Canadian Artists and Producers Professional Relations Tribunal

CANADA

Tribunal canadien des relations professionnelles artistes-producteurs

Ottawa, January 8, 2003 File No.: 1330-01-004

# Decision No. 040

**In the matter of the complaint filed by the Guilde des musiciens du Québec against CKRL-FM 89.1, Québec**

*Decision of the Tribunal:*

The Tribunal grants the respondent's motion and dismisses the complaint on the ground that it is inadmissible.

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| *Place of hearing:* | Québec, Quebec |
| *Dates of hearing*: | June 12 and 13, 2002 |
| *Quorum:* | John M. Moreau, Presiding Member<br>Marie Senécal-Tremblay<br>Moka Case |
| *Appearances:* | For the complainant, the Guilde des musiciens du Québec: Sylvie Cloutier.<br><br>For the respondent CKRL-FM 89.1:<br>Philippe Boivin and Jean-Pierre Bédard. |

# *Reasons for decision*

1330-01-004: In the matter of the complaint filed by the Guilde des musiciens du Québec against CKRL-FM 89.1, Québec

## *Background*

[1] This decision concerns a complaint filed by the Guilde des musiciens du Québec ("the Guilde" or "the complainant") against CKRL-FM 89.1 ("CKRL") under section 53 of the *Status of the Artist Act*, S.C. 1992, c. 33 (hereinafter referred to as the "*Act*"). The complaint was heard by the Canadian Artists and Producers Professional Relations Tribunal (the "Tribunal") on June 12 and 13, 2002 in Québec City.

[2] The Tribunal received the complaint on November 9, 2001. The complaint alleges that CKRL breached its duty to bargain in good faith for the purpose of concluding a scale agreement with the Guilde, contrary to paragraph 32(*a*) of the *Act*. CKRL alleges that the Guilde's complaint is statute-barred and therefore inadmissible.

[3] The Guilde is an artists' association certified by the Tribunal on January 16, 1997 to represent:

> (...) a sector composed of all independent contractors engaged within the province of Quebec by a producer subject to the *Status of the Artist Act* to perform the function of performing musician, conductor, arranger or orchestrator, except when these artists are represented by the American Federation of Musicians of the United States and Canada (AFM) under the terms of the jurisdictional agreement between La Guilde des musiciens du Québec and the AFM dated October 23, 1996.

[4] The Guilde is affiliated with the American Federation of Musicians of the United States and Canada ("AFM"), the Canadian offices of which are located in Toronto. Sylvie Cloutier is the representative of the Guilde for eastern Quebec. CKRL is a corporation established pursuant to Part III of the *Companies Act*, R.S.Q., c. C-38, which operates a community radio station serving Québec City and the surrounding area. Jean-Pierre Bédard is the General Manager of the station.

[5] At the commencement of the hearing, the Tribunal informed the parties that it would hear the evidence and the submissions of the parties concerning the respondent's preliminary objection and the merits of the case and that it would render its decision on the preliminary objection as part of these reasons for decision.

## *Evidence of the complainant*

[6] The complainant called only one witness, Sylvie Cloutier, who also acted as agent for the Guilde. In her testimony, Ms. Cloutier spoke of her experience as a negotiator. In particular, she stated that she was the only negotiator working for the Guilde. Moreover, in four and one-half years, she has negotiated 167 agreements under the *Act respecting the professional status and conditions of engagement of performing,*

*recording and film artists*, R.S.Q., c. S-32.1, hereinafter "the provincial legislation", and managed 21 mediation cases and 26 arbitration cases. This is the first matter involving negotiations with a producer subject to federal jurisdiction with which she has dealt.

