Canadian Artists and Producers Professional Relations Tribunal

CANADA

Tribunal canadien des relations professionnelles artistes-producteurs

Ottawa, 1 November 2002 File No.: 1350-01-007

Decision No. 039

In the matter of a request for reconsideration of Decision No. 033, as modified by Decision No. 036, filed by The Writers' Union of Canada

Decision of the Tribunal:

Decision No. 033 and Decision No. 036 are rescinded.

The certification order issued following Decision No. 036 is rescinded and a new order will be issued to confirm the certification of the Editors' Association of Canada / Association canadienne des réviseurs for a modified sector.

Place of hearing: Toronto, Ontario

Date of hearing: May 9 and 10, 2002

Quorum: David P. Silcox, Chairperson
Marie Senécal-Tremblay
John M. Moreau

Appearances: For The Writers' Union of Canada:
Marian D. Hebb, Counsel; Penny Dickens, Executive Director.

For the Editors' Association of Canada / l'Association canadienne des réviseurs:
Connie John, Executive Director, Jennifer Latham, President; Rosemary Shipton.

For the intervenor the Playwrights Union of Canada:
Otto Sibenmann, Counsel; Angela Rebeiro, past Executive Director.

For the intervenor the Writers Guild of Canada:
Joshua Phillips, Counsel; Jim McKee, Director of Policy and Communications.

Reasons for decision

1350-01-007: In the matter of a request for reconsideration of Decision No. 033, as modified by Decision No. 036, filed by The Writers' Union of Canada

Background

[1] This decision concerns a request for reconsideration of Decision No. 033, as modified by Decision No. 036, filed with the Canadian Artists and Producers Professional Relations Tribunal (the "Tribunal") pursuant to section 20 of the *Status of the Artist Act* (S.C. 1992, c.33, "the *Act*") by The Writers' Union of Canada ("TWUC") on October 29, 2001. The request for reconsideration was heard in Toronto on May 9 and 10, 2002.

[2] Decision 033, issued on February 28, 2001, is an interim decision [2001 CAPPRT 033] rendered by the Tribunal in the matter of an application for certification filed by the Editors' Association of Canada / l'Association canadienne des réviseurs (the "EAC"). In that decision, the Tribunal certified the following sector:

> [79] [...] 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 literary works in the form of compilations or collective works, or
>
> (b) prepare original literary 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 (renamed the Société des auteurs de radio, télévision et cinéma) by the Tribunal on January 30, 1996,
>
> (d) authors covered by the certification granted to The Writers' Union of Canada by the Tribunal on November 17, 1998.

[3] Decision 033 was stayed by the Tribunal as the EAC's by-laws did not meet the requirements set out in subsection 23(1) of the *Act*. On June 21, 2001, the EAC informed the Tribunal that its membership had approved two amendments to the association's by-

laws. As a result, they were now in compliance with subsection 23(1) of the *Act*. Accordingly, in Decision 036 [2001 CAPPRT 036], which was issued on September 14, 2001, the Tribunal lifted the stay and issued an order certifying the EAC to represent a sector composed of freelance editors who are artists within the meaning of the *Act*.

[4] However, Decision 036 slightly modified the sector definition from the one set out in Decision 033, in that it also excluded the authors covered by the certification granted to the Union des écrivaines et écrivains québécois ("UNEQ") and the authors covered by the certification granted to the Playwrights Union of Canada ("PUC"). As well, the sector definition was now explicitly limited to authors of "literary works".

[5] These modifications were made as a result of three requests for reconsideration that were filed with the Tribunal following the issuance of Decision 033. The first request was submitted by UNEQ, the second by the Directors Guild of Canada (the "DGC") and the third by PUC. In their requests for reconsideration, UNEQ and PUC essentially asked the Tribunal to exclude the authors covered by their respective certifications from the EAC sector definition and the DGC asked the Tribunal to limit the sector granted to the EAC to editors who are authors of "literary works".

[6] With regard to these requests, the Tribunal stated the following in Decision 036:

> *Applications for reconsideration*
>
> [4] Prior to receiving notice that the EAC had amended its constitution, the following organizations each filed an application for reconsideration of Decision No. 033:
>
> a) The Union des écrivaines et écrivains québécois (UNEQ) (May 7, 2001);
> b) The Directors' Guild of Canada (DGC) (May 29, 2001);
> c) The Playwrights Union of Canada (PUC) (June 15, 2001).
>
> [5] A different panel of the Tribunal has been seized with these three reconsideration applications. However, given that all of the applications are inextricably linked to Decision No. 033, the original panel was provided with a copy of the parties' submissions. The panel seized with the reconsideration applications has decided to adjourn the proceedings of the three applications *sine die* pending the issuance of this decision [2001 CAPPRT 036]. If required, that panel will then consider the merits of each of the applications and render its decision respecting same.
>
> [6] In light of the perceived confusion surrounding the EAC sector definition, the original panel has decided to rely on its power under section 20 of the *Act* to amend *proprio motu* Decision No. 033. Subsection 20(1) states that "The Tribunal may uphold, rescind or amend any determination or order made by it, and may re-hear any application before making a decision."
>
> [7] Subsection 20(1) of the *Act* is virtually identical to section 18 of the *Canada Labour Code*. The Federal Court of Canada has upheld the Canada Labour Relations Board's (now the Canada Industrial Relations Board) position that it can exercise the review power set out in section 18 of the *Canada Labour Code* on its own motion. More specifically, the Board does not require an application by a party to trigger a review of a decision (see *C.U.P.E.* v.

> *Canadian Broadcasting Corp.* (1985), sub. nom. *Latrémouille* v. *Canada* (Labour Relations Board)) 14 Admin. L.R. 210, 57 N.R. 1888, 17 D.L.R. (4th) 709 (Fed. C.A.)).
>
> *Amendment to the sector definition*
>
> [8] Accordingly, in an effort to clarify the scope of the sector granted to the EAC and eliminate any perceived confusion, the Tribunal has decided to exclude the authors covered by the UNEQ and PUC certificates in the same manner that authors covered by the Periodical Writers Association of Canada (PWAC), the Writers' Guild of Canada (WGC), the Société des auteurs de radio, télévision et cinéma (SARTeC) and The Writers' Union of Canada (TWUC) certificates have been excluded, notwithstanding that these two associations did not intervene in the EAC's application for certification.
>
> [9] In addition, the sector description as initially defined by the Tribunal in Decision No. 033 included some references to "literary works" although the term was not used consistently throughout the sector description. The Tribunal will therefore add the word "literary" where applicable and appropriate in the sector description.

