Canadian Artists and Producers Professional Relations Tribunal

CANADA

Tribunal canadien des relations professionnelles artistes-producteurs

Ottawa, February 28, 2001 File No. 1310-95-0019-A

Decision No. 033

In the matter of an application for certification filed by the Editors' Association of Canada/ Association canadienne des réviseurs

Interim decision of the Tribunal

The application for certification is stayed.

Place of hearing:	Toronto, Ontario
Date of hearing:	January 17 and 18, 2001
Quorum:	David P. Silcox, Chairperson Curtis Barlow, Member Moka Case, Member
Appearances:	Connie John, Executive Director, EAC Rosemary Tanner, Past President, EAC Marian Hebb, Counsel for TWUC Penny Dickens, Executive Director, TWUC

Reasons for decision

1310-95-0019-A: In the matter of an application for certification filed by the Editors' Association of Canada/Association canadienne des réviseurs

Background

[1] This decision concerns an application for certification submitted to the Canadian Artists and Producers Professional Relations Tribunal (the "Tribunal" or "CAPPRT") pursuant to section 25 of the *Status of the Artist Act* (S.C. 1992, c.33, hereinafter "the *Act*") by the applicant, the Editors' Association of Canada/Association canadienne des réviseurs ("EAC" or "the applicant") on February 20, 1996. The application was heard in Toronto on January 17 and 18, 2001.

[2] The EAC originally applied for certification to represent a sector "composed of freelance and in-house editors of books, periodicals, government documents and other printed materials in both official languages".

[3] The proposed sector was subsequently amended on June 1, 2000 to read as follows:

> a sector composed of all professional freelance editors engaged by a producer subject to the *Status of the Artist Act* to
>
> (*a*) prepare original works in the form of compilations or collective works within the meaning of the *Copyright Act;* or
>
> (*b*) prepare original works of joint authorship, where the editor's contribution constitutes the work of a joint author;
>
> in either French or English.

[4] Public notice of this application was given in the *Canada Gazette* on Saturday, June 17, 2000 and in the *l'Express* (Toronto), *La Presse*, *The Globe and Mail*, *Le Soleil*, *L'Acadie Nouvelle*, *l'Eau Vive* (Regina), *The Montreal Gazette*, the *Franco Albertain* (Edmonton) and *La Liberté* (St. Boniface) on dates between June 20 and 23, 2000. The public notice set a closing date of August 31, 2000 for the filing of expressions of interest by artists, artists' associations and producers.

[5] As of that date, expressions of interest were received from four artists' associations certified by the Tribunal: the Writers' Guild of Canada ("WGC"), the Société des auteurs de radio, télévision et cinéma ("SARTeC"), the Writers' Union of Canada ("TWUC") and the Periodical Writers Association of Canada ("PWAC"). These intervenors are "intervenors as of right" with respect to the definition of the sector and the representativeness of the applicant. A request to intervene was also filed by Les Éditions Louis Martin Inc. but that request was subsequently withdrawn.

[6] On September 12, 2000, the Canadian Newspaper Association ("CNA") applied for intervenor status pursuant to subsection 19(3) of the *Act* which provides that "any interested person may intervene in a proceeding before the Tribunal with its permission ...". In its correspondence, the CNA took the position that the Tribunal's decision in *Periodical Writers Association of Canada*, 1996 CAPPRT 014, applies to these proceedings with the effect that no decision of the Tribunal can have any effect upon newspapers. The CNA sought intervenor status solely for the purpose of having its correspondence placed on the record of proceedings. The Tribunal considered the CNA's request and granted it limited intervenor status as requested.

Evidence

EAC

[7] At the commencement of the hearing, the EAC made a further, formal amendment to the sector for which it was applying, to provide for certain exclusions:

> a sector composed of all professional freelance editors engaged by a producer subject to the *Status of the Artist Act* to
>
> (a) prepare original works in the form of compilations or collective works within the meaning of the *Copyright Act*, or
>
> (b) prepare original works of joint authorship, where the editor's contribution constitutes the work of a joint author;
>
> in either French or English, but excluding
>
> (a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Tribunal on June 4, 1996,
>
> (b) authors covered by the certification granted to the Writers Guild of Canada by the Tribunal on June 25, 1996,
>
> (c) authors covered by the certification granted to the Société des auteurs, recherchistes, documentalistes et compositeurs (SARDEC) by the Tribunal on January 30, 1996, and
>
> (d) authors covered by the certification granted to the Writers' Union of Canada by the Tribunal on November 17, 1998.

[8] This amendment was made further to agreements reached between the EAC and each of the intervenors PWAC, WGC and SARTeC, copies of which were filed by the respective intervenors. The Tribunal took notice of those agreements and they were filed as exhibits.

[9] Connie John gave evidence for the EAC. Ms. John is the Executive Director of the EAC and has a background in editing. The Freelance Editors' Association of Canada,

the predecessor of the EAC, was founded in 1979, and has since grown into an organization of 1,200 members. The EAC has five branches: British Columbia, the Prairie Provinces, Toronto, the National Capital Region, and Québec and Atlantic Canada. Members work in either or both French and English. It has some 70 francophone members, most of whom are associated with the Québec and Atlantic Canada branch; its francophone membership has almost doubled in the past year and continues to be a significant source of growth for the EAC.