[7] Ms. Cloutier explained to the Tribunal how negotiations, mistakenly undertaken under the provincial legislation, unfolded in 1998 and 1999. Ms. Cloutier stated that she did not know that the negotiations in this case were supposed to be conducted under federal legislation. She added that the negotiations with radio and television stations were usually conducted by the AFM. Furthermore, at the time, the Guilde had no lawyers on its staff. The relevant events may be summarized as follows:

> - An initial meeting between the Guilde and CKRL took place on February 24, 1998. Ms. Cloutier submitted to Mr. Bédard, for information only, an agreement negotiated between the Guilde, CIBL, a community radio station in Montréal, and the Régie des installations olympiques ("RIO"), as part of an event that took place in the premises of the Régie. Mr. Bédard informed her that the rates set out in the agreement were too high.
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> - On February 25, 1998, the Guilde sent a notice to bargain under the provincial legislation to CKRL as well as an initial proposal for negotiation.
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> - On March 3, 1998, CKRL informed the Guilde of its intention to continue the negotiations and of its desire to meet with the Guilde.
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> - On March 16, 1998, the parties met for a second time.
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> - On March 17, 1998, the Guilde submitted a second proposal to CKRL.
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> - On March 26, 1998, the parties met for a third time. The same day, the Guilde submitted a third proposal to CKRL. This proposal indicated that CKRL did not have to pay the appearance fee in the event of a taping before an audience but had to pay only the broadcasting fee.
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> - On April 20, 1998, CKRL responded with a counter-proposal to the Guilde's third proposal. The same day, the Guilde submitted a fourth proposal to CKRL.
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> - A fourth meeting was held on April 30, 1998.
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> - On May 1, 1998, the Guilde presented a fifth proposal to CKRL that contained a proposal that would permit an artist to waive one-half of his or her fee in exchange for the issuance by CKRL of a receipt for tax purposes.
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> - On May 6, 1998, the parties met for a fifth time and this meeting was attended by Gérard Masse, the Vice-President of the Guilde.
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> - On May 8, 1998, the Guilde submitted a sixth proposal to CKRL.
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> - On May 13, 1998, the Guilde presented a seventh proposal. It included a provision concerning the waiver of fees that reads as follows:

> [TRANSLATION]
> The artist shall be free to agree, on a completely voluntary basis, to give to CKRL the whole of his or her fee and shall use the form attached in Appendix "D" for this purpose. CKRL, for its part, shall provide the musician with a receipt for tax purposes. The form in Appendix "D" used and signed by the artist shall subsequently be returned to the office of the Guilde des musiciens du Québec. However, CKRL shall pay the contribution to the pension fund and pay the annual dues for each artist who is a member of the Guilde.

- On January 12, 1999, CKRL rejected the Guilde's seventh proposal by way of a resolution of its board of directors. It gave as the main reason for doing so, the need for the scale agreement to contain a clause that permitted an artist to waive the whole of his or her compensation. In its letter, CKRL also informed the Guilde of its intention to take this case to mediation. According to Ms. Cloutier, CKRL always referred to the excessive amounts of the fees and the need to include a clause concerning the waiver of the whole of the compensation as its main reason for rejecting the Guilde's proposals.

- On January 12, 1999, Ms. Cloutier asked the Commission de reconnaissance des associations d'artistes et des associations de producteurs ("CRAAAP") to appoint a mediator in the case. She cited as her reason the rejection by CKRL of all the proposals made by the Guilde.

- On January 29, 1999, CRAAAP informed the parties that CKRL was a producer under federal jurisdiction subject to the *Status of the Artist Act*.

[8] On June 15, 1999, Ms. Cloutier requested permission from her superiors to continue negotiations with CKRL and she was authorized to do so on September 16, 1999. The Guilde filed its request for mediation with the Federal Mediation and Conciliation Service (the "FMCS") on February 18, 2000, and, on February 23, 2000, sent a new notice to bargain to CKRL in accordance with the *Status of the Artist Act*. On March 1, 2000, CKRL informed the Guilde of its intention to continue the negotiations and of its desire to conclude a scale agreement.

[9] A mediator was appointed on March 2, 2000, and a mediation session was held on April 25, 2000. Approximately one year later, the Guilde asked the Tribunal Secretariat to make inquiries of the FMCS concerning a mediation report. The Secretariat informed the Guilde on March 1, 2001 that no report would be produced and also informed it of the fact that it could file a complaint with the Tribunal if it had [TRANSLATION] "difficulties in continuing the negotiations."

