

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, December 13, 2000

File N° 1310-00-001

Decision No. 031

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION FILED BY THE CANADIAN MEDIA GUILD (CMG) ON BEHALF OF THE PROFESSIONAL ASSOCIATION OF CANADIAN TALENT (PACT)

Decision of the Canadian Artists and Producers Professional Relations Tribunal

The application for certification is dismissed.

Place of hearing: Toronto, Ontario

Date of hearing: September 26 and 27, 2000
November 8 and 9, 2000

Quorum: David P. Silcox, Chairperson
Curtis Barlow, Member
Moka Case, Member

Appearances: Patricia D'Heureux, Counsel for PACT/CMG
Keith Maskell, Staff Representative, CMG

Paul Falzone, Counsel for ACTRA
Robin Chetwynd, Chief
Administrative Officer,
ACTRA Toronto
Stephen Waddell, National Executive Director, ACTRA

Henry Dinsdale, Counsel for the CBC
Robert Thistle, Senior Talent Relations Officer, CBC

REASONS FOR DECISION

1310-00-001: In the matter of an application for certification filed by the Canadian Media Guild (CMG) on behalf of the Professional Association of Canadian Talent (PACT)

BACKGROUND

[1] This decision concerns a preliminary objection by the Alliance of Canadian Cinema, Television and Radio Artists (“ACTRA”) to an application for certification submitted to 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*”) by the applicant, the Canadian Media Guild on behalf of the Professional Association of Canadian Talent (“PACT/CMG”). The application for certification was filed on March 31, 2000 and amended by way of letter dated April 19, 2000.

[2] In its amended application, PACT/CMG has asked to be certified to represent a sector composed of:

All independent contractors engaged by any producer subject to the *Status of the Artist Act* as background performers in a live or recorded television or radio production, or in a film production, intended for broadcast or any other use, with the exception of,

- a) independent contractors engaged as performers in live theatre, opera, ballet, dance, industrial show, cabaret show or concert performance within the scope of the certification issued to Canadian Actors’ Equity Association on April 25, 1996,
- b) musicians within the jurisdiction of the American Federation of Musicians of the United States and Canada (AFM), as described in the certificates issued to it by the Tribunal on January 16, 1997,
- c) independent contractors within the jurisdiction of the Union des artistes as described in the certificate granted by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996 amended December 30, 1997.

[3] In its application, PACT/CMG indicates that it wishes to represent artists who work as background performers, primarily in the film and television industry. The applicant asserts that background performers are not represented by any other artists’ association.

[4] When new applications for certification are received by the Tribunal, they are reviewed to ensure that the sector which the applicant seeks to represent does not overlap with a sector in respect of which another artists’ association has been certified. In the case of background performers, ACTRA was certified by this Tribunal to represent various performers, including background performers, on June 25, 1996. The certification was renewed in 1999. The sector granted to ACTRA reads as follows:

(...) a sector composed of independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of principal actor, actor, **background performer**, dancer, stunt performer, stunt co-ordinator, announcer, commentator, disc-jockey, host, narrator, panelist, singer, variety principal, sportscaster or puppeteer, in a live or recorded television or radio production intended for broadcast or other use, with the exception of:

- a) independent contractors engaged as performers in live theatre, opera, ballet, dance, industrial show, cabaret show or concert performance within the scope of the certification issued to Canadian Actors' Equity Association on April 25, 1996 and subject to any reciprocal agreements between ACTRA Performers Guild and Equity;
- b) musicians within the jurisdiction of the American Federation of Musicians of the United States and Canada (AFM), as described in the agreement between ACTRA Performers Guild and the AFM dated May 14, 1996;
- c) performers within the jurisdiction of the Union des Artistes, as described in the agreement between ACTRA Performers Guild and the Union des Artistes dated May 17, 1996. [Emphasis added]

[5] In light of potential overlap in jurisdiction with respect to background performers, a copy of PACT/CMG's application for certification was provided to ACTRA for comment.

[6] On April 20, 2000, ACTRA filed with the Tribunal an intervention and a Notice of Intent to Participate. In its submissions, ACTRA objected to PACT/CMG's application on the grounds that it already represents background performers and that the application is therefore barred by paragraph 25(1)(a) of the *Act*.

[7] In its written submissions, ACTRA referred to scale agreements it has negotiated with several producers under federal jurisdiction, including the Canadian Broadcasting Corporation ("CBC"). Under these agreements, ACTRA is the exclusive bargaining agent for all performers including background performers. Its scale agreements generally include specific provisions applicable to background performers.

[8] ACTRA also contests the application on the grounds that PACT/CMG's bylaws do not conform to section 23 of the SAA.

[9] On May 1, 2000, PACT/CMG filed its reply to ACTRA's objection. PACT/CMG states that its members are not the same group of performers represented by ACTRA, although ACTRA members may from time to time work as background performers. PACT/CMG further submits that background performers cannot become ACTRA members on the basis of their background work alone and are therefore prevented from becoming members, voting and ratifying scale agreements. PACT/CMG argues that if ACTRA ever had the right to represent background performers, it has abandoned this right.