[10] Connie John gave evidence to the effect that trade publishing represents approximately 20 to 30 % of the work of the editors in the proposed sector. The EAC defined trade publishing as commercial publishing for general readership. The remaining 70 to 80 % of editors' work involves editing academic materials, advertising, calendars, cookbooks, computer manuals, corporate publications, conference proceedings, databases, dictionaries, educational materials, textbooks, glossaries, indexes, government publications, royal commission publications, legal materials, reference materials and other reports. New and developing sources of work include CD-ROM and web page contents. The EAC filed its *Directory of Editors 2000-2001*, which also attests to the diversity of editors' work.

[11] The EAC provided evidence of the many different types of editing, which can be divided into the following basic groups: developmental editing, structural and substantive editing, line (or manuscript) editing, copy editing, and proofreading. Each of these types of editing can be defined as follows (definitions are based on the materials filed with the Tribunal by the EAC, as well as the evidence given by Rick Archbold, a freelance editor and writer and Rosemary Tanner, Past President of the EAC and a freelance editor):

- *developmental editing*: "writer and editor jointly evolve a concept or story idea, [to] which either or both have contributed, into a strong outline or proposal. They extend that into a manuscript in progress ... . [The author] sends pages and chapters to his editor as he writes them so that the editor can provide immediate response and guidance." (McCarthy, *Developmental Editing*, at pp. 135-136)
- *structural and substantive editing*: "substantive editing includes reorganizing, rewriting, writing transitions and summaries" (Soughton, 1996, at p. 2, quoted in Bailey, 1998, at p. 25.) The editor engaged in substantive and structural editing will suggest changes to the structure of a work, for example, that parts of a work be removed or moved, or that new parts be added. This type of editing is among the most creative and demands a strong collaboration between the editor and writer.
- *line editing* (or *manuscript editing*): "In the line-by-line editing of the manuscript, [the editor] assumes the ... role of midwife or handmaiden, as he draws the work out of the author by his comments, queries, and suggestions in the manuscript margins, in a process that is called, interchangeably, line editing or manuscript editing" (Bailey, at p. 27). The line editor may suggest or write changes in words, phrases or entire paragraphs.
- *copy editing*: "copyediting means reviewing a 'finished' manuscript (copy) for spelling, grammar, consistency, and format ... Copyediting doesn't usually include rewriting or reorganization, but it does mean

eliminating wordiness and reviewing the content for logic" (Soughton, 1996, at p. 2, quoted in Bailey, 1998, at p. 35.) A copy editor's role is to take a "last look" at a manuscript in order to make corrections to punctuation, spelling and syntax.

- *proofreading*: "Proofreading consists of checking the final keyboarded version (proof) against the manuscript version to find typographical errors and deviations from the typesetting or wordprocessing instructions. Proofreaders query (question) but normally don't change, editorial errors and inconsistencies" (Smith, 1997, at p. 3, quoted in Bailey, 1998, at p. 44).

[12] The evidence of the EAC was that writers are entitled to accept or reject editorial suggestions, subject to any agreement to the contrary with the publisher. In other words, the writer normally has the final say. This is typically the case in trade publishing. On the other hand, there are cases where a publisher and writer may agree that the editor will have certain prerogatives and will be able to override the writer's wishes in certain areas. This practice is more prevalent in non-trade publishing.

[13] Mr. Archbold pointed out that the extent of the editor's collaboration and involvement in the final work will, in some cases, depend on his or her ability as a writer. He cited, by way of example, the situation of individuals who write on subjects in respect of which they have specialized expertise but who do not have any particular facility for writing. In this kind of example, an editor takes a hands-on role and can actually become a co-author, albeit an invisible one.

[14] The "ethic of invisibility" was explored at some length by the EAC. It manifests itself primarily in two ways. First, any changes made to a manuscript are invisible to the reader: to accomplish this, the editor must ensure that his or her suggestions reflect the original style and voice of the writer. Second, the editor must not attempt to lay claim to the moral rights or the copyright in the finished work: the writer must retain the sole right to be associated with the work as its author, and as its author, is normally the first owner of the copyright in the work. Editors are normally satisfied with an acknowledgment by the writer. According to the EAC's witnesses, this ethic of invisibility is customary in the publishing world. An editor who does not respect this custom will soon find himself or herself without work.

[15] Ms. John also submitted that the work of editors as described above attracts copyright and moral rights but that, in accordance with custom and the ethic of invisibility, editors traditionally waive these rights.

[16] Ms. John also testified that editors write indexes, glossaries, tables of contents and bibliographies, and compile the works of others.

[17] Jim Lyons testified for the EAC. He has been an editor for over 10 years, usually editing legal materials. He regards himself as an editor, not a writer. He testified in relation to a report which he was commissioned to prepare by Revenue Canada. Three subcommittees of the Advisory Committee on Electronic Commerce ("the Advisory Committee") had prepared individual reports, which had to be combined and rewritten into a single report. Mr. Lyons blended the three reports into one and, in consultation

with the Advisory Committee, made a series of revisions. He made an extensive contribution to the writing of the contextual chapters of the report; his contribution was minimal in relation to the more technical chapters. He wrote the glossary and bibliography. He worked intensively on this project for a period of five months. The final report, *Electronic Commerce and Canada's Tax Administration*, was published in April 1998; copyright rests with the Crown.