[7] Following the communication of this decision to the interested parties, UNEQ and the DGC advised that they did not wish to pursue their requests for reconsideration. However, PUC advised that notwithstanding its exclusion from the EAC sector description it wished to continue with its request, since it believed that Decision 033, as modified by Decision 036, had created a precedent with respect to the Tribunal's interpretation of the notion of joint authorship under the *Copyright Act*, R.S.C. 1985, c. C-42.

[8] PUC's request for reconsideration was dismissed as the Tribunal concluded that it did not raise an error of law or serious error of fact justifying a reconsideration of the decision in question. This decision was communicated to the parties by letter dated November 20, 2001.

[9] In connection with TWUC's request for reconsideration of Decision 033 as modified by Decision 036, the Tribunal received written representations from the following intervenor parties: SARTeC, PUC, the WGC, PWAC, the DGC and the EAC. These associations either participated in the original EAC application for certification or submitted their own requests for reconsideration of Decision 033. UNEQ also received intervenor status but did not submit any representations. It did, however, reserve its right to be kept informed of the developments of the hearing.

[10] In its request for reconsideration, TWUC asserted that the Tribunal made five errors of law and two errors of fact in Decision 033, as modified by Decision 036. Their arguments are summarized as follows:

Errors of law

1. The conclusion that editors can be considered joint authors is erroneous because the writer maintains the ability to accept or reject the editor's contribution; and the issue of "common design" and "mutual intent", criteria that are required to be examined in order to determine joint authorship under the *Copyright Act*, were not considered by the Tribunal.

2. If editors are joint authors with writers of the works they create, the Tribunal's conclusions constitute a partial revocation of TWUC's certification, since all authors are already covered by its certification with the Tribunal. TWUC believes that the distinction of "writers who are authors" and "editors who are authors" is artificial and does not exist under the *Copyright Act*.

3. The Tribunal's conclusions will automatically recognize copyright interests and moral rights, notwithstanding the EAC's claim that editors will not "assert" these rights. Such recognition will impose upon producers an obligation to bargain copyright interests and moral rights with two "authors", thus creating "complex and intractable problems".

4. The EAC's sector, as defined by the Tribunal, is not suitable for bargaining because it is impossible to define with reasonable accuracy the editors who will be included in the sector in advance of the work being completed.

5. If editors can be considered authors, they would have common interests and a history of professional relations with writers who are authors and that would justify including both editors and writers in one bargaining sector. In addition, the certification of a separate sector for editors will undermine the working relationship between writers and editors. The "ethic of invisibility", wherein editors do not normally assert copyright interests, will not eliminate the need for authors to obtain the assignment or waiver of these rights from the editor, failure of which will create a "potential time bomb". These decisions will impact beyond the federal jurisdiction and therefore create an "unfortunate precedent". It will also provide a publisher with an opportunity to claim joint authorship as a result of the work done by one of its own editors.

Errors of fact

1. Contrary to the Tribunal's conclusions in paragraph 21 of Decision 033, TWUC wishes to represent all persons designated as authors and as such, the EAC is not the only association interested in representing editors.

2. TWUC already represents authors of collective works and joint authors, which include "editors" of anthologies and editors who are joint authors.

[11] TWUC indicated that it would support granting to the EAC a sector which includes editors of compilations that result from the arrangement of data, including indexes, glossaries, tables of contents and bibliographies, or editors who prepare works to be included in collective works or compilations of literary works.

[12] The intervenors all supported the arguments put forward by TWUC, with the exception of the EAC which argued that Decision 033, as modified by 036, was well founded in law and would encourage writers, editors and publishers to sign contracts that are necessary in the domain of trade book publishing. The EAC reiterated its position that editors have no intention of asserting copyright interests, since such a practice would have a negative effect on their ability to work.

[13] The Tribunal convened on January 15, 2002, to consider whether TWUC's request for reconsideration raised an error of law, a serious error of fact, or demonstrated that new evidence existed that was not available at the time of the EAC application for certification hearing which would justify a reconsideration of Decision 033, as modified by Decision 036.

[14] At the end of this hearing, the Tribunal concluded (i) that the request for reconsideration raised sufficient grounds to warrant a reconsideration of Decision 033, as modified by Decision 036; (ii) that the reconsideration should take the form of an oral hearing; and (iii) the panel would hear evidence and submissions with respect to the following issues:

1. joint authorship - criteria of "mutual intent" / "common design";
2. joint authorship - ability of writer to accept or reject an editor's suggestions;
3. partial revocation of existing certification orders - editors as joint authors and editors as authors of original collective works or compilations.

[15] TWUC and the EAC were granted the right to make written and oral representations as well as to present evidence respecting the issues identified by the Tribunal. The other intervenors were granted the right to present written and oral representations respecting these issues. This decision was communicated to the parties by letter dated January 17, 2002.

Issues

[16] This request for reconsideration raises the following issues:

1. What is the appropriate test to determine joint authorship within the meaning of the *Copyright Act*?

1. Did the original panel err in determining that certain professional freelance editors were joint authors of a literary work within the meaning of the *Copyright Act* and therefore artists within the meaning of the *Act*?

2. If certain professional freelance editors are joint authors of literary works within the meaning of the *Copyright Act*, and therefore artists within the meaning of the *Act*, are these artists already covered by existing certifications?

3. Can professional freelance editors be authors of original literary works in the form of compilations and collective works within the meaning of the *Copyright Act*?

4. If certain professional freelance editors are authors of original literary works in the form of compilations and collective works within the meaning of the *Copyright Act*, and therefore artists within the meaning of the *Act*, are they already covered by existing certifications?

Legislation

[17] 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,
[...]

20. (1) The Tribunal may uphold, rescind or amend any determination or order made by it, and may rehear 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.

[...]

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.

[18] The relevant provisions of the *Copyright Act* 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*) 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.

Evidence

TWUC

[19] At the reconsideration hearing, TWUC presented seven witnesses: Marc Côté, Bill Harnum, Rebecca Schechter, Julie Barlow, Angela Rebeiro, Susan Crean and Larry Muller. They were presented to the Tribunal as representative of the various players in the literary world, namely writers, publishers and editors. Many have acted in more than one of these roles throughout their careers.