[10] PACT/CMG has asked that, if the Tribunal allows ACTRA's objection and declares PACT's application untimely or rejects it outright, it consider other possibilities:

- (a) that the Tribunal exercise its powers under section 20 of the *Act* and reconsider its decision granting certification to ACTRA to represent background performers,
- (b) that the Tribunal review the sector for clarification, also pursuant to section 20 of the *Act*.

[11] The Tribunal decided to convene a public hearing in order to hear oral evidence on the issues raised in the preliminary objection filed by ACTRA and in PACT/CMG's reply, including the following:

- (a) The applicability of the scale agreements to background performers who are not members of ACTRA.
- (b) The effect of ACTRA membership criteria for background performers.
- (c) ACTRA's representation of non-members background performers.

EVIDENCE

[12] A hearing was held on September 26 and 27 and November 8 and 9, 2000 in Toronto.

[13] Six witnesses testified for ACTRA: Robin Chetwynd, Chief Administrative Officer of ACTRA's Toronto branch, Eda Zimler, a Steward at ACTRA's Toronto branch; Richard Hardacre, a performer and member of ACTRA's Toronto and National Councils; Cara Martin, National Director of the Canadian Film and Television Production Association ("CFTPA") (by summons); Robert Thistle, Senior Consultant in Industrial and Employee Relations at the CBC (by summons); and Stephen Waddell, National Executive Director of ACTRA.

[14] The ACTRA Toronto branch administers some eight to ten scale agreements, for a membership of approximately 9,000 professionals. The most important scale agreement is the Independent Production Agreement ("the IPA"). Other agreements include the Commercial Agreement, and the CBC Television and Radio Agreements. Work under the IPA accounts for approximately 70 % of its members' earnings. In Toronto, ACTRA members earn, on average, \$7,500 per year. Only 1 to 1 ½ % of the membership is able to earn a significant income in the industry. ACTRA submitted evidence to show the significant growth in the Toronto membership in recent years. Its "Member and Apprentice Count" was

entered showing growth from 6690 members to 8971 members between 1996 and 2000.

[15] Approximately 1250 ACTRA Toronto members do some background work, of which some 700 to 800 work exclusively as background performers. Background work is done mainly under the IPA, which recognizes four kinds of “qualified background performers”: stand-ins, photo-doubles, special-skills and background performer. The ACTRA-CBC agreement provides for three kinds: general background performer, special business background performer and special skills background performer. General background performers are engaged to add environment to a scene or scenes and do not give individual characterization and do not have lines or dialogue. For the purposes of this decision, the Tribunal will use the term “background performers” to embrace all types of background performers.

[16] ACTRA’s witnesses also testified regarding the preference of engagement for members of ACTRA who apply for work as background performers. Under the IPA and the CBC scale agreement, a Producer, who has the final say as to whether a prospect is suitable or not, must offer engagements in the following order of preference: first, to suitable ACTRA members; second, to suitable ACTRA Apprentice members; and last, if there are insufficient suitable ACTRA members and Apprentice members, to suitable non-members. If a non-member is among the first 25 persons hired as a background performer, upon payment of a daily work permit fee to ACTRA (as required by the scale agreement), he or she will receive a “voucher” and will be entitled to payment at ACTRA rates and other conditions applicable to ACTRA members under the scale agreement. The size of the potential voucher pool was increased in the last round of bargaining from 15 to 25, which would improve the chances for non-members to obtain vouchers.

[17] The IPA and the CBC agreement establish the minimum hourly rate for background performers represented by ACTRA, the minimum workday and minimum overtime rates. On the other hand, neither the IPA nor the CBC agreement establishes minimum rates or minimum calls for non-member/ non-voucher background performers (*i.e.* those who are not members of ACTRA and are not working on a voucher). Most of the evidence provided to the Tribunal indicated that these background performers were normally paid at, or slightly above, the provincial minimum wage; Cara Martin stated that, under the IPA, non-member/ non-voucher background performers were paid anywhere from minimum wage to \$12.00 per hour. ACTRA provided documents showing that some productions guarantee six to eight hour minimum calls, but the evidence did not establish that this was the case in all, or even the majority, of productions.

[18] Mr. Waddell gave evidence respecting how professional performers become members of ACTRA. The relevant excerpts from ACTRA’s Constitution

and By-Laws were filed. They provide that a performer must have six engagements as a performer, *other than as a background performer*, in order to qualify to apply for full membership in ACTRA. Upgrades on set, which refer to an upgrade of a background performer to an Actor or Principal Actor, do not count toward the six engagements; ACTRA's rules provide that each of the six engagements must be won through an open audition process. Furthermore, engagements obtained in productions not covered by an ACTRA scale agreement are not counted. A performer may also obtain full membership if he or she is admitted on the basis of professional reputation. Appendix B to ACTRA's By-laws set out guidelines for admission to ACTRA on the basis of professional reputation.

[19] A performer may also apply to ACTRA to become an Apprentice member as an initial step to becoming a full member. A performer may apply on the basis of one speaking role in a production. Until June 2000, there were no means for performers doing strictly background work (in which there are no lines or dialogue) to be admitted to the Apprentice program. Nor were upgrades on set credited towards admission in the program. However, as a result of the events which gave rise to the present hearings, ACTRA modified its requirements, as will be explained below.