[18] Mr. Lyons indicated that little of the work he has done for the government has called for this kind of creative input; on the other hand, it is the norm in relation to his work on textbooks.

[19] Ms. John testified that the EAC offers various services to its members. For example, the EAC has created its *Professional Editing Standards*, a copy of which is available to all members. As well, it offers a variety of seminars to its membership, annually. It has developed a standard form contract for editors and conducts rates surveys. Each of its five branches has a hotline which members can call for information. Finally, it publishes an annual directory, a copy of which is also available on-line.

[20] The EAC's by-laws establish two categories of members: voting members and associate members. To become a voting member, a person must have done at least 500 hours of editing work in the previous year; associate membership is open to anyone having an interest in editing. As of the date of the hearing, the EAC's by-laws made no reference to members' right to have access to financial statements. However, Ms. John advised the Tribunal that financial reports are provided to all members each year. As well, there was no reference to members' right to ratify a scale agreement. The EAC undertook to make these changes if it were certified.

[21] Ms. John indicated that, to her knowledge, the only association interested in representing editors is the EAC. She also pointed out that editors are not eligible for membership in TWUC, pursuant to the latter's constitution.

TWUC

[22] The TWUC disagreed with the EAC's description of trade publishing. Bill Freeman, a freelance writer, testified that trade publishing is any commercial publishing and includes work for corporations and government. He testified that, in his experience, a novel usually takes approximately nine months to write. An editor is involved at the end of the process and will take a few hours to read his manuscript and give a verbal critique of a general nature. As the writer, he can take or reject any of the editor's suggestions. The manuscript then goes through the copy editing process, which is quite mechanical, involving corrections to punctuation and grammar. He testified that he does not view editors as co-authors. In his view, there is no comparison between the contribution of an editor, to the time and energy invested by a writer. In his words, an editor's contribution is "negligible". He also pointed out that writers are usually remunerated through royalties, whereas editors are usually paid a fee (freelancers) or wages (in-house editors).

[23] On cross-examination, Mr. Freeman was less certain as to the meaning of trade publishing. He indicated that writing for government was a "grey area". Ms. John referred Mr. Freeman to a definition of trade publishing which refers to publishing works

for the general public. On re-direct, Mr. Freeman admitted that he was confused about the whole area of government publishing.

[24] Christopher Moore, a writer and historian, testified for TWUC. He gave evidence of his experience as a joint author. He and another writer, Janet Lunn, were recruited by the editor in a publishing house to write a history of Canada for young readers. He and Ms. Lunn each wrote different parts of the manuscript and then exchanged and re-wrote them. They continued making revisions to the work in this manner, until they arrived at a final manuscript. Although there was also significant editorial support, he and Ms. Lunn are the only authors of that book.

[25] He gave evidence of a recent experience involving an inexperienced editor who made extensive re-writes to the third edition of the book described above. He called the editor to ask that she do a re-edit using normal practice. The editor did so, making queries in the margin and suggestions, but not re-writing the text. Mr. Moore emphasized that, in his experience, he has the final authority to accept or reject an editor's suggestions. He testified that he values the contribution of editors but does not consider editors to play the role of co-authors.

[26] On cross-examination, Mr. Moore confirmed that professional, experienced editors will not make changes to a manuscript without first consulting with the writer; he confirmed that editors and writers are collaborators in this respect.

[27] TWUC's last witness was its Executive Director, Penny Dickens. Ms. Dickens testified that TWUC's members are not restricted to trade publishing but also write textbooks, academic materials, *etc.* Furthermore, TWUC, which holds a certificate from the Tribunal, does not intend to restrict its negotiations to the area of trade publishing; it intends to negotiate in relation to writing of any books over 44 pages. She also affirmed that TWUC's certification encompasses joint authors and authors of collective works.

[28] On cross-examination, Ms. Dickens testified that a condition of membership in TWUC is that a writer have written at least one published trade book. If this requirement is not met, a person cannot become a member. Exceptionally, this criterion may be waived, but only in a small number of cases.

Legislation

[29] The relevant provisions of the *Status of the Artist Act* are as follows:

> **5.** In this Part,
> "artist" means an independent contractor described in paragraph 6(2)*(b)*;
> [...]
>
> **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
(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.

[...]

17. The Tribunal may, in relation to any proceeding before it,
[...]
(p) decide any question that arises in the proceeding, including whether
(i) a person is a producer or an artist,
[...]

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.

[...]

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.

[...]
26. (1) After the application period referred to in subsection 25(3) has expired, the Tribunal shall determine the sector or sectors that are suitable for bargaining, taking into account
(a) the common interests of the artists in respect of whom the application was made;

(b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; and
(c) any geographic and linguistic criteria that the Tribunal considers relevant.

[...]

27. (1) After determining the sector pursuant to subsection 26(1), the Tribunal shall determine the representativity of the artists' association, as of the date of filing of the application for certification or as of any other date that the Tribunal considers appropriate.

[...]

