Should the Tribunal waive the 30-day limitation period set out in the procedures for a request for reconsideration?

Alternatively, should the Tribunal review the sector definition set out in Decision No. 010 in order to clarify its scope?

Issue 1: Should the Tribunal waive the 30-day limitation period set out in the procedures for a request for reconsideration?

[18] Section 20(1) of the *Status of the Artist Act* provides that “the Tribunal may uphold, rescind or amend any determination or order made by it, and may re-hear any application before making a decision”. The *Tribunal Procedures* explain the grounds for requesting the reconsideration of a Tribunal decision:

1. Reconsideration of a Tribunal decision

A party affected by a decision or order of the Tribunal may make a written application to the Tribunal for a review of that decision or order on the grounds that:

- (a) the Tribunal's decision contains an error of law or a serious error of fact;
- (b) the applicant has new information or evidence that was not available at the time the decision or order was originally made, and which could alter the basis on which the decision or order was made.

An application for reconsideration of a Tribunal decision should be made *within 30 calendar days of the date of the original decision or order*. If this time period is exceeded, the applicant must provide *a compelling reason* why this time limit should be waived. (At page 19)

(...) (Emphasis added)

[19] With respect to the possibility of waiving the 30-day time limit and reconsidering its decision, the Tribunal examined the reasons to do so advanced by the NAC. In its submissions, the NAC did not allege any serious error of law or fact nor did it provide the Tribunal with any new information or evidence not available at the time the decision was made.

[20] The Tribunal is of the view that reconsideration of its decisions should be the exception rather than the rule. In the case at bar, the 30-day time limit for filing an application for reconsideration elapsed on May 25, 1996. To reconsider a decision after such a lengthy period could cause serious prejudice to the CAEA as well as to other artists' associations with whom it has jurisdictional agreements. However, the Tribunal would consider extending the time limit in appropriate circumstances.

[21] In its submissions, the NAC also alleged that there had been a failure of “due process” to advise properly those potentially affected by the application and decision. This warrants a review, according to the NAC, because there was nothing in the public notice that would have led them or anyone else to suspect that the sector might apply to singers in a symphonic performance. The relevant portion of Public Notice 1995-1 reads as follows:

(...)

In accordance with section 25(3) of the *Status of the Artist Act*, the Canadian Artists and Producers Professional Relations Tribunal hereby gives notice that it has received an application for certification from the Canadian Actors' Equity Association for certification to represent a sector composed of artists engaged in the preparation and presentation of live theatrical performances and entertainments except where, by specific agreement between Canadian Actors' Equity Association and Union des Artistes, Canadian Actors' Equity Association recognizes the jurisdiction of Union des Artistes in this sector. (...)

[22] On the basis of Public Notice 1995-1, it would appear that the NAC determined that it was unnecessary for them to send a representative to the hearing although the Professional Association of Canadian Theatres, of which the NAC is a member, was in attendance. When the Tribunal publishes a public notice, the sector definition which appears is in fact only a *proposed* sector, not necessarily the sector which will be granted to the particular artists' association. At that stage of the process, the Tribunal has not made a determination as to what the appropriate sector for bargaining should be. The Tribunal has frequently refined or amended proposed sector definitions in light of the evidence it heard from applicants and intervenors. In cases where the Tribunal has done so, it has satisfied itself that the new sector definition did not enlarge the sector that was initially proposed. Consequently, the Tribunal is of the view that the NAC has not been refused or denied procedural fairness.

[23] The Tribunal therefore declines to waive the 30-day limitation period for the reconsideration of one of its decisions.

Issue 2: Alternatively, should the Tribunal review the sector definition set out in Decision No. 010 in order to clarify its scope?

[24] In its application for review, it was unclear which type of review application the NAC was seeking. In addition to an application for reconsideration, the *Tribunal Procedures* set out a second type of review application which allows it to clarify the scope of a sector determination. The NAC requested that the Tribunal "reconsider or amend [Decision No. 010] or alternatively under section 26 of the *Act*, clarify the scope of the sector determination...".

[25] The conditions under which an application for a review of a sector determination may be made pursuant to section 20 of the *Act* are contained in the *Tribunal Procedures*:

2. Review of a sector determination

The certified artists' association or a producer affected by a Tribunal decision prescribing the sector suitable for bargaining may apply in writing to the Tribunal for a review of the sector determination. The purpose of such applications may be to enlarge, modify or clarify the scope of the sector determination. *Such applications can be made at any time.* (Emphasis added)

[26] The Tribunal examined the sector definition in the light of the NAC's concerns. The proposition that a "symphonic performance of an opera in concert" was somehow different from a "concert performance" of an opera and therefore excluded from the sector was a distinction that the Tribunal could not accept.

[27] In its submissions, the CAEA provided examples of agreements (the Vancouver Opera Agreement and the Professional Opera Companies of Canada) in which the term "concert performance" was clearly defined and an earlier example of an NAC production closely resembling the *Gypsy Baron* example, which was presented as a concert performance under a CAEA contract. The CAEA's definitions and the production referred to demonstrated that within the industry, a concert performance was akin to a symphonic performance of an opera in concert. The NAC did not cite any examples in support of its position nor were the definitions provided from dictionaries a demonstration of the use of terms as understood within the industry.

[28] If the Tribunal were to accept that the sector definition excluded symphonic performances of an opera as requested by the NAC, it would be accepting that some singers could not be covered by a scale agreement. It has been the constant intention of the Tribunal in defining various sectors to be as inclusive as possible, in the interest of the well-being of all artists.

[29] In the Tribunal's view, the jurisdictional agreements between the CAEA and the American Federation of the Musicians of the United States and Canada and the Union des Artistes ensure that all singers are covered. As well, the sector definition was meant to include all artists who take part in an operatic work as singers, in whatever form. Singers performing an opera on stage, off stage, or in a pit are within the sector. The lack of theatrical elements including staging, direction, costumes, lighting, sets, props or costumes is irrelevant. The wording of the sector definition is sufficiently broad to encompass singers engaged in symphonic performances of opera in concert.

[30] On the evidence before it, the Tribunal concludes that there is no distinction between concert performances of operas and symphonic performances of operas in concert, with the result that there is no need to clarify the scope of the sector. Concert performances are and always have been included in the CAEA sector definition and so there is no expansion of the scope of the sector by including singers in these productions.

[31] The Tribunal therefore determines that there are insufficient grounds to grant a review of the sector definition and it therefore dismisses the application.

Ottawa, December 8, 1999

David P. Silcox, Presiding Member

Meeka Walsh, Member

Moka Case, Member