[20] Messrs. Chetwynd and Waddell affirmed that ACTRA's membership requirement of six non-background engagements is needed in order to ensure that members meet a proven standard of professionalism and dedication. They asserted that these membership criteria are one of the reasons why ACTRA has credibility at the bargaining table: producers recognize that ACTRA represents performers with credentials and proven ability. Mr. Waddell referred to similar criteria in the scale agreements of the Union des Artistes, the Director's Guild of Canada and the English scale agreements of members of the International Federation of Actors.

[21] ACTRA also asserted that it does, in practice, advocate for non-member background performers and strives to administer the non-monetary items of the scale agreements equally to members and non-members. Eda Zimler gave evidence that she advocates strongly on behalf of child performers, whether or not they are members and regardless whether they have vouchers. She also provided On-Site Liaison Officer ("OSLO") reports which set out specific occasions on which the interests of non-member/ non-voucher background performers were represented by ACTRA, for example, by ensuring they received the same meals and breaks as members. She testified that OSLOs attend to the needs of both ACTRA members and non-members. Mr. Hardacre gave similar testimony, from the perspective of an OSLO.

[22] ACTRA says it has also advocated for non-members in relation to monetary issues. Eda Zimler testified that as an ACTRA steward, she attends pre-

production meetings in order to ensure that performers will be properly compensated for their work. For example, if it becomes apparent that a background performer has been given lines or will provide characterization, ACTRA requests that the performer be upgraded. Although non-members may initially be asked to deal with this type of issue through their agent, Ms. Zimler stated that ACTRA will step in on behalf of the performer if the agent cannot resolve the matter. ACTRA has also had occasion to pursue cancellation fees for non-members. As well, ACTRA has advocated for a secure method of payment for non-member background performers.

[23] Although much of the foregoing evidence of ACTRA's representation of non-members was anecdotal, the Tribunal also heard from two producer representatives who generally confirmed it. Cara Martin testified that, in her experience, ACTRA has been trying to administer the IPA non-monetary items equally to members and non-member/ non-voucher background performers but she hastened to add that producers are not *required* to apply the IPA to non-member/ non-voucher performers. Robert Thistle indicated that in CBC productions, all background performers are treated equally in terms of non-monetary items; he cited numerous examples to the Tribunal, the only exception being in relation to crowd work involving more than 25 background performers.

[24] PACT/CMG called the following witnesses, all of whom are background performers: David Gray, Bob Brown, Jim McCabe, Ron Oke, Wayne McMahon and Charlie Fife. None are members of ACTRA.

[25] The experience of PACT/CMG's witnesses in the film and television industry ranged from four to twelve years; they work regularly as background performers, some having worked over one hundred days on set in a single year. Messrs. Gray and Oke testified that they pursued some theatre courses in university but none of PACT/CMG's witnesses gave evidence of having done any professional theatre work or of having auditioned for acting roles, with the exception of one witness. All have agents, who arrange for their background calls. The evidence of PACT/CMG's witnesses was mainly in relation to the IPA; they testified to having done little work for the CBC.

[26] All of PACT/CMG's witnesses stated that they considered themselves to be professionals. Examples of professionalism cited to the Tribunal were promptness, providing suitable wardrobe, understanding cues on set and the ability to take direction. Several witnesses indicated that the quality of their work had never been an issue, and that they had been selected to do foreground work. Mr. Fife pointed out that PACT/CMG requires anyone applying for membership to take a course in background performance work, which is offered at no charge. They all testified that the quality of work expected of them on set was identical to that expected of an ACTRA background performer. The quality of ACTRA and non-ACTRA/non-voucher background performers being the same, casting directors choose background performers based on whether they have the right

“look”.

[27] All of PACT/CMG’s witnesses testified that, as background performers, they are normally paid \$7.00 per hour and sometimes \$8.00 per hour, out of which their agents receive a commission of 10 to 15 %. They complained of not being paid for overtime and of not receiving cancellation fees when a production cancels a booking. Messrs. McCabe and Oke testified of having complained to OSLOs about not receiving cancellation fees, and having been told that they should take the issue up with their agents, since ACTRA could not do anything for non-members. Mr. McMahan told the Tribunal of a recent case in which he and another background performer had not been paid for a minimum call. Mr. McMahan received no assistance from ACTRA despite requests and even though he had already tried, without success, to resolve the problem through his agent.

[28] The Tribunal also heard evidence of difficulties in relation to upgrades. Mr. Gray was hired as a background performer in a film in which he was upgraded to a Principal Actor role. He testified that ACTRA refused to give him any assistance in modifying his contract, despite the fact that his agent could not be reached and, similarly, when a problem subsequently arose in obtaining full payment for his work on the production, ACTRA provided no assistance, despite his request. Mr. McCabe also testified that ACTRA made inadequate efforts respecting a request which he made for an upgrade on set.