28. (1) Where the Tribunal is satisfied that an artists' association that has applied for certification in respect of a sector is the most representative of artists in that sector, the Tribunal shall certify the association.

[30] The relevant provisions of the *Copyright Act*, R.S.C. 1985, c. C-42, are as follows:

2. In this Act,

[...]

"book" means a volume or a part or division of a volume, in printed form, but does not include
(a) a pamphlet,
(b) a newspaper, review, magazine or other periodical,
(c) a map, chart, plan or sheet music where the map, chart, plan or sheet music is separately published, and
(d) an instruction or repair manual that accompanies a product or that is supplied as an accessory to a service;

[...]

"collective work" means
(a) an encyclopaedia, dictionary, year book or similar work,
(b) a newspaper, review, magazine or similar periodical, and
(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

[...]

"compilation" means
(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or
(b) a work resulting from the selection or arrangement of data;

[...]

“every original literary, dramatic, musical and artistic work” includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

[...]

“literary work” includes tables, computer programs, and compilations of literary works;

[...]

“performance” means any acoustic or visual representation of a work, performer’s performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set;

“performer’s performance” means any of the following when done by a performer:

(a) a performance of an artistic work, dramatic work or musical work, whether or not the work was previously fixed in any material form, and whether or not the work's term of copyright protection under this Act has expired,

(b) a recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired, or

(c) an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work;

[...]

“work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

[...]

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

[...]

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

[...]

and to authorize any such acts.

12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

[...]

14.1. (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

The issues

[31] The EAC's application for certification raises the following issues:

(1) Whether editors are artists within the meaning of the *Status of the Artist Act*.

(2) The suitability, for bargaining purposes, of the sector proposed by the EAC.

(3) Whether the EAC is representative of the artists in the sector.

(1) Whether the EAC's bylaws comply with subsection 23(1) of the *Status of the Artist Act.*

Submissions

EAC

[32] Respecting the first issue, the EAC submits that editors are artists within the meaning of the *Status of the Artist Act*, on two grounds. The EAC's main argument is that editors are authors of literary works within the meaning of the *Copyright Act* and, accordingly, are artists pursuant to subparagraph 6(2)*(b)*(i) of the *Status of the Artist Act*. Alternatively, the EAC submits that editors are directors of literary works and, accordingly, are artists pursuant to subparagraph 6(2)*(b)*(ii) of the *Status of the Artist Act*.

[33] In relation to its first argument, the EAC submitted, at the outset, that since the word "author" is not defined in the *Copyright Act*, the Tribunal is free to fashion its own definition for the purposes of the *Status of the Artist Act*. The EAC says that editors are authors of compilations, collective works and works of joint authorship.

[34] In support of its argument that editors are authors of compilations and collective works, the EAC referred to the fact that editors write indexes, glossaries, tables of contents and bibliographies, and compile the works of others, such as short stories or poems.

[35] The EAC also argues that editors are joint authors, in their creative involvement with writers. The work of an editor as joint author requires creative spark and collaboration with the writer. The EAC submits that all types of editing, from developmental editing to copy editing, constitute the work of a joint author. The EAC argues that, in writer-editor relationships, the contribution of one author (the writer) is not distinct from that of the other author (the editor). An equal contribution by joint authors is not necessary, provided that both have made a significant contribution. The EAC states that editors do make a significant contribution, sufficient to meet the test for joint authorship.

[36] In the context of its argument on joint authorship, the EAC says that editors typically waive copyright and moral rights. The EAC acknowledged that it had no written examples of such waivers but argued that a waiver need not be in writing, but may be implied.

[37] The EAC's second argument was that editors fall within subparagraph 6(2)*(b)*(ii) of the *Status of the Artist Act*, in particular, within the meaning of the words "independent contractors determined to be professionals ... and who ... direct ..., in any manner, ... a ... literary ... work". It relies on the broad interpretation given to subparagraph 6(2)*(b)*(ii) by the Tribunal in *Canadian Actors' Equity Association*, 1996 CAPPRT 010, where the Tribunal found that assistant stage managers were artists. Even though the role of assistant stage managers is primarily one of coordinator, the Tribunal held that: "Since these professions are part of the process of shaping and refining a production, they are to some degree artistic". The EAC says that editors are part of the artistic process of shaping and refining a literary work and should be considered as artists pursuant to this provision.

[38] Respecting the second issue, the suitability of the sector, the EAC reiterated that no other association is interested in representing editors. The EAC also addressed the

question of a potential overlap with the TWUC certification. TWUC has been certified to represent:

> ... a sector composed of independent contractors ... engaged by a producer subject to the *Status of the Artist Act* as:
> i) authors of literary works in languages other than French, intended for publication in volume, electronic or multimedia form; or
> ii) authors of literary works in languages other than French, initially published in volume, electronic or multimedia form, offered for performance or adaptation into other media including audio, audiovisual, multimedia and other electronic forms, ...

The EAC argues that the TWUC certification should be interpreted as giving TWUC the right to represent "writers who are authors", rather than all "authors". The EAC pointed out that when the Tribunal certified PWAC, it was to represent "writers who are authors". The EAC says that the Tribunal also intended the TWUC certification to be for writers who are authors.