[20] TWUC's witnesses testified that in their role as editors, they never considered themselves to be joint authors with the writer of a work, even when their contributions as an editor were very significant. Some witnesses described the editor as someone who assists the writer to deliver as perfect and finished a manuscript as possible, a sort of literary midwife.

[21] Marc Côté, a writer, editor and part owner of Cormorant Books, an independent literary press, testified that an editor's contribution to a work is only as significant as the writer will allow them to be and further stated that the suggestions are not original to the editor as they are inspired by the manuscript itself. According to Bill Harnum, Senior Vice-President of Scholarly Publishing, University of Toronto Press, if an editor deems his or her contribution to be so significant, he or she should approach the writer to obtain credit as joint author. However, the work of an editor does not automatically attract this recognition of joint authorship.

[22] Julie Barlow has worked both as a writer and editor, primarily for periodicals. She described the difference between the relationship of joint authors and the relationship between author and editor as follows: "in a joint author situation, the collaboration is the common voice of the two writers" whereas in an author/editor situation, there is only one voice, that of the writer's. The editor's job is to help the writer express what the writer has to express. This idea was echoed by all of TWUC's witnesses, and in particular Larry Muller, President and Managing Director of Scholastic Canada Ltd., who stated that as an editor, he "helped the author manifest what the author really wanted to achieve, that was [his] job".

[23] Angela Rebeiro, the Publisher for the Playwrights Canada Press and the former Executive Director of the Playwrights Union of Canada, testified that plays are a collaborative exercise involving a number of players, including playwrights, audiences, dramaturges etc.; the contribution of all of these players does not transform them into authors of the plays. The authorship of the work remains that of the playwright.

[24] All of TWUC's witnesses testified that a writer is free to accept or reject an editor's suggestions. As an example of this power, Bill Harnum referred to section 8 of the University of Toronto Press Standard Contract wherein it is stipulated that any changes to a manuscript must be approved by the writer, such approval not to be unreasonably withheld. In addition, Angela Rebeiro cited sections 1 and 7 of the Playwrights Canada Press Trade Publishing Contract in support of this evidence.

[25] Finally, Susan Crean, writer and co-president of the Creators' Rights Alliance / l'Alliance pour les droits des créateurs, gave evidence respecting the authors of anthologies. It was her testimony that an "editor" of an anthology conceives of the concept of the book, gathers the required material together and usually writes an introduction of some kind. Citing the definition of editor found in the Guidelines of the Public Lending Rights Commission, she states that these "editors" are actually writers and come more appropriately within TWUC's jurisdiction.

The EAC

[26] The EAC presented three witnesses: Rosemary Shipton, Rosemary Tanner and Jennifer Latham. Ms. Shipton is, *inter alia*, a professional editor and coordinator of the publishing program at Ryerson University. Her testimony was in the same vein as that of TWUC's witnesses. She refers to herself as a publisher's editor and, in this role, her mandate is to make the author's project as good as it can possibly be. She testified that as an editor, she has made significant contributions to the projects on which she has worked and this work has been completed in a happy collaboration with the author. She does not, however, consider herself to be a joint author of these projects. She stated that as the editor, she assists the author. When she is the writer, then she is in the driver's seat.

[27] In her role as instructor at Ryerson University, Ms. Shipton testified that she teaches students enrolled in the editing course "never to take over the author's project (...)." She tries to train them to clone the author's voice in everything that they do, because they are working to enhance the author and not to take over the project.

[28] Ms. Shipton also testified with respect to her work on collective works and compilations. In her opinion, particularly with regard to textbook publishing, freelance editors are often the "editor" responsible for the collective work and compilations. She herself has never authored a collection, but she has worked on a number of such works as the publisher's editor. She explained to the Tribunal that there is an "unfortunate dual definition of the word 'editor'". The editor of a compilation or collective work, the "organizing editor", is the person who initiates the project, contacts the contributors and provides some shape to the work. The "publisher's editor", which is what she is, provides normal editorial work which consists of substantive/stylistic editing of, say, a collection of essays.

[29] Rosemary Tanner, professional freelance editor, testified regarding a membership survey conducted by the EAC prior to the reconsideration hearing. The survey set out a series of questions related to the issues that the Tribunal tabled for the reconsideration hearing, primarily the issue surrounding a writer's ability to accept or reject an editor's suggestions. Roughly 23 % of the EAC membership responded. Approximately 90 % of the respondents indicated that substantive changes are usually accepted by the writer 71 % to 100 % of the time. Twenty-seven percent of the respondents indicated that they have worked for the federal government in some capacity within the last five years. Ms. Tanner also testified that her role as editor is to help the author clarify his or her writing. Given this role, authors are willing to accept the suggestions, including substantive suggestions made by an editor, in an effort to improve their work.

[30] Finally, Jennifer Latham, professional freelance editor and President of the EAC, testified that as a freelance editor, she has worked with writers in many different situations. In her opinion, it is not always the writer who has the final word on whether an editor's suggestions will or will not be incorporated into a work, particularly with respect to government work. The client who has commissioned the work usually has the authority to override the author's wishes.

[31] Ms. Latham defines substantive editing as looking at the coherence of a document, reading it from start to finish, determining the theme of the document, determining what the intended audience is and then reorganizing, rewriting, editing or otherwise preparing the document for release, either internally or externally. In her opinion, substantive editing is very creative. In her view, she contributes and collaborates on the projects on which she works.

[32] As an example, Ms. Latham explained to the Tribunal the work she did on a book regarding the Cree people of James Bay. The project was initiated by what she referred to as an "overseeing editor", *i.e.* the individual involved in the initial concept development of the project as well as the one who gathered the research and commissioned the articles. Once these steps were completed, Ms. Latham was hired as the "managing/substantive editor". In this role, she discovered that the outline that had been initially prepared did not conform to the material that had been commissioned. It was her job to assemble a style guide for the book in an effort to ensure consistency and develop a theme that was carried throughout the book. In many cases, with the approval of the authors, Ms. Latham made the suggested changes herself. Where the author was no longer available, she and her team did the additional research and rewrote the necessary parts. She was also assigned the task of choosing the photographs that would be included in the book.

Submissions of the parties

TWUC, PUC, the WGC, the DGC and PWAC

Criteria of mutual intent / common design

[33] While the term author is not defined in the *Copyright Act*, TWUC submits that it only applies to the creator or maker of a work. While the work of an editor may affect an author's manner of expression or influence how an author may treat his or her material, the editor is not the creator of the work and therefore not entitled to protection under the *Copyright Act* as joint author. Moreover, TWUC submits that while an editor's work may be creative, this creative contribution is not sufficient to meet the standard of originality required in order to establish authorship, as this standard has been enunciated by the Federal Court, Trial Division, in *CCH Canadian Ltd. et al.* v. *Law Society of Upper Canada* (1999) 179 DLR (4th) 609, additional reasons at (2000) 184 DLR (4th) 186.