[29] PACT/CMG’s witnesses testified that non-member/ non-voucher background performers were also treated differently in relation to non-monetary terms. For example, meals were of lesser quality; non-members were not allowed to eat with the cast and crew, while ACTRA members were; in one case, non-members were required to stand by on an outdoor balcony, in the month of January. Evidence was given that complaints were made to the OSLO, but the response in each case was that nothing could be done for those who were not members of ACTRA.

[30] Several witnesses gave evidence of their efforts to join ACTRA. Mr. Gray testified that he approached ACTRA to request admission into its Apprentice program, based on his work in the film in which he was upgraded. Ms. Zimler told him he did not qualify and he received the same information from the membership department of ACTRA. Subsequently, he sent two letters, in November 1999 and February 2000, to Mr. Chetwynd. He never received a response. He felt that ACTRA’s refusal was unfair, as he was personally aware of some six to twelve other performers who had been admitted to the program on the basis of smaller roles than his. However, no specifics were offered regarding these other performers or their roles; none of them were called to testify.

[31] Mr. Brown also testified that he had applied to become a member of ACTRA in July 1999, based on various roles which he had had over more than

ten years. He requested admission on the basis of professional reputation. His application was denied by Mr. Chetwynd, who suggested that he pursue the Apprenticeship program as an alternate route. Mr. Brown testified that, although he left messages for Mr. Chetwynd, the latter did not return his calls. He testified that he did not pursue the suggestion of applying for the Apprenticeship program; it was his understanding that he did not qualify for it because he had not had at least one speaking line. Based on the evidence given to the Tribunal, Mr. Brown's impression that he did not qualify at the time appears to be justified, since the Apprenticeship program was not modified until some months later.

[32] None of PACT/CMG's witnesses filed a complaint against ACTRA alleging a breach of its duty of fair representation.

[33] Mr. Fife is the President of PACT/CMG. He testified that the "Professional Association of Canadian Talent" or "PACT" (not to be confused with the Professional Association of Canadian Theatres) originated out of discussions which took place between a group of background performers in late 1997 and early 1998, respecting their unequal treatment. In 1998, this informal group circulated a petition to other background performers in order to assess whether there was interest in organizing; approximately 1,000 signatures were obtained. Ray Millar, who was the President of PACT at the time, approached ACTRA and a first meeting was held on August 27, 1999, attended by representatives of both groups. PACT's aim was to gain recognition for non-voucher background performers within ACTRA, as a third category of ACTRA members (in addition to full members and apprentice members). Mr. Fife testified that it was at this meeting that PACT's representatives discovered that ACTRA already held bargaining rights for background performers.

[34] The parties met again in October and November 1999 and the concerns of background performers, such as unequal pay and meals, were once again discussed. ACTRA's witnesses testified that the key issues discussed were minimum hourly rates (\$10 to \$12) and a minimum daily call (six to eight hours) for non-member/ non-voucher background performers. At the end of the last meeting, on December 1, 1999, the parties' discussions ceased.

[35] The two parties have very different perspectives on the reasons for the failure of the negotiations. PACT/CMG says that ACTRA refused to give any commitment that it would represent the interests of background performers and negotiate on their behalf. They brought specific complaints to the table, such as overtime, meals, health and safety, and cancellation fees, but ACTRA refused to offer any commitment in this regard. ACTRA insisted on receiving the list of names on PACT's petition, as well as PACT's financial documents, which was unacceptable to PACT. Mr. Fife stated that ACTRA showed itself to be unwilling to make any commitment to represent the interests of background performers during the course of these meetings and rejected PACT's suggestion of a

“marriage” of the two organisations. Mr. Fife denied that ACTRA offered to take PACT’s concerns to the CFTPA. Mr. Fife also testified that either Mr. Waddell or Mr. Chetwynd indicated that background performers were not part of ACTRA’s bargaining unit. In Mr. Fife’s opinion, ACTRA treated its representation of background performers as an option rather than an obligation. PACT members considered it pointless to continue discussions with ACTRA.

[36] Mr. Waddell strongly denied that he or Mr. Chetwynd ever told PACT representatives that background performers were not covered by ACTRA’s scale agreement or in its bargaining unit. He testified that ACTRA undertook to approach the CFTPA, in order to attempt to request that independent producers voluntarily provide better conditions to all background performers, but it could not do so in the absence of concrete proposals. He stated that any particulars which were given by PACT varied from one meeting to the next, citing pay as an example. Proposals were never put into writing, a point which was admitted by Mr. Fife.

[37] Mr. Waddell testified that the discussions broke down over the issue of PACT’s desire to be recognized as a distinct organization, under the umbrella of ACTRA. This was not acceptable to ACTRA Toronto’s elected council. Messrs. Chetwynd and Waddell indicated that ACTRA, as an organization with more than 50 years’ experience representing performers, could not “hand over the keys” to a new organization after just four or five meetings, particularly when PACT had refused to provide any details of its status, its membership, its financial records, *etc.*

[38] Given the failure of its negotiations with ACTRA, PACT decided to approach another union. PACT joined the CMG shortly thereafter and this application for certification was made to the Tribunal on March 31, 2000.