[10] According to Ms. Cloutier, there was a misunderstanding as to the "complaint" in question. In her view, the complaint referred to the absence of a mediation report and not a complaint alleging a failure to bargain in good faith. On March 5, 2001, Ms. Cloutier sent a letter to the Tribunal entitled [TRANSLATION] "Complaint concerning a mediation report that we have been awaiting for one year." In her letter, she requested that the report be produced so that she could request the appointment of an arbitrator and continue the negotiations that were on hold. She believed that without this report she

could not request the appointment of an arbitrator, as is the case under the relevant provisions of the provincial legislation.

[11] On November 9, 2001, Ms. Cloutier again contacted the Tribunal Secretariat to inquire about the progress of the case. It was at this point that she learned what constituted a complaint alleging a breach of the duty to bargain in good faith. The same day, the Guilde filed this complaint.

[12] On cross-examination, Ms. Cloutier asserted that she had not been involved in the Guilde's certification proceedings with the Tribunal and had not participated in negotiating the agreement between the Guilde and CIBL and the RIO. However, she acknowledged that at a meeting between the parties, it had been stated that radio stations were under federal jurisdiction, but she did not have the necessary knowledge to understand the implications of such a statement.

## *Evidence of the respondent*

[13] The respondent called one witness, Jean-Pierre Bédard. Mr. Bédard has been the General Manager of CKRL since January 1998. He explained that CKRL has six full-time employees, one part-time employee and approximately 150 volunteers who contribute between one and five hours of work a week to ensure that the station can continue operating. CKRL holds a type B licence issued by the Canadian Radio-Television and Telecommunications Commission, which permits it to operate a community radio station. Its specific mission is to promote access to the airwaves for the community and to encourage up-and-coming cultural performers. CKRL produces 168 hours of programming per week.

[14] According to Mr. Bédard, the majority of the artists featured by CKRL in its programs are artists for whom this radio station is the only medium through which they can initially make themselves known. CKRL has an annual budget of approximately $350,000 and it obtains its funding from government grants, various fundraising activities and revenues derived from the advertising it broadcasts. Its accumulated deficit is approximately $60,000.

[15] At the time of the first meeting between the parties, CKRL produced the program "Danger culture," the format of which included interviews and live public performances by artists who were active in the region. On February 23, 1998, Ms. Cloutier contacted Mr. Bédard to strongly suggest to him that the February 23, 1998 program of "Danger Culture" be cancelled because a musician had complained that he would not be paid by CKRL for the broadcast of his performance. Mr. Bédard consented to this request and agreed to meet with Ms. Cloutier on the following day.

[16] Mr. Bédard's testimony did not contradict the summary of events given by the Guilde. Mr. Bédard acknowledged that CKRL's counter-proposal dated April 20, 1998 included a provision that would allow an artist to waive the whole of his or her fee. The counter-proposal excluded amateur artists, as well as teachers and students who give a performance as part of a course. It also provided that the artists would not be paid for the time they spent preparing for the performance and time spent waiting to perform. It did

not apply to advertisements or to signature tunes. The fees offered were lower than those requested by the Guilde.

[17] Mr. Bédard admitted that a large number of the items requested in this counter-proposal were accepted and incorporated into the Guilde's subsequent proposals.

[18] Mr. Bédard testified that CKRL could not issue the receipts for tax purposes requested by the Guilde in its proposal dated May 13, 1998 because the radio station did not have status as a charitable organization at either the federal or provincial level. However, in November 1998, CKRL obtained artistic organization status which allows it to issue receipts for provincial tax purposes.

[19] According to Mr. Bédard, the Guilde agreed that an artist could waive his or her fee as part of CKRL's "radiothon," an annual fundraising activity, provided that CKRL paid a contribution to the pension fund and the annual dues and agree to mention on air that the artists' performances had been made possible with the co-operation of the Guilde.

[20] Mr. Bédard stated that the desire of CKRL to include a waiver clause in the compensation was in fact part of the very mission of the radio station. He also asserted that volunteering was at the very core of CKRL's mission and that it was normal, therefore, that the artists whose performances were broadcast should also have an opportunity to participate voluntarily in the activities of the station. There would, in fact, be a harmful effect on the morale of those people who volunteered their services at the station if the station was required to pay the musicians who came to perform on air. The amount of the fees requested by the Guilde would mean that the cost of broadcasting a program such as "Danger culture" could amount to several hundred dollars solely for the payment of artists' fees.