[34] TWUC admitted that the issue of the required threshold of creativity in a work remains unsettled in Canadian law. This issue notwithstanding, TWUC and PUC argue that in order to claim joint authorship, an editor's contribution must be made pursuant to a common design, and there must be a shared intent on the part of all joint authors, to be joint authors. The WGC adds that the Tribunal erred in law when it failed to consider the requirement of mutual intent in Decision 033, as modified by Decision 036.

[35] TWUC and PUC refered to a number of cases from Britain, Canada and the United States that have discussed the criteria applicable in a determination of works of joint authorship. The discernable principles respecting joint authorship from these cases are, *inter alia*: a preconcerted joint design (*Levy* v. *Rutley* [1871] L.R. 6 C.P. 523 (C.A.), per Byles J. at p. 528); a shared responsibility for the skill and labour contributed to the work and for what appears in the work (*Ray (Robin)* v. *Classic FM PLC*, [1998] EWHC Patents 340 (H.C., Chancery Division) at para. 27 and 28); "who is the effective cause of the work" and objective manifestations on the part of the putative joint authors of a shared intent to be co-authors (*Aalmuhamed* v. *Lee*, 202 F.3d 1227 (9th Circuit 2000) at para. 22).

[36] The DGC cited the U.S. decision of *Childress* v. *Taylor*, 945 F. 2d. 500 (United States Court of Appeals, 2nd Circuit 1991) at p. 507, where the court specifically addressed the writer-editor relationship and stated that the lack of intent of both participants in this relationship to regard themselves as joint authors illustrates that they are not joint authors.

[37] TWUC and PUC also rely on the Canadian author J. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3rd ed. (Scarborough: Carswell, 2000) at 323, where he states that a claimant to joint authorship must make a "significant and original contribution to the creation of the work pursuant to a common design". TWUC submits that although the contribution need not be equal, it must be significant and that the degree of editorial revision to a work is rarely sufficient to create a new work in which copyright will accrue to both the writer and editor as joint authors.

[38] TWUC relied extensively on the British Columbia Superior Court decision in *Neudorf* v. *Nettwerk Productions Inc*., [2000] 3 W.W.R. 522 , [1999] B.C.J. No. 2831 (Q.L.) [hereinafter *Neudorf* cited to Q.L.], where, after conducting an extensive review of domestic and foreign case law with respect to joint authorship, the Court enunciated the following test at para. 96:

> (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?

At the time of the reconsideration hearing, this was the most recent decision respecting the issue of joint authorship in Canada.

[39] PUC argues that since *Neudorf*, the requirement of mutual intent for a finding of joint authorship has now been made explicit in Canadian copyright law. This criteria was adopted from American copyright law, where the definition of joint authorship differs from the one found in the Canadian *Copyright Act*. But PUC stresses that the judge in *Neudorf* stated that this requirement was incorporated into American copyright law despite, rather than because of, the American statutory definition of joint authorship.

[40] With regard to this criteria of mutual intent, the WGC referred the Tribunal to its experience in negotiating on behalf of both screenwriters and story editors in the television and film industry. Counsel argued that while editors make written contributions to a work, they are not authors. For example, under the Canadian Broadcasting Corporation/WGC scale agreement (the "CBC agreement"), screenwriters and story editors are remunerated differently. Writers retain full and undivided copyright in their work (article C3); they are paid other fees according to their "credit", which is determined on the basis of whether a Program under the CBC agreement was "written by" the writer, or whether the writer made a "substantial written contribution" to the Program (article C904). Editors are not eligible to receive a writing credit for their work on a Program nor are they entitled to any portion of a writer's fee (article C1201(*h*)). Finally, if a story editor contributes as a writer to a Program, he or she must be contracted as a writer separately (article C1201(*i*)).

[41] PUC and the WGC submit that all of the witnesses at the reconsideration hearing testified that editors do not share an intent with writers to be joint authors. They add that the EAC's "ethic of invisibility", as defined in Decision 033, illustrates that editors do not consider themselves authors, as it is an understanding between the writer and editor that copyright does not accrue to an editor as joint author when he or she works with a writer. The WGC further argues that the Tribunal committed an error of fact when it failed to find that an intent to co-author does not exist between editors and writers.

Ability of a writer to accept or reject an editor's suggestions

[42] TWUC submits that writers are usually free to accept or reject an editor's suggestions. This ability reflects the fact that the work incorporates and demonstrates the writer's vision and design for the work rather than a common design of the writer and the

editor as joint authors, notwithstanding that many works are commissioned or their general parameters are agreed to with a prospective publisher or an editor engaged by a publisher. Many publishing contracts include a provision that prevents changes to a manuscript without the author's approval.

[43] PUC submits that the requirement of a pre-concerted joint design, as it was set out in the English case of *Levy* v. *Rutley*, *supra*, calls for a pre-existing common intent to pursue a common design in the sense of a design that all of the joint authors originated. The design of a work is that of an author. This work only becomes a joint design when an editor makes suggestions or corrections because the editor then takes on the author's project. The author's ability to accept or reject an editor's suggestions illustrates that it is the author who is the guiding mind of the project. Unless the editor is directly responsible for what appears in the work, he or she cannot be a joint author. PWAC submits that the work of an editor when he or she improves the presentation and quality of a writer's work is not authorship because this work already existed, in largely the same form.

[44] Both TWUC and PUC argue that in order to be considered a joint author, the editor must contribute something more than ideas. He or she must contribute original expression to the work and must exercise some control or authority over the work. PUC submits that the EAC sector, as it is presently defined in Decision 036, would cover both editors who contribute ideas and editors who contribute to the final expression of the work. Relying on the case of *Cala Homes (South) Limited* v. *Alfred McAlpine Homes East Ltd.* (1995) F.S.R. 818, at pp. 831-834, PUC argues that only in exceptional cases can copyright be granted to a contribution of ideas.

Partial revocation of existing sectors

[45] TWUC, PUC, the WGC and PWAC submit that the sector granted to the EAC overlaps with TWUC's sector since TWUC's certification does not exclude joint authors or authors of collective works and compilations. PUC submits that the Tribunal itself recognizes that TWUC's certification extends to all authors. Without the "re-interpretation" of this sector in para. [72] of Decision 033, there could be no sector composed of professional freelance editors who are authors.