[39] In June 2000, ACTRA’s Toronto branch relaxed its membership criteria so as to allow background performers to apply for entrance into the Apprentice program, if they had accumulated 200 days of background work in the previous two years. Also, the rules were modified so that upgrades on set to a speaking role would be counted for the purposes of that program. Mr. Chetwynd testified that, as of the September hearings, a small number of background performers (less than one dozen) had gained admission into the Apprentice program as a result of these changes in the rules. Mr. Hardacre testified that, in his view, 200 engagements in two years is reasonable: it is achievable but also limits access to people with experience and proven ability.

[40] PACT’s witnesses testified that any efforts made by ACTRA to represent the interests of background performers were brought on by this application for certification and are self-serving. The fear was expressed that, if PACT/CMG is not certified, ACTRA will stop making any efforts to advance their interests.

Even though some of them would like to join ACTRA, ACTRA does not want them as members. On cross-examination of ACTRA's witnesses, Messrs. Chetwynd and Waddell agreed that the application for certification has been a factor in bringing about improvements but insist that ACTRA's actions have been in good faith.

[41] At the conclusion of his evidence, Mr. Fife agreed that ACTRA offers limited representation to vouchered non-members; however, PACT/CMG takes issue with the adequacy and fairness of ACTRA's representation of background performers. He stated that some 80 % of background performers on any given set have no representation from ACTRA. Mr. Fife did not dispute that ACTRA holds a certificate to represent background performers. He agreed that the issue was the quality of ACTRA's representation of background performers and that ACTRA has not been living up to its obligations under the certificate granted by the Tribunal.

ISSUES

[42] This matter raises the following issues:

- (a) Is PACT/CMG's application untimely?
- (b) Has ACTRA abandoned its bargaining rights in respect of background performers?
- (c) Should the Tribunal reconsider its decision to certify ACTRA?
- (d) Should the Tribunal review the sector for which ACTRA is certified?

THE STATUS OF THE ARTIST ACT

[43] The following provisions of the *Status of the Artist Act* are relevant to these proceedings:

7. 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.

...

19. (1) In any proceeding before it, the Tribunal
- (a) shall proceed as informally and expeditiously as the circumstances and considerations of fairness permit;
 - (b) is not bound by legal or technical rules of evidence; and
 - (c) may receive and decide on any evidence adduced that the Tribunal believes to be credible.

...

20. (1) The Tribunal may uphold, rescind or amend any determination or order made by it, and may re-hear any application before making a decision.

...

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.
- (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.

...

25. (1) An artists' association may, if duly authorized by its members, apply to the Tribunal in writing for certification in respect of one or more sectors
- (a) at any time, in respect of a sector for which no artists' association is certified and no other application for certification is pending before the Tribunal;
 - (b) in the three months immediately preceding the date that the certification or a renewed certification is to expire, where at least one scale agreement is in force in respect of the sector; or
 - (c) after one year, or such shorter period as the Tribunal may fix on application, after the date of the certification or a renewed certification, where no scale agreement is in force in respect of the sector.

...

35. An artists' association that is certified in respect of a sector, or a representative thereof, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the artists in the sector in relation to their rights under the scale agreement that is applicable to them.

THE PARTIES' SUBMISSIONS

ACTRA

[44] ACTRA submitted that it is certified to represent background performers and that it does so. The scale agreements which it has negotiated with various producers apply to all background performers. However, different terms and conditions apply to different groups of background performers. ACTRA submits that it must be allowed to establish membership criteria, since its mandate is to represent professional artists. If its membership criteria were diluted so as to allow any background performer to join, regardless of qualifications, ACTRA's ability to represent all of its members would be undermined. The film industry in Canada has experienced phenomenal growth in the past two to three years, resulting in a great deal more work for background performers. While an artist could not make a living doing strictly background work only a few years ago, the situation has now changed. ACTRA admits that it must, in a sense, "catch up" with this growth in its representation of background performers.

[45] This is just what ACTRA was trying to do when it offered to take the concerns of non-member background performers to the CFTPA. The only reason it did not was because PACT never provided it with specific proposals. As well, ACTRA stewards already spend a significant amount of time providing services to non-member background performers, a service for which non-members are not required to pay. Lastly, as a result of the concerns raised by background performers, ACTRA has modified its Apprenticeship program so as to allow background performers to apply on the basis of 200 days of background work in

two years.

[46] ACTRA submitted that no valid duty of fair representation complaint had been filed with the Tribunal and that the Tribunal's decision should not be made on the basis of section 35 of the *Act*. Nevertheless, it did provide certain cases to the Tribunal for its consideration, should the Tribunal decide to rule on this provision. Since the Tribunal has concluded that this case should be decided on other grounds, it is not necessary to set out the details of this jurisprudence.

[47] ACTRA also cited two decisions for the policy of the Public Service Staff Relations Board and the Canada Industrial Relations Board against the fragmentation of bargaining units: *Québec Air Traffic Controllers Union*, [1978] C.P.S.S.R.B. No. 9; and *Oceanex (1997) Inc.*, [2000] C.I.R.B. No. 37. ACTRA submitted that this Tribunal should also adopt such a policy in respect of sectors it certifies under the *Status of the Artist Act*.