[21] He explained the time that elapsed between the filing of the Guilde's last proposal dated May 13, 1998, and the response of CKRL dated January 12, 1999, by the fact that the meeting of the board of directors of the radio station had just taken place and that the next meeting would not be held until after the summer season.

[22] Mr. Bédard noted that all the proposals of the Guilde contained amounts to be paid to the pension fund and in annual dues as well as a provision requiring that the head musician must receive double compensation. During the negotiations, the Guilde maintained that these amounts were not negotiable.

[23] Mr. Bédard explained that the parties had reached a compromise in order to conclude a scale agreement on the first day of the mediation session, but that in the afternoon, the Guilde informed CKRL that negotiations had to start over from the beginning because CKRL was not only a promoter but also a producer of artistic events. The mediation session ended without any agreement being concluded.

[24] Mr. Bédard stated that at no time had he not intended to conclude a scale agreement with the Guilde. He also testified that CKRL wished to conclude an agreement that would make it possible to continue to broadcast live musical performances. He stressed that CKRL could have accepted the Guilde's initial proposals and quite simply have ceased all future broadcasts of live performances, although this would have adversely affected artists.

[25] CKRL filed a letter from Ms. Cloutier to the Conseil de la Culture des régions de Québec et de Chaudière-Appalaches dated January 22, 1999, in which she authorized CKRL to broadcast an event put on by the Conseil subject to certain conditions. She stated in the letter that she was granting this authorization despite the fact that CKRL refused to negotiate with the Guilde.

[26] On cross-examination, Mr. Bédard stated that with respect to CKRL's rejection of the Guilde's last proposal dated January 12, 1999, that it included a clause waiving the whole of the fee but that he objected to this waiver being made conditional on a requirement to issue a receipt for tax purposes to the artist.

[27] He asserted that when a public performance is broadcast live, CKRL usually signs an advertising agreement with the owner of the location where the performance takes place. The revenues obtained in this way are used primarily to cover the technical and administrative costs relating to the broadcasting of the performance. In addition, CKRL must pay a royalty to the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

## *Submissions of the respondent concerning the preliminary objection*

[28] The respondent objects to the filing of the complaint on the ground that it is statute-barred. He referred to section 53 of the *Act*, which provides a period of not more than six months for the filing of such a complaint with the Tribunal. According to the respondent, more than 16 months had elapsed before the complainant filed its complaint.

[29] The respondent noted that Ms. Cloutier could not plead ignorance of the law in relation to time limitations because she was informed by the Tribunal Secretariat on March 1, 2001 of the possibility that the Guilde could file a complaint, which was not done until November 2001, more than eight months later. Nor can Ms. Cloutier claim not to have known that the negotiations should have taken place under federal jurisdiction since she was informed of this fact at one of the meetings between the parties. Furthermore, the respondent rejects the argument that the complainant was not familiar with the relevant provisions of the legislation because the respondent is an organization that specializes in the negotiation and administration of scale agreements and she should have called upon experts on the subject.

[30] The respondent also argues that paragraph 17(*k*) of the *Act*, which permits the extension of certain procedural time limits, cannot be used to extend the time allowed for filing this complaint. In support of this argument, the respondent referred to the decision of the Supreme Court of Canada in *Upper Lakes Shipping Ltd.* v. *Sheehan*, [1979] 1 S.C.R. 902.

[31] Finally, the respondent argues that the reasons given by the complainant were insufficient to justify extending the time limit and that the Tribunal should dismiss the complaint on the ground that it is inadmissible.

## *Submissions of the complainant concerning the preliminary objection*

[32] The complainant denies having filed its complaint outside the time limits and requests that, in the event the time for filing a complaint has expired, the deadline be extended under paragraph 17( *k*) of the *Act.* She argues that the Tribunal should extend the deadline in light of the circumstances that preceded the filing of the complaint, that is, the error with respect to jurisdiction and the misunderstanding concerning the mediation report.

[33] The complainant argues that it filed its complaint in a timely manner as soon as it became aware of the bad faith of the respondent. In reply to the argument of the respondent that it had informed the Guilde that the negotiations should take place under federal jurisdiction, the complainant argues that CKRL did not stress the issue very strongly at the time of the negotiations.