[39] The EAC submits that it is representative of the editors in the sector for which it is applying. The EAC's evidence was that it has some 1,200 members; in its application, it estimated that the total number of artists in the sector could be as high as 2,000.

[40] Respecting the fourth issue, the EAC undertook to amend its by-laws in order to ensure that members would have the express right to obtain financial statements and the right to participate in a ratification vote.

TWUC

[41] The TWUC limited its arguments to the first two issues: whether editors are authors and the appropriateness of the sector.

[42] The TWUC initially agreed that editors could be authors of compilations or collective works, within the meaning of the *Copyright Act*. However, at the hearing, TWUC advised that it was changing its position respecting collective works: in its submission, editors are not authors of collective works. Finally, TWUC strongly opposed the EAC's position that editors are joint authors within the meaning of the *Copyright Act*. Thus, the only area of agreement was that editors could be authors of compilations.

[43] TWUC submitted that, contrary to the EAC's suggestion, the Tribunal cannot give any definition it wishes to the word "author". Notwithstanding that the *Copyright Act* does not define this term, the meaning of "author" is established in copyright law through jurisprudence and it is this meaning which the Tribunal must adopt.

[44] On the issue of originality, TWUC relied on *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2000] 2 F.C. 451 (T.D.) (on appeal), where the Federal Court, Trial Division, held that even though the preparation of editorially enhanced judicial decisions involved extensive labour, skill and judgment, "the whole process, particularly those elements involving skill and judgment, lacked the 'imagination' or 'creative spark' that I determine to now be essential to a finding of originality" (at p. 474). TWUC submits that

editors do work of varying degrees of significance, but that no editing involves sufficient imagination or creative spark as to meet the test for originality.

[45] Furthermore, TWUC pointed out that editors may suggest changes but that it is the writer who makes the decision whether or not to accept a suggestion. Only writers have moral rights in their works. Editors do not have such rights, not because they have waived them as the EAC suggests, but because moral rights simply do not arise in respect of editors. Nor does editing give rise to copyright, in TWUC's submission. A finding to the contrary would literally turn the industry on its head.

[46] Respecting joint authorship in particular, TWUC relied on the decision in *Neudorf v. Nettwerk Productions Ltd.* (1999) C.P.R. (4th) 129 (S.C.) (on appeal). In that case, the B.C. Supreme Court expressed the test for joint authorship as follows (at p. 164):

> (i) Did the plaintiff contribute significant original expression to the songs? If yes,
> (ii) Did each of the plaintiff and McLachlan intend that their contributions be merged into a unitary whole? If yes,
> (iii) Did each of the plaintiff and McLachlan intend the other to be a joint author of the songs?

[47] TWUC submits that editors do not contribute significant original expression to literary works and writers and editors have no common intention to be joint authors. As such, editors do not meet all of the requirements for joint authorship.

[48] TWUC also relied on *Boudreau v. Lin* (1997), 150 D.L.R. (4th) 324 (Ont. Gen. Div.), for the proposition that a person whose editing includes correcting grammar, changing structure, adding words, changing style and rewriting parts of a work is not a joint author.

[49] TWUC disagrees with the EAC's alternative argument that editors "direct, in any manner, a literary work", pursuant to subparagraph 6(2)*(b)*(ii). In TWUC's submission, such an interpretation would strain the meaning of that provision.

[50] TWUC suggested that editors could fall within subparagraph 6(2)*(b)*(iii), in particular, as artists who contribute to a production in arts and crafts. However, the *Status of the Artist Act Professional Category Regulations*, SOR/99-191, would have to be amended in order to prescribe editors as a professional category for the purposes of that provision of the *Act*.

[51] On the issue of the suitability of the proposed sector, TWUC says that, to the extent that editors could be considered joint authors or authors of collective works, they are covered by its certification. Certifying the EAC for a sector including editors as joint authors or as authors of collective works would effectively revoke TWUC's certification, something which cannot be done except through a proper application for revocation.

Reply of the EAC

[52] In reply, the EAC submits that to reduce the sector to editors who are authors of compilations would make a mockery of the work of editors. There is no requirement for a creative spark in copyright law. The *Neudorf* case is irrelevant because that case involved a dispute over copyright; in making this application, neither the EAC nor editors are asserting copyright and, indeed, they have no interest in doing so. Editors simply wish to be represented and to engage in collective bargaining pursuant to the *Status of the Artist Act*.

[53] The EAC disagreed with TWUC's submission that editing could fall within subparagraph 6(2)*(b)*(iii), as a form of "arts and crafts".

Analysis and conclusions

Preliminary matters

[54] Connie John presented the EAC's submissions and also acted as a witness in these proceedings. In the interests of fairness, the Tribunal ruled that Ms. John, in her capacity as a witness, was subject to cross-examination by TWUC. Despite Ms. John's request, the same ruling was not made in relation to counsel for TWUC, Marian Hebb, as Ms. Hebb did not act as a TWUC witness.