The CBC

[48] The CBC's primary submission was that PACT/CMG's application was not timely under subsection 25(1) of the *Act*. ACTRA has a certificate for a sector which includes background performers and which is not due to expire until June 25, 2002. As well, it has a scale agreement with the CBC. PACT/CMG's application is untimely whether it is considered under paragraphs 25(1)(a), (b) or (c) and consequently, it should be dismissed.

[49] The CBC responded to the submissions contained in PACT/CMG's written reply. As a preliminary matter, the CBC objected to PACT/CMG's reply because it raises new arguments, which are not proper for a reply. In the alternative, the CBC submitted that PACT/CMG's reply submissions should be dismissed on the merits. Respecting the argument of abandonment, the CBC submitted that the Tribunal should insist on a very high standard of proof, which is lacking here: the evidence showed that ACTRA does represent background performers and that the issue is the quality of that representation. In response to the argument that ACTRA is preventing background performers from becoming members, the CBC reiterated ACTRA's submissions and pointed out that PACT/CMG also establishes membership criteria. Finally, the CBC submitted that PACT/CMG had failed to establish a basis for the Tribunal to review ACTRA's certificate pursuant to section 20 of the *Act*.

[50] The CBC raised policy arguments for dismissing PACT/CMG's application. Artists have appropriate avenues to pursue if they are unhappy with the quality of their representation by ACTRA: a complaint of breach of the duty of fair representation or an application to decertify. From the perspective of producers, the application should be dismissed, in order to enhance the stability and predictability of the bargaining relationship. Finally, the application should

be dismissed in order to preserve the credibility of the Tribunal and to protect the integrity of its certificates. Furthermore, the Tribunal should not deal with the application on the basis of section 20, since this would encourage parties to bring applications “through the back door”.

[51] Finally, the CBC raised the issue of the Tribunal’s constitutional jurisdiction, since virtually all of the evidence presented at the hearing dealt with the IPA and almost none related to federal producers. The CBC submits that all work under the IPA falls within provincial jurisdiction. However, counsel suggested that the application could be dismissed on other grounds and need not be decided on this basis.

The CFTPA

[52] The CFTPA was allowed to file a written submission, in which it also objected to the Tribunal’s constitutional jurisdiction over the IPA.

PACT/CMG

[53] PACT/CMG submitted that ACTRA’s scale agreements are not applicable to non-member background performers. Despite the possibility of obtaining a voucher, in practice there are virtually no non-members who succeed in doing so, since ACTRA members have a preference of engagement. Furthermore, the scale agreements contain no minimum rates of pay, overtime or cancellation fees and there is no enforcement mechanism to ensure minimum conditions are met. ACTRA has told non-member background performers that they are free to negotiate their own terms and conditions and has abdicated its responsibility to negotiate on their behalf.

[54] PACT/CMG addressed ACTRA’s membership criteria. Although background performers may become Apprentice members, they do not have the right to vote, under ACTRA’s constitution and by-laws. Nor can they become full members based solely only on background work. Even though ACTRA has changed some of its rules in ways which are favourable to background performers, there is no guarantee that ACTRA will not simply change the rules again, at a whim.

[55] PACT/CMG denied that the work done by ACTRA to assist background performers in obtaining upgrades constituted representation of background performers. Rather, it involves representing a performer who does work which does not qualify as background work. When ACTRA gets upgrades for performers, it is not representing background performers but rather, is ensuring that its actor and principal actor rates are not undercut. ACTRA did not consult with non-member background performers before changing the rules for the Apprenticeship program.

[56] Though ACTRA's certification includes "background performers", ACTRA does not, in practice, represent them. ACTRA's conduct in relation to background performers is contrary to the purpose of the *Status of the Artist Act* as set out in section 7. ACTRA's by-laws discriminate unfairly against background performers so as to prevent them from becoming members of ACTRA, contrary to subsection 23(2) of the *Act*.

[57] PACT/CMG provided a casebook to the Tribunal. It highlighted the decision *The Writers Union of Canada*, [1998] Decision No. 028 (CAPPRT) ("*TWUC*"), for the proposition that where an association has by-laws which effectively prevent a group of artists from becoming members, this is contrary to section 23 of the *Act* and the Tribunal's policy will be that the sector for which the association is certified does not include such artists. PACT/CMG also points to the Tribunal's statement in *TWUC* that the *Act* is a form of human rights legislation.

[58] PACT/CMG urges the Tribunal to re-examine the certificate which it granted to ACTRA. Failure to do so will prevent background performers from having access to collective bargaining. As for the suggestion that a duty of fair representation complaint could be filed against ACTRA, background performers feel that "it is too late to go back to ACTRA"; they want their own, separate representation.

[59] In rebuttal, the CBC distinguished the *TWUC* case because the discrimination in that case was entirely unrelated to the artists' professional status; rather, it was based on citizenship. It is entirely appropriate to differentiate between different classes of artists based on their professional qualifications. Both counsel for the CBC and counsel for ACTRA submitted that not having a vote is not the equivalent of not having representation.