[46] TWUC states that the author of a collective work or compilation is the person who is responsible for its arrangement or selection, as defined in section 2 of the *Copyright Act*, and that this person is normally referred to as an "editor". However, as this person usually writes an introduction or is a contributing writer to the work, he or she has more in common with writers than with professional freelance editors. In light of the criteria set out in subsection 26(1) of the *Act*, these "editors" should remain in TWUC's sector.

[47] Since, in its view, the EAC certification constitutes a partial revocation of the sector for which it is certified, TWUC submits that such a revocation cannot be accomplished in the course of an application for certification proceeding. PUC suggests that such a proceeding could have been brought pursuant to paragraphs 25(1)(*b*) or (*c*) of the *Act*. However, as the EAC filed an application for certification of an unrepresented sector, the Tribunal cannot, on its own motion and without proper notice, convert it into an application to represent a sector already certified. Accordingly, TWUC argues that the

Tribunal lacks jurisdiction to certify the EAC as it did in Decision 033, as modified by Decision 036.

[48] The WGC argues that TWUC's jurisdiction has been diminished as a result of the certification of the EAC respecting editors who are joint authors. In its opinion, the Tribunal is required to take into consideration the applicable principles of labour law for any question that comes before it pursuant to section 18 of the *Act* and such a diminution is not appropriate. The WGC cites *Re BCT Telus*, [2000] CIRB No. 27 in support of its argument that this modification of an existing bargaining unit is not appropriate in the present circumstances. In its view, the reinterpretation of TWUC's sector will have serious ramifications, consequences and problems that cannot be ignored by the Tribunal.

The EAC

Preliminary arguments

[49] The EAC argues that the statutory definition of "author" under the *Copyright Act* is not confined to writers, although "author" is often used as a synonym for "writer". Because editors contribute to the fixed written form of a work, they too can be included in the statutory definition of author.

[50] In interpreting the *Act*, the EAC submits that the Tribunal is strictly bound to apply the terms of the legislation as passed by Parliament, notwithstanding the ramifications that a strict application of the statute may bring: Edgar, *Craies on Statute Law* (London: Sweet and Maxwell, 1971) at p. 64-5 and 67, Langden, *Maxwell on the Interpretation of Statutes*, (Bombay: N.M. Tripathis Private Ltd., 1976) at p. 1 and 31.

[51] Finally, the EAC argues that the Tribunal's jurisdiction is confined to producers subject to the *Act*. Consequently, any evidence and submissions that relate to issues outside of this jurisdiction, including copyright in the trade publication industry, is not relevant to the proceeding.

Criteria of mutual intent / common design

[52] The EAC states that the statutory requirements to establish joint authorship are fourfold:

1. the irrelevance of quantitative equality between authors;
2. the necessity of establishing collaboration in a common design;
3. the necessity of working toward a unitary project; and
4. the requirement that the contribution of the "authors" are not distinct, one from the other.

In the opinion of the EAC, Canadian copyright law does not contain a requirement of "mutual intent" to establish joint authorship. It is the nature of the work that determines the issue of joint authorship.

[53] With respect to the element of "common design", where an editor makes a significant contribution to a work, the initial author and the editor collaborate by common design on a final product. Without the editor's contribution, there would be no final

product. The EAC argues that editors and writers collaborate together to produce a finished work, the mutual intent and common design of the parties being explicitly set out in the contract between the editor and the producer.

[54] In light of their "ethic of invisibility", editors who are joint authors exercise their right to remain anonymous under section 14.1 of the *Copyright Act* and to waive any claims of moral rights that they may have to a work. According to the EAC, the Tribunal's decision does not create what TWUC characterizes as "a series of complex and intractable problems" because of its copyright implications. Copyright protection accrues automatically to the work of some editors who in turn choose not to assert their rights. The Tribunal simply interpreted and applied the relevant statutes.

[55] With respect to the evidence and argument of the WGC, specifically the reference to a story editor being mandatorily contracted as a second writer if his or her contribution is no longer that of a story editor (article C1201(i) of the CBC agreement), the EAC states that the contribution of the second screenwriter under this article is exactly what the editor in the literary world of print does without any recognition.

[56] Accordingly, the only question for the Tribunal to answer is: Given the criteria set out in the legislation, the evidence of collaboration between editors and authors and the significant contribution of some editors to the works that they edit, are editors joint authors? In the EAC's view, the Tribunal rightly answered 'yes' to this question in Decision 033, as modified by Decision 036.

Ability of a writer to accept or reject an editor's suggestions

[57] The EAC submits that the contributions of editors are expressed in a fixed and written form. By accepting suggestions of an editor, the writers are in fact the scribes of editors. According to the EAC, whether or not a writer can accept or reject the suggestions of an editor is a matter of contract. They argue that the membership survey they conducted demonstrates that in the majority of situations, the substantive suggestions of editors are accepted by writers.

[58] The EAC acknowledges that in many situations a writer does have the right to accept or reject an editor's suggestions. However, in other situations, particularly in government work, someone other than the writer may have authority to sign off on the finished work or, on some occasions, it is the editor who makes the final decision.

Partial revocation of existing sectors

[59] The EAC argues that Decision 036 did not revoke TWUC's certification. It is merely a clarification of TWUC's certification. TWUC was evidently certified to represent a sector composed of artists who are authors of volume work, *i.e.* writers. The EAC argues that TWUC cannot represent those authors who are not "writers" within the meaning of TWUC's constitution.

[60] All of the evidence at the hearings in January 2001 and in May 2002 indicates that editors and writers have historically been represented by two different associations. TWUC's membership does not, and never has, represented a group composed of professional freelance editors.

[61] With respect to the certification of editors of compilations, the EAC states that, with respect to government work, it is not seeking to represent members of TWUC who might be engaged in the task of preparing collective works and compilations. TWUC argues that editors of compilations and collective works are already covered by its certification, these editors usually being a contributing writer to the compilation or collective work. However, professional editors compile indexes, bibliographies, tables of contents, glossaries, etc. In the opinion of the EAC, the number of compilations prepared by the professional editors outweighs the number of compilations or collective works prepared by members of TWUC.