[55] The CNA's written submission was that no decision of the Tribunal can have any effect upon newspapers, based on the decision in *Periodical Writers Association of Canada*, 1996 CAPPRT 014 ("*PWAC*"). The EAC did not present any response to this submission. However, the Tribunal is aware that the Canadian Radio-television and Telecommunications Commission ("the CRTC") issued a decision on May 17, 1999, in *Public Notice 1999-84*, in which it concluded that certain types of new media constitute "broadcasting". Therefore, it appears that the CRTC has taken jurisdiction over some new media broadcasters. If some newspapers are engaged in these kinds of new media, which are now under the CRTC's jurisdiction, this would represent a significant change since *PWAC* was decided and would likely affect the Tribunal's conclusions as to whether such newspapers are producers within the meaning of subparagraph 6(2)*(a)*(ii) of the *Status of the Artist Act*. In all of the circumstances, the Tribunal does not consider it appropriate to make a definitive ruling on this question, in the absence of full argument. If necessary, this is a matter which can be addressed directly in the context of other proceedings.

Issue 1 : Are editors artists within the meaning of the Status of the Artist Act ?

[56] The *Status of the Artist Act* creates a scheme for the certification of artists' associations to represent sectors composed of artists. The term "artist" is defined in section 5 of the *Act* as "an independent contractor described in paragraph 6(2)*(b)*". Paragraph 6(2)*(b)* creates essentially three categories of artists: specified creators of works, *viz.*, authors and directors of audiovisual works (subparagraph 6(2)*(b)*(i)); performers and directors of performers (subparagraph 6(2)*(b)*(ii)); and contributors in the performing arts, where prescribed by regulation (subparagraph 6(2)*(b)*(iii)). The EAC is attempting to bring editors within one of the first two categories.

[57] In order for editors to fall within the first category of artists covered by the *Status of the Artist Act*, they must be "authors" within the meaning of the *Copyright Act*. The Tribunal agrees with TWUC that in determining whether editors are authors, it must apply established principles of copyright law. David Vaver explains the notion of "author" in the *Copyright Act* as follows:

> Some say that "author" and "original work" are "correlative; the one connotes the other". It has even been said that "the word 'author' conveys a sense of creativity and ingenuity". These comments are not entirely accurate, nor do they make originality a tautologous condition. *The Act's reference to "author" requires the discovery and isolation of the person or persons who have actually done the original work that attracts copyright.* The person who draws a straight line may be an "author", but this effort is too trivial to be called "original".
>
> (David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000), at pp. 73-74, footnotes omitted, emphasis added.)

Accordingly, while a person may be an "author" in the ordinary sense of the word, even though he or she has not created an original work, the meaning of the word "author" in the *Copyright Act* does demand originality, since only "original" works are entitled to copyright protection: *Copyright Act*, s. 5(1).

[58] Turning first to compilations and collective works, the EAC has argued that editors write indexes, glossaries, tables of contents and bibliographies and compile the works of others, such as short stories or poems, and that these are all examples of authorship of compilations and collective works. Given the definitions of "compilation" and "collective works" in the *Copyright Act*, the Tribunal considers that these examples would fall more naturally into the meaning of "compilation". However, at least one academic notes that the courts have tended to consider compilations and collective works to be "essentially similar" and that "the definition of 'compilation' is broad enough to include all of the works listed in the definition of 'collective work'": McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3rd Ed. (Toronto: Carswell, 2000), at p. 321. In the Tribunal's opinion, the preparation of indexes, glossaries, tables of contents and bibliographies and compilations of the works of others, such as anthologies of short stories or poems, may all fall within the meaning of "compilation", provided that they meet the test for originality.

[59] In copyright law, the threshold for originality in respect of most types of compilations is a low one: generally all that is required is that labour, skill and judgment have been expended, *i.e.* sweat of brow; creative spark is not required: McKeown, at pp. 124-125; Vaver, at pp. 57-61. The exception occurs in relation to compilations of data, where the courts have held that, even though a great deal of labour may have been invested in it, a compilation of data will not be considered "original" if its creation did not require ingenuity or creative spark: *Tele-Direct (Publications) v. American Business Information, Inc.*, [1998] 2 F.C. 22 (C.A.); *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195 (C.A.). Both Vaver and McKeown cite various cases to show that the determination as to how much labour, skill and judgment (and, in the case of compilations of data, creativity and ingenuity) are required must be decided on a case by case basis.

[60] The Tribunal is satisfied that some, though certainly not all, of the work of editors will meet the test for authorship of a compilation or collective work. In order to be authors, their compilations or collective works must be original. Any inquiry as to originality is fact-driven and cannot be decided in a vacuum. It is neither necessary nor advisable to attempt, in this decision, to define precisely which circumstances would make an editor the author of a compilation or collective work. Disputes of that nature should be dealt with based on fact and not theory. For the purposes of this application for certification, suffice it to say that the Tribunal does consider that editors are "artists" pursuant to subparagraph 6(2)*(b)*(i) of the *Status of the Artist Act*, insofar as they are authors of *original* compilations or collective works, including (but not limited to) original indexes, glossaries, tables of contents and bibliographies.