ANALYSIS AND CONCLUSIONS

Preliminary matters

[60] It is appropriate to address two preliminary matters at the outset. First, the Tribunal is of the view that this case should not be decided based on the objections to its constitutional jurisdiction. The purpose of the preliminary hearing was to assess ACTRA's objection that it already holds bargaining rights – it was not to put PACT/CMG's application under constitutional scrutiny. This should not be taken as a statement that the panel considers that it has constitutional jurisdiction over the IPA. Rather, there is no need to make this determination, since this case should simply be decided on other grounds.

[61] Second, as is discussed in greater detail below, the crux of the case lies in the arguments made by PACT/CMG in its reply. The CBC objects to the Tribunal considering these issues, on the grounds that they were raised for the first time in a reply and should have been raised by way of an application. The Tribunal agrees that, normally, a reply should address the issues raised in a respondent's pleading and should not be used to bring forward an entirely new application. However, the Tribunal is not a court and need not adopt strict rules of pleading, particularly in light of subsection 19(1) of the *Act*. The Tribunal may, in its discretion, allow a pleading of this nature provided that "considerations of fairness permit". In this case, even though PACT/CMG should have made the request for review at the outset, it cannot be said that ACTRA or the CBC were taken by surprise or that they did not have a reasonable opportunity to respond to the issues, which were raised months before the oral hearing was held. In the circumstances of this case and given the importance of some of the questions before it, the Tribunal has decided that it should address the issues raised in the reply.

Is PACT/CMG's application untimely?

[62] There was no dispute between the parties that ACTRA holds a certificate for a sector which includes "background performers". There is also no dispute that ACTRA's certificate was renewed on June 25, 1999 for a further three years, to June 25, 2002. PACT/CMG says that the background performers covered by ACTRA's certificate are not the same as the ones covered by its application for certification – it states that background performers covered by ACTRA's certificate are limited to those background performers who are members of ACTRA. This is not a valid position. The certificate held by ACTRA is not limited to ACTRA members. When the Tribunal certifies an artists' association, it normally does so for all artists in the sector, not just for members of the association; exceptions rarely occur, as was noted by the Tribunal in *Conseil des métiers d'art du Québec* ("CMAQ"):

[T]he Tribunal endeavours to certify the artists' association that it considers the most representative of each artistic sector, granting to this association the exclusive authority to bargain on behalf of all the artists in the sector, **whether or not they are members of the association**. Apart from the CMAQ's case, the Tribunal has made only one exception to this practice [...]. [Emphasis added.]

CMAQ, Decision No. 026 (CAPPRT), at para. 23.

[63] Accordingly, on its face, the application is untimely pursuant to subsection 25(1) of the *Status of the Artist Act*.

Has ACTRA abandoned its bargaining rights in respect of background performers?

[64] PACT/CMG's argument of abandonment must be dismissed. PACT/CMG did not offer any basis upon which the Tribunal could consider this argument. Nowhere does the *Act* refer to the notion of "abandonment" of bargaining rights. According to George Adams, *Canadian Labour Law*, 2nd Edition, only three provinces' labour laws makes express reference to abandonment of bargaining rights: Manitoba, Prince Edward Island and Alberta. Adams notes that the Ontario Labour Relations Board ("OLRB") recognizes abandonment as an *implied* statutory method to terminate bargaining rights (at ¶ 9:330-9.400).

[65] Should this Tribunal adopt an approach like that of the OLRB, *i.e.* recognizing an *implicit* power to declare bargaining rights to have been abandoned? Such an interpretation is not a step which should be taken lightly, or without the benefit of full argument, since it goes to the jurisdiction of the Tribunal. The onus was on PACT/CMG to convince the Tribunal that it should adopt an approach like that of the OLRB, which it failed to do.

Should the Tribunal reconsider its decision to certify ACTRA?

[66] The other two arguments raised in PACT/CMG's reply are based on subsection 20(1) of the *Status of the Artist Act*. PACT/CMG has requested that the Tribunal reconsider its decision certifying ACTRA or, alternatively, review the sector for which ACTRA was certified.

[67] Normally, the Tribunal requires that a request for reconsideration be filed within 30 calendar days of the date of the order: *National Arts Centre*, Decision No. 030 (CAPPRT), at paragraphs 19-20 ("*NAC*"). In the present case, the initial certification order was made on June 25, 1996 and was automatically renewed on June 25, 1999. The request for reconsideration was made in the reply of PACT/CMG, dated May 1, 2000. PACT/CMG has submitted that the Tribunal should waive the time limits because the evidence respecting ACTRA's failure to represent background performers was not readily available when the certificate was granted. It also says that, due to the nature of the industry and the proposed

sector, it was impossible to intervene at the time of the certification or the renewal.

[68] In this case, the request to reconsider the certification order comes almost four years after the order was made. This is an extremely long delay. The prejudice to ACTRA is obvious: it has relied on this certification in its negotiations for scale agreements. To reconsider the certification decision would upset the regime which ACTRA and the producers have negotiated. Furthermore, PACT/CMG has not offered any evidence as to why the information which it now asks the Tribunal to consider was not available at the time of the original certification order. From the evidence, it appears that the circumstances which have led to dissatisfaction amongst background performers existed in 1996 and earlier, although they have only come to the fore in the last year or so. This case is similar to that of the *NAC*, in that PACT/CMG has not provided the Tribunal with any new information or evidence not available at the time the original order was made. The fact that the background performers' dissatisfaction has only more recently come to the fore does not alter this fact. Accordingly, the Tribunal has decided that the request for reconsideration should be dismissed as untimely.