[34] The complainant rejects the respondent's argument that the Tribunal cannot rely on paragraph 17(*k*) of the *Act* to extend the time limit and referred to the decision of the Canada Industrial Relations Board in *Pinel (Re),* [1999] CIRB (Quicklaw) No. 19.

## *Submissions of the respondent on the merits*

[35] The respondent noted that there is a presumption of good faith and that the onus of proving bad faith lies with the complainant. CKRL always bargained in good faith and the evidence establishes this fact: the many conversations, discussions and meetings between the parties, the concessions made by the respondent during the negotiations and the correspondence between the parties that explicitly refers to CKRL's desire to conclude an agreement.

[36] Moreover, the respondent noted that CKRL could have accepted the Guilde's first offer and ceased doing any broadcasting of live performances, which would have meant that the agreement served no purpose. According to the respondent, it was the complainant that appeared intransigent in the negotiations, taking the position that certain matters such as the rate of contributions to the pension fund were not negotiable.

[37] With respect to the question of the issuance of receipts for tax purposes in return for a waiver of the fees, the respondent argued that this measure was unfavourable to the artists who would be required to pay the tax on amounts that they had not received since CKRL was not a charitable organization within the meaning of the tax laws.

[38] In conclusion, the respondent maintains that CKRL must bargain on the basis of its very limited financial resources and that CKRL rejected the proposals made by the Guilde because they were too onerous.

## *Submissions of the complainant on the merits*

[39] Ms. Cloutier stated that she was the sole negotiator in the employ of the Guilde but added that the Vice-President and the President also negotiated on behalf of the Guilde. She maintained that she realized that CKRL had not bargained in good faith only when the Tribunal Secretariat informed her of what was required for a complaint alleging a breach of the duty to bargain in good faith.

[40] She asserted that the amounts payable to the pension fund and the annual dues included in the the Guilde's proposals have been the same for 20 years and were not negotiable. She also admitted that the counter-proposal dated April 20, 1998, incorporated several items requested by the Guilde. According to her, these were concessions of a procedural nature, the main demand of CKRL being the clause concerning the waiver of the whole of the compensation.

[41] The complainant mentioned the right of the artist to be compensated and noted that paragraph 2(*e*) of the *Act* referred to "the importance to artists that they be compensated for the use of their works, including the public lending of them." She argues that the concept of volunteering underlying the demands made by CKRL contradict the purpose of the *Act*.

[42] The complainant argues that the fact that the respondent rejected the seventh and final offer despite the inclusion of a provision concerning waiver of compensation, essentially reproducing the provision requested by the respondent with the exception of the requirement for the issuance of a receipt for tax purposes, proves that CKRL did not intend to conclude a scale agreement.

## *Issues*

[43] The complaint filed by the Guilde raises the following questions:

(a) Is the Guilde's complaint statute-barred?

(b) If so, should the Tribunal extend the time limit provided in section 53 of the *Act* and hear the complaint?

(c) If so, did CKRL breach its duty to bargain in good faith in violation of paragraph 32(*a*) of the *Act*?

## *Analysis and conclusion*

### *Issue 1: Is the Guilde's complaint statute-barred?*

[44] Section 53 of the *Act* provides as follows:

> **53.** (1) Any person or organization may make a complaint in writing to the Tribunal that
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> (a) a producer, a person acting on behalf of a producer, an artists' association, a person acting on behalf of an artists' association, or an artist has contravened or failed to comply with section 32, 35, 50 or 51; or
>
> (b) a person has failed to comply with section 52.
>
> (2) A complaint under subsection (1) shall be made to the Tribunal within six months after the date that the complainant knew, or in the opinion of the Tribunal ought to have known, of the action or circumstances giving rise to the complaint.

[45] Thus, the *Act* requires a complainant to file his or her complaint within six months of the date on which he or she knew or, in the opinion of the Tribunal, ought to have known of the action or circumstances giving rise to it. In this case, the actions or circumstances that gave rise to the complaint were allegedly those showing the breach by CKRL of its duty to bargain in good faith and to make every reasonable effort to conclude a scale agreement.