[61] Turning to the question of joint authorship, the *Copyright Act* defines "work of joint authorship" in terms of collaboration and contribution. Two or more authors must collaborate in order to be considered joint authors. On the issue of collaboration, McKeown writes: "Frequently, this will involve engaging in the production of a work by joint labour in the implementation of a pre-concerted joint design." (At pp. 322-323.) Respecting contribution, he states: "The contribution must be that of an 'author' and the exercise of skill, labour and judgement in the expression of the work in material form is required." (At p. 323). The contributions do not have to be equal in quantity or quality, provided that they are significant and original.

[62] The following passage from David Vaver (at pp. 75-76) is also pertinent:

> What contribution warrants co-authorship may be contentious. Trivial editing is obviously not enough. Correcting punctuation, grammar, and syntax in another's manuscript before publication should not qualify; nor should providing chapter titles, suggesting a few ideas or lines, or requiring additions and alterations as part of the process of approving a work under statutory authority. ... On the other hand, contributions to a work's expression that would independently create an original work are obviously enough. ... Any substantial intellectual contribution to a work's composition pursuant to a common design – not just the product of the relationship of master and scribe – should, in principle, count as co-authorship. ...

> An apparent reluctance on the part of some courts to admit joint authorship may spring partly from the romantic view of the author as Lone Genius, or from a more pragmatic desire to avoid problems that plague co-ownership generally but that are particularly acute for copyright.

[63] Without endorsing the view that any type of editing is "trivial", the Tribunal agrees with this passage insofar as it stands for the general proposition that copy editing does not represent a significant enough contribution to a manuscript to make an editor a joint author. On the other hand, the Tribunal considers that developmental editing and substantive and structural editing clearly do involve a significant contribution of original expression. Line editing may also qualify, although this would depend on the extent of the editor's contribution in any given case. Based on the definitions which the Tribunal was given, line editing falls on a spectrum between copy editing and substantive editing. When line editing tends more towards the substantive end of the spectrum, the editor's contribution will be more likely to involve significant original expression. When line editing falls on the copy editing end of the spectrum, the editor's contribution is likely not significant or original enough to qualify.

[64] The Tribunal was given a specific example of extensive collaboration and contribution as between an editor and a group of writers. Jim Lyons and the writers of the Revenue Canada Advisory Committee subcommittee reports collaborated over a period of approximately five months to create the work, *Electronic Commerce and Canada's Tax Administration*. Mr. Lyons contributed significant original expression to this work, particularly in relation to the contextual chapters. Mr. Lyons did not merely copy or line edit: he made substantive and structural changes to bring about the final product. Mr. Lyons and the writers worked with the common intention that their contributions be merged into a unitary whole. In the Tribunal's opinion, this is a concrete example of joint authorship.

[65] Accordingly, the Tribunal considers that editors who collaborate with other authors and make significant and original contributions to literary works, as described above, are "artists" within the meaning of subparagraph 6(2)*(b)*(i) of the *Status of the Artist Act*.

[66] What about the fact that editors do not assert or purport to have copyright? The Tribunal considers that this is irrelevant to the question as to whether editors are authors. In our view, an editor who otherwise meets the criteria for an author does not lose that status merely because he or she does not assert copyright. The *Copyright Act* does not require that an individual assert his or her copyright in order to be considered an author. Indeed, the *Copyright Act* recognizes that even when the author of a work is unknown, that person is nevertheless the author (s. 6.1). Similarly, where a person authors an original literary work under the direction or control of the Crown or any government department, the copyright belongs to the Crown in the absence of any agreement to the contrary (s. 12 of the *Copyright Act*). Even though the author may not assert copyright, he or she nevertheless remains the author of the work. Accordingly, the fact that an editor may not assert copyright will not change the conclusion that he or she is an author, if the criteria for authorship have been met, as discussed above.

[67] The EAC's alternative argument is that editors should be considered as professionals who direct, in any manner, in a literary work, pursuant to subparagraph 6(2)*(b)*(ii) of the *Status of the Artist Act*. Subparagraph 6(2)*(b)*(ii) provides that Part II of the *Act* applies "to independent contractors determined to be professionals ... who ... 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". The EAC has submitted that editors "direct" writers "in a literary work".

[68] Given the immediate context of subparagraph 6(2)*(b)*(ii), this interpretation is untenable. In that provision, the words "perform, sing, recite, direct or act" are associated grammatically and logically, as are the words "musical, literary or dramatic work". When words are associated in a grammatical and logical sense, the scope of one of the words may be determined by examining the common features of all of the associated words: Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworths, 1994), at p. 200. In the case of the associated words "perform, sing, recite, direct or act", the words all convey functions related to a performance (be it dramatic, musical, literary or cinematographic). This idea of a performance also fits with the next group of associated words: "musical, literary or dramatic work". This interpretation is also consistent with the Tribunal's previous decisions, where it found that copyists were not artists within the meaning of subparagraph 6(2)*(b)*(ii), since they were not performers: *American Federation of Musicians*, 1997 CAPPRT 019, ¶¶ 31 & 34; *Guilde des musiciens du Québec*, 1997 CAPPRT 020, ¶¶ 30-32. The Tribunal concludes that subparagraph 6(2)*(b)*(ii) of the *Status of the Artist Act* does not include editors.

[69] The Tribunal similarly finds that TWUC's argument that editors could be prescribed as a professional category for the purposes of subparagraph 6(2)*(b)*(iii) is without merit. Editing has no relationship to the creation of a production in "arts and crafts" or any of the other types of productions listed in that provision.