[69] In any event, even if the request had been made in a timely manner, the Tribunal did not find the arguments of PACT/CMG to be persuasive. In particular, PACT/CMG's reliance on the *TWUC* decision is not tenable. In that case, membership criteria respecting an artist's citizenship status violated section 23 of the *Act*. The result is quite different when the criteria are related to artistic or professional qualifications. This distinction was expressly recognized by the Tribunal in *Canadian Artists' Representation/Le Front des artistes canadiens* ("CARFAC"):

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.[Emphasis added.]

CARFAC, Decision No. 029 (CAPPRT), at para. 58.

[70] Section 23 does not proscribe all restrictions or limitations on membership but only those which "discriminate unfairly": subsection 23(2). Where an artists' association establishes membership criteria which are *prima facie* related to an individual's artistic or professional qualifications, the party launching the challenge must offer convincing reasons for the Tribunal to interfere. It must be remembered that the Tribunal's role is to assist the parties in establishing a

framework for effective negotiations. Its role is not to interfere in the internal affairs of an artists' association.

[71] ACTRA has adopted criteria which allow background performers to become Apprentice members, if they have achieved 200 days of background work in two years. The evidence suggested that this is a reasonable threshold; indeed, several of PACT/CMG's witnesses gave evidence of having achieved 100 or more days in a single year. Furthermore, the Tribunal finds no fault with ACTRA's position that the threshold is necessary to ensure that only those background performers who are truly committed may be allowed to become Apprentice members. In summary, the circumstances fall far short of offering a compelling reason to interfere with ACTRA's membership criteria.

[72] Similarly, PACT/CMG's argument that ACTRA's by-laws violate the *Act* by not giving background performers the right to vote is not supported by the language of section 23. Paragraph 23(1)(b) provides that by-laws must give "regular members" the right to take part and vote in meetings and ratification of scale agreements. As shown by the evidence, background performers can become members of ACTRA, in the Apprentice category. They can also become regular members of ACTRA by fulfilling the requirements established by ACTRA. Accordingly, the Tribunal is not persuaded by this argument.

Should the Tribunal review the sector for which ACTRA is certified?

[73] The alternative approach of PACT/CMG under subsection 20(1) is its request for a review of the sector. A review of this sort may be requested at any time, unlike a request for reconsideration.

[74] Two factors are important in relation to this request for a review. First, it is important to recognize that the Toronto film industry has changed significantly since ACTRA was first certified. Previously, it was unlikely that performers could make a living doing solely background work. The evidence showed that this is no longer the case. ACTRA has recognized the need to adapt to these changing circumstances. It has relaxed the requirements of the Apprentice program and has agreed to credit upgrades on set. It has increased its efforts to represent non-members in respect of non-monetary items under the scale agreement. Although some or all of these changes may have been prompted by PACT/CMG's application for certification, the changes ultimately do respond to much of the dissatisfaction of background performers.

[75] More importantly, reviewing the sector as requested would be contrary to the Tribunal's policy against fragmentation. The Tribunal has expressed its policy in this regard in *CMAQ*, as follows:

The Tribunal believes that the framework governing professional relations

between producers under federal jurisdiction and artists cannot be effective if there is a multiplicity of certified artists' associations in the same area. For this reason, the Tribunal endeavours to certify the artists' association that it considers the most representative of each artistic sector, granting to this association the exclusive authority to bargain on behalf of all the artists in the sector, whether or not they are members of the association.

CMAQ, Decision No. 026 (CAPPRT), at para. 23.

[76] If the Tribunal were to establish a separate bargaining unit for background performers, this would lead to a multiplicity of certifications in the same area and would ultimately dilute bargaining power for artists' associations while forcing producers to undertake collective bargaining with two or more associations instead of just one. These are just some of the undesirable effects of fragmentation. Furthermore, when it certified ACTRA, the Tribunal did so on the basis of a community of interest which it found between background performers and other performers referred to in ACTRA's certificate. This community of interest remains a live consideration in this case. Although some performers work exclusively in background, the evidence showed that others work in both background and other disciplines mentioned in the ACTRA certificate. In those circumstances, the Tribunal will not fragment the sector unless there are compelling circumstances.

[77] Compelling circumstances are absent in this case. This dispute is in relation to the scope, quality and fairness of ACTRA's representation. Given the scheme of the *Act*, reviewing the certification order is not the appropriate mechanism to address these concerns. More appropriate avenues would be a 'duty of fair representation' complaint, an application for revocation or partial revocation, or a timely application for certification when ACTRA's certificate comes up for renewal.

DECISION

[78] For all of these reasons, PACT/CMG's application for certification is dismissed.

Ottawa, December 13, 2000

David P. Silcox

Curtis Barlow

Moka Case