TWUC's reply

[62] While the Tribunal may certify artists' associations to bargain collectively with producers subject to the *Status of the Artist Act*, it is called upon to interpret the *Copyright Act* by its enabling legislation. Accordingly, the EAC's argument that the hearing is not about copyright law cannot be sustained. The Tribunal must take into account the applicable principles of copyright law.

[63] Contrary to the literal rule of statutory interpretation that has been argued by the EAC, TWUC cites a passage from professor Ruth Sullivan's book *Driegder on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworths, 1994) at p. 130, which advocates that a tribunal should adopt the modern rule of interpretation of the statutes in question. This modern rule requires courts to determine the meaning of a legislative text in its entire context, "having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids".

[64] Finally, TWUC takes the position that the EAC argument that writers are the scribes of editors when they incorporate an editor's suggestions is incorrect. This argument was specifically addressed by Justice Cohen in *Neudorf*, *supra*, wherein he stated that Sarah McLachlan, the defendant in that case, was not the scribe of the plaintiff who was claiming joint authorship because, as the author, she was the one who, in fact, decided what would ultimately be included in the song.

Analysis and Conclusion

[65] Subsection 20(1) of the *Act* empowers the Tribunal to "uphold, rescind or amend any determination or order made by it (...)". The *Canada Labour Code*, R.S.C. 1985, c. L-2, contains an identical provision at section 18. This provision has been interpreted by the Canada Industrial Relations Board and it has clearly articulated that its "... reconsideration power is not intended to be an appeal process, nor is it meant to contest the Board's findings or the decision of the original panel" (*Telus Corp. (Re)*, [2000] CIRB no. 94 (Q.L.) at para. 7). The Tribunal agrees with this interpretation and, accordingly, will not interfere lightly with its findings unless it has committed an error of law or a serious error of fact.

[66] With respect to the applicable rule of statutory interpretation, none of the parties dispute that the Tribunal is mandated, through subparagraph 6(2)(*b*)(i) of the *Act*, to

interpret the *Copyright Act*. In light of this, and as the original panel stated in paragraph 53 of Decision 033, we concur that established principles of copyright law must govern the present decision.

Issue 1: What is the appropriate test to determine joint authorship within the meaning of the Copyright Act*?*

[67] TWUC, PUC, the WGC, the DGC and PWAC argued that the original panel erred when it failed to consider the three-pronged test for joint authorship established by Justice Cohen of the Supreme Court of British Columbia in *Neudorf*, *supra* which they submit is the leading authority on joint authorship. More specifically, they submitted that the Tribunal could not determine the issue of joint authorship without considering the third element of the test. The elements of the test are summarized as follows:

1. a putative joint author must contribute significant original expression to a work;
2. a joint authors must intend their contributions to be merged into a unitary whole; and
3. each of the joint authors must intend to be joint author with the other.

[68] TWUC also argued that the contribution of editors to a work is not sufficiently creative to satisfy the first element of the test for joint authorship and attract copyright protection. The first panel concluded, based on the evidence and argument before it, that developmental and substantive editing involved a significant contribution of original expression on the part of professional freelance editors. All of the evidence and argument presented at the reconsideration hearing also support this finding. We see no reason to disturb it.

[69] In establishing the test for joint authorship, and particularly the second and third elements of *Neudorf*, the Court relied extensively on *Childress* v. *Taylor*, *supra*, the leading American authority on joint authorship. While Canadian courts will often consider American case law, the Tribunal is mindful of the comments of the Federal Court of Appeal in *CCH* v. *LSUC* [2002] F.C.J. No. 690 (Q.L.) when interpreting Canadian copyright law. As Linden J.A. stated at para. 22:

> [...] This Court might be guided by British jurisprudence, since Canadian copyright law was historically based upon, and still closely resembles British law (see J.S. McKeown, Fox Canadian Law of Copyright and Industrial Designs, 3rd ed. (Scarborough: Carswell, 2000 at 38-39 ("Fox")). On the other hand, the Supreme Court of Canada has indicated that American jurisprudence must be carefully scrutinized, because there are important differences between Canadian and American copyright policy and legislation (Compo, supra at 367). Canadian courts must always be careful not to upset the balance of rights as it exists under the Canadian Act.

[70] The Tribunal considers that the issue of whether professional freelance editors are joint authors cannot be determined on the basis of the intent of the parties alone. It is one factor that must be taken into consideration and it is unclear, at this time, whether it constitutes an independent part of the test for joint authorship. The Tribunal will

therefore look first to the elements of joint authorship that have been clearly established by Canadian and British jurisprudence to determine the test for joint authorship.

[71] The definition of "work of joint authorship" found in the *Copyright Act* requires two elements: collaboration and contribution. Regarding these two elements, the original panel stated at paragraph 61 of Decision 033:

> 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.

[72] Essentially, an editor must contribute significant original expression and must collaborate with the other author in a pre-concerted joint design in order to be a joint author. This panel concurs that this is the correct test to be applied in determining whether professional freelance editors can be, in certain circumstances, joint authors with the authors of the works that they edit.

Issue 2: Did the original panel err in determining that certain professional freelance editors were joint authors of a literary work within the meaning of the Copyright Act *and therefore artists within the meaning of the* Act*?*

[73] The original panel concluded that editors who perform substantive and developmental editing contribute original significant expression to the works that they edit. Joint authorship also requires an element of collaboration with the other author or authors. While we agree with the test that the original panel adopted in Decision 033, we are of the view that it was not applied correctly. The original panel relied on the second component of the *Neudorf* test, which requires that putative co-authors intend that their contributions be merged into a unitary whole. Paragraph 64 of Decision 033 states:

> 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. (Emphasis added)

The crux of the issue before this panel is to determine whether professional freelance editors "collaborate" within the meaning of the *Copyright Act*.

[74] TWUC and PUC took the position that although an author and an editor work together to complete a common project, this limited meaning of collaboration is not sufficient to establish the existence of a pre-concerted joint design between writer and editor, as this concept has been developed by the jurisprudence.