[46] In order to determine whether the Guilde complied with the time provided in the *Act*, we should consider certain aspects of the legal nature of the duty to bargain in good faith. The decision of the Canada Labour Relations Board [now the Canada Industrial Relations Board] ("the Board") in *CKLW Radio Broadcasting Limited* (1977), 23 di 51, sets out an interpretation that has generally been followed since then in the interpretation of a similar provision of the *Canada Labour Code*, R.S. 1985, c. L-2 (hereinafter the "Code"). We find the following at page 89:

> The duty to bargain in good faith and make every reasonable effort is a continuous duty from when notice to bargain is given until a final resolution of an agreement. It survives the intervention of a work stoppage, although the character of the duty may change. It also survives a complaint of failure to bargain in good faith. Of course, the existence of the complaint may make it very difficult for the parties to meet face to face on their own.

[47] Thus, the duty to bargain in good faith is ongoing, beginning at the point at which the notice to bargain is given and ending when a scale agreement is signed. This has specific consequences in terms of calculating the time for filing a complaint. Once again, the case law of the Board offers guidance. In *Iberia Airlines of Spain* (1990), 80 di 165, the following is stated at pages 170-171:

> The nature of the duty to bargain in good faith determines the method of calculating the time limit for filing a complaint with the Board. Thus, since the duty to bargain in good faith is a continuous duty, that is, it is uninterrupted

> from the time the notice to bargain is given to the other party, it follows that the party alleging that this duty has been violated may file a complaint with the Board at any time during the period of the collective bargaining process.

[48] Finally, in the decision in *Brewster Transport Company Ltd* (1986), 66 di 1, the Board stated the following at pages 35 and 36:

> … Complaints under section 148(a) relate to a course of conduct, rather than to discrete events as such. The Federal Court of Appeal has already pronounced on the point in *Eastern Provincial Airways Limited v. Canada Labour Relations Board et al.*, [1984] 1 F.C. 732; (1983), 2 D.L.R. (4th) 597; and 50 N.R. 81.
> …
>
> Since a complaint alleging failure to bargain in good faith deals with a course of conduct, the 90-day time limit for a complaint about the entire course of conduct starts to run only at the end of the course of conduct.
> …
>
> Any other approach would be unworkable. Complainants would have to keep filing new complaints as events unfolded, which would entail new consents from the Minister. Complainants would risk having the earlier aspect of their complaint as time barred while the Minister was investigating whether it was advisable to grant consent, something over which the complainant has no control. Section 187(2) is designed to prevent complainants from being deleterious about pursuing their rights once the conduct being complained of has terminated. It is not designed to promote multiple applications, nor to frustrate a complainant awaiting Ministerial consent, nor to protect a respondent who is continuing to act in an ongoing pattern of illegal conduct.

[49] On the one hand, it is clear that a party may file a complaint alleging a failure to bargain in good faith at any time in the bargaining process if it believes that the circumstances so justify. It is not necessary to wait until the parties have reached an impasse. On the other hand, a party alleging bad faith on the part of the other party may also file a complaint, even after the conduct complained of has ceased.

[50] The duty to bargain in good faith is a duty that is ongoing and a breach of this duty usually relates to general behaviour and not necessarily to any event in particular. Consequently, the approach taken in the case of *Brewster Transport, supra*, in calculating the time limit seems to us to be appropriate. The period of six months will accordingly start to run from the point when the alleged conduct ceased.

[51] When the Guilde was erroneously bargaining under the provincial legislation, the evidence indicates that the parties held meetings and exchanged proposals from February 24, 1998 to January 12, 1999, on which date the complainant requested that CRAAAP appoint a mediator. One might conclude that the alleged conduct ceased as of that date. However, the Guilde to some extent started the bargaining process over again by forwarding a new notice in accordance with the *Status of the Artist Act* to CKRL on February 23, 2000. CKRL responded by informing the Guilde on March 1, 2000 of its intention to continue bargaining for the purpose of concluding an agreement. The evidence shows, however, that no meetings were held and no new proposals were exchanged between the parties prior to the mediation session that was held on April 25,

2000. The parties were unable to conclude an agreement at the mediation session and no further negotiations were undertaken after that date.

[52] The Tribunal is of the view that it must consider April 25, 2000, to be the date on which the alleged conduct ceased since the parties did not have any meetings after that date and no other proposals were exchanged. Accordingly, with this approach, the period of six months for the filing of the complaint expired on October 25, 2000.