Issue 2 : Is the sector proposed by EAC a sector that is suitable for bargaining?

[70] 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 them, 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.

[71] There are clearly common interests among freelance editors who are artists within the meaning of the *Status of the Artist Act*. The EAC has also demonstrated that it has worked to represent the interests of editors in the past and continues to do so. Although no scale agreements have been negotiated with any federal producers, this *per se* is not a prerequisite to finding that a sector is suitable. As well, the EAC has a growing francophone membership, in addition to a well-established anglophone membership. The EAC demonstrated that it is able to provide services to both its English-speaking and its French-speaking constituents.

[72] TWUC has argued that the EAC cannot be certified for a sector which includes authors of works of joint authorship or authors of collective works, since these artists fall

within the sector for which TWUC was certified. However, TWUC also clearly stated that it does not wish to represent editors. Having considered the evidence and arguments, the Tribunal is satisfied that the sector for which TWUC was certified is intended to be a sector composed of "writers who are authors of literary works", notwithstanding that the certificate only mentions "authors of literary works". By making this finding, the Tribunal is not effecting a revocation or partial revocation of TWUC's certification; it is merely interpreting the intended scope of the certification. For the reasons given herein, the Tribunal concludes TWUC's certification does not bar the EAC's application for a sector composed of editors who are authors.

[73] After considering all of the oral and written representations of the applicant and the intervenors, the Tribunal has determined that the sector suitable for bargaining is a sector composed of professional freelance editors who are authors within the meaning of the *Copyright Act* and who are engaged by a producer subject to the *Status of the Artist Act* to:

> (a) prepare original works in the form of compilations or collective works , or
>
> (b) prepare original works of joint authorship, where the editor's contribution constitutes the work of a joint author;
>
> in either French or English, but excluding
>
> (a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Tribunal on June 4, 1996,
>
> (b) authors covered by the certification granted to the Writers Guild of Canada by the Tribunal on June 25, 1996,
>
> (c) authors covered by the certification granted to the Société des auteurs, recherchistes, documentalistes et compositeurs (SARDEC) (renamed the Société des auteurs de radio, télévision et cinéma (SARTeC)) by the Tribunal on January 30, 1996, and
>
> (d) authors covered by the certification granted to the Writers' Union of Canada by the Tribunal on November 17, 1998.

Issue 3 : Is the EAC representative of the artists in the sector?

[74] The EAC has a total membership of some 1,200 editors. It has estimated that the sector for which it applied could include as many as 2,000 editors. Based on this information, which was not contradicted and therefore provides the best basis for the Tribunal's decision, the Tribunal concludes that the EAC is representative of the artists in the sector.

[75] No other artists' association has indicated an interest in representing editors who are artists within the meaning of the *Status of the Artist Act*.

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

Issue 4 : Do the EAC's bylaws comply with subsection 23(1) of the Status of the Artist Act?

[77] Subsection 23(1) of the *Status of the Artist Act* creates a clear prohibition: the Tribunal may not certify an artists' association unless its by-laws, *inter alia*, give its regular members the right to participate in a ratification vote on any scale agreement and provide members with the right to access a copy of its financial statements. The EAC's by-laws do not meet these requirements.

[78] Subsection 23(1) prevents the Tribunal from certifying the EAC at this time. However, the EAC has indicated that it will amend its by-laws in order to bring them into conformity with subsection 23(1) of the *Act*. Accordingly, the Tribunal considers it appropriate to stay this application for certification pending satisfactory proof that the EAC has made the required changes.

Decision

[79] For all these reasons, the Tribunal:

Declares that editors who are authors of original compilations and collective works are artists within the meaning of the *Status of the Artist Act*;

Declares that editors who are authors of literary works of joint authorship, *i.e.* who collaborate with other authors and make a significant and original contribution to literary works, are artists within the meaning of the *Status of the Artist Act*;

Declares that the sector suitable for bargaining is a sector composed of professional freelance editors who are authors within the meaning of the *Copyright Act* and who are engaged by a producer subject to the *Status of the Artist Act* to:

(a) prepare original works in the form of compilations or collective works, or

(b) prepare original works of joint authorship, where the editor's contribution constitutes the work of a joint author;

in either French or English, but excluding

(a) authors covered by the certification granted to the Periodical Writers Association of Canada by the Tribunal on June 4, 1996,

(b) authors covered by the certification granted to the Writers Guild of Canada by the Tribunal on June 25, 1996,

(c) authors covered by the certification granted to the Société des auteurs, recherchistes, documentalistes et compositeurs (SARDEC) (renamed the Société des auteurs de radio, télévision et cinéma (SARTeC)) by the Tribunal on January 30, 1996, and

(d) authors covered by the certification granted to the Writers' Union of Canada by the Tribunal on November 17, 1998.

Declares that the Editors' Association of Canada/Association canadienne des réviseurs is the association most representative of artists in the sector.

Orders that this proceeding be stayed to permit the applicant to amend its by-laws so as to bring them into conformity with subsection 23(1) of the *Status of the Artist Act*.

Ottawa, February 28, 2001

David P. Silcox Curtis Barlow

Moka Case