[75] In *Boudreau* v. *Lin* (1997), 75 C.P.R. (3d) 1 (Ont. Gen. Div.), a decision dealing with joint authorship in a literary setting, a university student submitted a term paper to his professor. The professor made corrections and suggested revisions to the paper, some of which were incorporated into the paper by the student. The professor made several further minor revisions, replaced the student's name with his own and that of another professor, published and presented the paper, all without the student's knowledge. The student brought an action for copyright infringement. The professor claimed to be a co-author of the paper. The Court disagreed and found that the student was the sole author of the work. At p. 9, the Court said:

> I now consider whether Professor Lin's changes, improvements and editing added enough to the paper to make him a co-author. I am guided by the decision in the case of *Dion v. Trottier* (1986), 9 C.I.P.R. 258 (Que. S.C.), where the plaintiff sued for recognition of his input into a work, authored by his former wife. The court held that one must look at the nature of the contribution as well as its importance. In the cited case, involving a story written by Trottier, the author's ex-husband had corrected her grammar, added certain words, summarized, altered the structure of text, improved literary style and rewritten much of what his former wife had written. The published version incorporated parts of both the original and the rewritten version.
>
> The court found that while the plaintiff's version had "some utility and certain value", the basis of the story, the vocabulary, the rhythm, the magnitude, the sensibility and the truthfulness, were all as a result of the defendant's labours and so the plaintiff's case was dismissed. One can see from this brief outline of the analysis that Professor Lin's contribution to the authorship of the paper in the case at bar came nowhere close to duplicating such efforts - efforts which were rejected as constituting joint authorship.

[76] Evidence was presented at the initial hearing and at the reconsideration hearing in support of the argument that although an author and an editor work toward a common project, the final product remains that of the author. This thought was expressed by a number of witnesses at the reconsideration hearing. Larry Muller testified that as an editor he has made significant contributions to final works but does not consider he has any kind of proprietary right in these works. Rosemary Shipton testified that her mandate was to work on the author's project and to make the publication as successful as it could be for the author and for the publisher.

[77] The Tribunal finds that the conclusions of the Court in *Boudreau* v. *Lin, supra*, and the evidence indicate that an editor collaborates with an author only in the sense that he or she assists the author in perfecting a work. The author's role is to write the best work possible and the editor's role is to help the author achieve that goal while preserving the author's voice.

[78] The EAC argued that the evidence pertaining to trade publishing did not apply in the context of works commissioned by the federal government. The EAC's witness, Jennifer Latham, testified that in works commissioned by government departments, the

project is not the writer's, the writer often having completed his or her part prior to the editor's involvement.

[79] We agree with the EAC that the relationship between editors and writers in trade publishing may differ from the one that exists in works commissioned by federal government departments. With respect to these works, the editor performing substantive and developmental editing no longer attempts to preserve the original author's voice, but rather the voice of the client, *i.e.* the producer subject to the *Act*. Consequently, whether it be in government work or trade publishing, the editor's role is to make someone else's publication as successful as it can be. But, it is not the editor's "work". In that regard, we note that the editors who testified at the reconsideration hearing indicated that they do not view themselves as the "author" of the works that they edit.

[80] In light of the above, the Tribunal finds that although an editor and an author work together on a common project, they do not collaborate on a pre-concerted joint design, as this term is understood under the *Copyright Act*.

[81] The EAC filed a survey of its membership to demonstrate that suggestions made by an editor are generally accepted by the writer, whether it be substantive editing or copy editing. Evidence was presented in support of TWUC's position that an editor's suggestions must always be approved prior to being included in a work. Bill Harnum referred the Tribunal to section 8 of the University of Toronto Press Standard Contract to demonstrate that the consent of a writer must be obtained for any changes made to a manuscript.

[82] When providing services to departments of the federal government, the "writer" of the report or other work may no longer be involved in the creative process and it is actually the client, *i.e.* the government department, which has the final say on the changes suggested by the editor. The fact that the "writer" does not always retain the ability to accept or reject an editor's suggestions in the context of works commissioned by federal government departments does not alter the conclusion that editors are not joint authors of the works they edit. The Tribunal views the authority of the writer in the trade publishing context to shift to the client, *i.e.* the government department when dealing with producers subject to the *Act*. Accordingly, the final approval rests not with an editor, but with a producer.

[83] The Tribunal finds that whether editors' suggestions are or are not accepted does not in and of itself address the issue. Rather, this element of control demonstrates that while an editor's suggestions may contribute to a work creatively, the final decision rests with the writer.

[84] Much of the evidence presented to the Tribunal at the reconsideration hearing pertained to who retained copyright. In the trade publishing industry, editors are usually paid an hourly fee for their work. Writers are compensated through royalties. This distinction is not quite as clear where government work is concerned, since copyright for the work usually rests with the Crown (see section 12 of the *Copyright Act*). In this context, professional freelance writers are often compensated in the same manner as professional freelance editors.

[85] What the Tribunal must determine in the end is whether or not professional freelance editors are authors within the meaning of the *Copyright Act*, and therefore

artists pursuant to the *Act*, and not whether they retain copyright in the works that they edit. While ownership of copyright may be an indication of authorship, such as in the trade publishing industry, it is not a determinative factor upon which the Tribunal should rely. It is merely one criteria among many that the Tribunal must take into consideration. Notwithstanding that professional freelance editors and writers may be similarly compensated for works commissioned by producers subject to the *Act*, it is not the manner of compensation that can make editors joint authors. Rather, it is the nature of the work done that determines authorship.

[86] In light of the above, we find that the original panel erred when it certified a sector that included professional freelance editors whose contribution was in the nature of joint authorship, as these editors are not authors within the meaning of the *Copyright Act*, and therefore not artists within the meaning of the *Act*. Given these conclusions, the EAC's argument respecting editors' credo of invisibility need not be addressed.

[87] Although this panel has decided not to adopt the *Neudorf* test in its analysis, the evidence presented by the EAC and TWUC demonstrates that professional freelance editors who perform developmental and substantive editing on a work do not view themselves as joint authors. Accordingly, we can only conclude that editors who perform any kind of editing, from developmental and substantive editing to line and copy editing, do not intend to be joint authors. Given that the third criteria of the *Neudorf* test requires putative joint authors to intend to be joint authors with one another, had we adopted this test, our conclusion would have been the same: professional freelance editors would not be considered joint authors within the meaning of the *Copyright Act*.

Issue 3: If certain professional freelance editors are joint authors of literary works within the meaning of the Copyright Act*, and therefore artists within the meaning of the* Act*, are these artists already covered by existing certifications?*

[88] In light of our conclusions that editors are not joint authors within the meaning of the *Copyright Act* and therefore not artists within the meaning of the *Act*, this issue is resolved. Accordingly, the evidence presented by the WGC with respect to revocation of existing bargaining sectors need not be addressed by the Tribunal.