[53] The complaint was filed on November 9, 2001, that is more than 12 months after the expiration of the deadline. Consequently, the complaint is statute-barred.

*Issue 2: Should the Tribunal extend the time limit provided in section 53 of the* Act *and hear the complaint?*

[54] In the event the Tribunal finds that the complaint is statute-barred, the complainant requests the Tribunal to exercise the discretionary power conferred on it by paragraph 17(*k*) of the *Act* to extend the time prescribed by subsection 53(2) and to hear the complaint. The provision in question reads as follows:

> **17.** The Tribunal may, in relation to any proceeding before it,
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> …
>
> (*k*) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;
>
> ...

[55] The Canada Industrial Relations Board, which has had for a few years a similar power (see paragraph 16(*m*.1) of the Code), has on a number of occasions considered the question of extending the time limits and has developed an approach that might be useful to the Tribunal (see *Re Pinel*, *supra*; *BHP Diamonds Inc*, [2000] CIRB No. 81, CIRB (Quicklaw) No. 35; and *Re Woodley*, [2000] CIRB No. 85; 69 CLRBR (2d) 161). The factors that the Board has taken into account in exercising its discretionary power include the following:

- The time that has elapsed between the expiry of the prescribed time and the filing of the complaint;
- The existence of *prima facie* evidence of the alleged conduct;
- The interests of the parties;
- The purpose of the Code;
- The existence of a serious reason for filing the complaint out of time.

[56] An examination of the case law leads the Tribunal to conclude that it must not exercise its discretionary power lightly, but that it must be flexible enough in order to permit the parties appearing before it to address their concerns when the circumstances warrant. Consequently, in order to determine whether it will exercise the power conferred on it by paragraph 17(*k*), the Tribunal may examine one or more of the following factors:

- The length of time that has elapsed and the circumstances surrounding the delay;
- The existence of *prima facie* evidence indicating that the application or the complaint has merit;
- The existence of serious reasons for extending the time limit;
- The interests of the parties and the purpose of the *Act*.

[57] With respect to the first factor mentioned above, namely the length of time that has elapsed and the circumstances surrounding the delay, a substantial period of time elapsed before the complaint was filed. A series of events contributed to this delay, but the first reason was a lack of awareness of the *Act*. As soon as the Guilde understood that it could file a complaint alleging a breach of the duty to bargain in good faith, it did so that very day. Thus, despite the time that elapsed before the complaint was filed, the Tribunal finds that the explanations given by the Guilde to justify its delay are reasonable in the circumstances. However, there are other factors that the Tribunal should consider before making a final decision on this issue.

[58] The second factor mentioned above that the Tribunal may consider is the existence of *prima facie* evidence or sufficient evidence that the complaint has merit. In *Ontario (Human Rights Commission)* v. *Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, a case involving an allegation of discrimination, Justice McIntyre stated the following on the question of what constitutes *prima facie* evidence at page 558:

> The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[59] The concept of *prima facie* evidence is important since it is unlikely that a tribunal can find that a case has merit if evidence that could support the allegations is missing. In this case, we understand *prima facie* evidence to mean evidence that, if it were not contradicted, would lead the Tribunal to conclude that the respondent breached his or her duty to bargain in good faith with the complainant.

[60] The complainant's evidence indicates that the parties held meetings and exchanged proposals and counter-proposals but these exchanges did not lead to the conclusion of an agreement. The Guilde argued that it made substantial concessions in order to accommodate the particular situation of CKRL as a community radio station, in particular with respect to the waiver of the fees in exchange for a tax receipt. There is no evidence alleging that CKRL refused to bargain or failed to attend any meetings. Nor is it alleged that CKRL refused to consider the proposals made by the Guilde. The complaint is based essentially on the fact that CKRL refused all the proposals put forward by the Guilde, even when the Guilde agreed to the most critical proposal, namely the waiver of the artists' fees.