Issue 4: Can professional freelance editors be authors of original literary works in the form of compilations and collective works within the meaning of the Copyright Act*?*

[89] In Decision 033, the Tribunal also certified a sector composed of professional freelance editors who are authors of compilations and collective works. The original panel relied on McKeown, *supra*, to conclude that, legally, compilations and collective works are "essentially similar", and that the "definition of 'compilation' is broad enough to include all of the works listed in the definition of 'collective work'" (see Decision 033, para. 58).

[90] The following definitions of "collective work" and "compilation" are found in section 2 of the *Copyright Act*:

> "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;

[91] TWUC concedes that a sector composed of professional freelance editors who are the authors of compilations of data which include indexes, glossaries, tables of contents and bibliographies, provided these works meet the test of originality, is an appropriate sector to be certified and does not overlap with its sector. We agree. These works correspond to the second definition of compilation found in section 2 of the *Copyright Act*.

[92] McKeown, *supra*, at p. 319, defines authors of collective works as follows:

> Generally speaking, the individual who provides the general conception and design will be the author of the collective work although there may be much detail left to individual contributors. In the case of collective works such as encyclopedias, directories, newspapers, periodicals and journals the editor or arranger of the whole work is the author of the work in so far as it consists of the arrangement and co-ordination of the separate parts. (Footnotes omitted)

[93] The Tribunal must now determine whether the evidence presented at the original hearing and the reconsideration hearing supports the conclusion of the original panel that professional freelance editors are authors of collective works and compilations of literary works, such authors being, as indicated in McKeown, *supra*, the individuals who provide the general conception and design of the work.

[94] TWUC argued that collective works and compilations of literary works (definition (*a*) of compilation in section 2 of the *Copyright Act*), commonly referred to as anthologies are normally authored by writers, not professional freelance editors and that these persons often write an introduction or contribute one of the works comprising the collected work or compilation. The Tribunal heard evidence that at the University of Toronto Press the author of an anthology must provide a significant scholarly introduction for the work to be published. TWUC also provided a list of anthologies and collective works where more than 75 % of the authors of the anthologies listed were members of TWUC at the time of the reconsideration hearing. Moreover, the Guidelines of the Public Lending Rights Commission refer to "editor" in the following manner:

> You are eligible to apply as an editor if you meet all of the following four conditions:
> A your name is listed as editor or co-editor on the title page; and,

B there are no more than two co-editors named on the title page; and
C you have written prefatory material to the book; and,
D your original written or combined written contribution comprises at least 10% of the book's text or 10 pages, whichever is greater. Original written work is considered to be the combination of your prefatory material, your notes on the text, or your other written work in the body of the book. It does not include notes on the contributors, revision work, indices, chronologies, bibliographies, glossaries or table of contents.

(...)

[95] Rosemary Shipton discussed two projects she called "collections" in which she had been involved. The first was Craig Brown's *Illustrated History of Canada* where Craig Brown provided the general design for the book. The second was a collection of essays about art museums put together by an academic "editor". She indicated that her role as the publisher's editor was to edit these works, to make sure they all met the usual editorial standards, to improve them as much as possible and to work with other people who may be involved in the project. Another of the EAC's witnesses, Jennifer Latham, testified that she had been the managing/substantive editor of a book about the Cree people of James Bay, which involved the contribution of multiple authors. In that case, there had been a general editor who developed the concept of the book, gathered the research and commissioned the articles.

[96] Ms. Shipton and Ms. Latham's contributions to these collective works were undoubtedly valuable. They did not, however, provide the general conception and design nor did they arrange and co-ordinate the separate parts. It is the organizing editors who are recognized as authors pursuant to the *Copyright Act*. The EAC did not present any evidence that would allow the Tribunal to conclude that professional freelance editors act in the capacity of "organizing editor" of collective works or compilations of literary works. We must therefore conclude that, within the meaning of the *Copyright Act*, professional freelance editors are not authors of these works.

Issue 5: If certain professional freelance editors are authors of original literary works in the form of compilations and collective works within the meaning of the Copyright Act, *and therefore artists within the meaning of the* Act, *are these artists already covered by existing certifications?*

[97] In light of the conclusions above, any issue respecting competing sectors between TWUC and the EAC with respect to authors of collective works and compilations of literary works is resolved.

Decision

[98] The Tribunal acknowledges the value of the work performed by professional freelance editors. Editors are essential to the literary world, and.many literary works would not be published were it not for their assistance. As the legislation is now drafted, however, professional freelance editors who provide services in the nature of developmental and substantive editing do not fall under the jurisdiction of the *Act*.

[99] Given the Tribunal's reconsideration powers in section 20 of the *Status of the Artist Act*, the Tribunal therefore concludes that it must rescind Decision No. 033 and Decision No. 036, and rescind the certification order issued to the EAC.

[100] The Tribunal concludes, after considering all of the evidence and representations of the parties, both from the original hearing and the reconsideration hearing, that the sector suitable for bargaining is a sector composed of professional freelance editors who are engaged by a producer subject to the *Status of the Artist Act* to prepare original works in the form of compilations of data, including but not limited to original indexes, glossaries, tables of contents and bibliographies, 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 de radio, télévision et cinéma by the Tribunal on January 30, 1996 as amended on June 8, 2001,

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

(e) authors covered by the certification granted to the Union des écrivaines et écrivains québécois by the Tribunal on February 2, 1996, and

(f) authors covered by the certification granted to the Playwrights Union of Canada by the Tribunal on December 13, 1996.

[101] None of the parties took issue with the Tribunal's findings respecting the representativity of the EAC of the artists in the sector. The original panel made its determination based on the evidence before it. We see no reason to revisit these findings.

[102] For all these reasons, the Tribunal:

Declares that professional freelance editors who are authors of original compilations of data, including but not limited to original indexes, glossaries, tables of contents and bibliographies, 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 engaged by a producer subject to the *Status of the Artist Act* to prepare original works in the form of compilations of data, including but not limited to original indexes, glossaries, tables of contents and bibliographies 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 de radio, télévision et cinéma by the Tribunal on January 30, 1996 as amended on June 8, 2001,

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

(e) authors covered by the certification granted to the Union des écrivaines et écrivains québécois by the Tribunal on February 2, 1996, and

(f) authors covered by the certification granted to the Playwrights Union of Canada by the Tribunal on December 13, 1996.

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

[103] The certification order issued following Decision No. 036 is rescinded and a new order will be issued to confirm the certification of the Editors' Association of Canada / Association canadienne des réviseurs for the sector described above.

Ottawa, 1 November 2002

David P. Silcox Marie Senécal-Tremblay

John M. Moreau