[61] The Tribunal understands that the situation experienced by the Guilde may have been extremely frustrating. However, it must be noted that labour relations boards usually express some sound reservations concerning the bargaining process between the parties, respecting their freedom to conclude their own contracts and intervening only in those cases where one of the parties does not intend to conclude an agreement. The duty

to bargain in good faith does not require one of the parties to the negotiations to have a receptive attitude to the proposals of the other party but merely requires an intention to reach an agreement (*The Ottawa Newspaper Guild, Local 205 of the Newspaper Guild and The Citizen*, [1979] 2 Can. L.R.B.R. 251 (Ont.)). In the instant case, the complainant introduced in evidence letters from CKRL that indicated the latter's intention to conclude an agreement.

[62] Finally, it should be noted that carrying on bargaining to an impasse may constitute bargaining in bad faith if the position of a party is designed to include a clause that is contrary to public order or contrary to the principles of the labour relations legislation in force (*Les Élévateurs de Sorel Ltée*, [1985] C.L.R.B. (Quicklaw) No. 512). On this issue, the Guilde believes the fact that CKRL wanted the artists to be able to waive the whole of their fees contradicts the purpose of the *Act*. In support of its argument, the complainant referred to paragraph 2(*e*) of the *Act*, which speaks of "the importance to artists that they be compensated for the use of their works, including the public lending of them."

[63] As it is worded, the proposal dated May 13, 1998, provides that an artist may, if he or she wishes, waive the fee. The proposal in question provides that CKRL must nevertheless pay an amount to the pension fund and the annual dues for each artist who is a member of the Guilde.

[64] Although the government of Canada does recognize the importance of artists being able to receive compensation for the use and the public lending of their works in Part I of the *Act*, the Tribunal is of the view that, in this case, it is more appropriate to consider the purpose of Part II of the *Act*, which deals with professional relations. Section 7 provides as follows:

> **The purpose of this Part is to establish a framework to govern professional relations between artists and producers that** guarantees their freedom of association, recognizes the importance of their respective contributions to the cultural life of Canada and **ensures the protection of their rights**. (Emphasis added.)

[65] The May 13, 1998 proposal provides that the producer must contribute to the pension fund and pay the annual dues to the Guilde where the artist waives his or her fee. Consequently, the artist derives a certain monetary benefit from his or her performance. The inclusion of such a provision in a scale agreement does not constitute an ideal situation, but we cannot conclude that it is a provision that would be contrary to the purpose of the *Act*.

[66] The Tribunal would also like to point out that case law dealing with the duty of the parties to bargain in good faith makes a distinction between two separate concepts: hard bargaining, which is not contrary to the *Act*, and so-called "surface" bargaining, which constitutes a breach of the duty to bargain in good faith. In this regard, the decision of the Board in the case of *Royal Bank of Canada (Kénogami, Québec)* (1980), 41 di 199, is highly instructive. At page 212 of the decision, we find the following:

> The difficulty lies in determining whether the employer is engaging in hard bargaining but is doing so in good faith or is making a pretense of bargaining. In *The Daily Times*, [1978] OLRB Rep. July 604, the Ontario Labour Relations

> Board was dealing with a complaint alleging a breach of the duty to bargain in good faith, and said the following:
>
> ... Surface bargaining is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between 'surface bargaining' and hard bargaining. The parties to collective bargaining are expected to act in their individual self-interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even 'predictably unacceptable' is not sufficient, standing alone to allow the Board to draw an inference of 'surface bargaining'. This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of 'surface' bargaining can be made.
>
> We share this point of view and are of the opinion that the distinction between hard bargaining and bargaining in bad faith lies essentially on an appreciation of the facts of each case and must take into account their entire relationship.

[67] In this case, the Tribunal finds that there is no *prima facie* evidence that would allow it to conclude that the respondent breached its duty to bargain in good faith. The lack of *prima facie* evidence showing that the complaint has merit is, in the view of the Tribunal, the decisive factor in this case. Thus, it is not a situation in which it would be appropriate for the Tribunal to exercise the discretionary power conferred by paragraph 17(*k*) of the *Act*. For these reasons, the complainant's request to extend the time limit is denied. In light of this conclusion, it is not necessary to examine the two other factors mentioned above.

## *Decision of the Tribunal*

[68] The Tribunal grants the respondent's motion and dismisses the complaint on the ground that it is inadmissible.

Ottawa, January 8, 2003

"John Moreau" "Marie Senécal-Tremblay"

"Moka Case"