

Tribunal canadien des relations
professionnelles artistes-producteurs



CANADA

Canadian Artists and Producers
Professional Relations Tribunal

Ottawa, December 9, 2003

File: 1350-03-009

Decision No. 047

**In the matter of an application for review of the Certification Order of
Canadian Artists Representation/le Front des artistes canadiens (CARFAC)**

Decision of the Tribunal:

The request for review is granted.

Date: December 9, 2003

Quorum: Marie Senécal-Tremblay, Presiding Member
Moka Case, Member
John Van Burek, Member

Reasons for decision

1350-03-009: In the matter of an application for review of the Certification Order of Canadian Artists Representation/le Front des artistes canadiens (CARFAC)

Background

[1] This decision concerns an application for review filed on April 28, 2003, under section 20 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter the “*Act*”) by the Canadian Artists’ Representation/le Front des artistes canadiens (“CARFAC”). CARFAC is asking the Canadian Artists and Producers Professional Relations Tribunal (the “Tribunal”) to review Decision No. 029 rendered on December 31, 1998, certifying it to represent the following sector:

... a sector composed of all independent professional visual and media artists in Canada who are authors of original artistic works of research or expression, commissioned by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-base media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type, excluding:

- a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997 as amended June 26, 1998;
- b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;
- c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996;
- d) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and
- e) artists covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and
- f) artists who identify themselves as craftspeople rather than visual artists.

[2] CARFAC is asking the Tribunal to amend its certification order by substituting the word 'engaged' for the word 'commissioned' and proposes that its sector description read as follows:

...a sector composed of all independent professional visual and media artists in Canada who are authors of original works of research or expression, engaged by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-base media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type, excluding:

a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997 as amended June 26, 1998;

b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;

c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996;

d) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and

e) artists covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and

f) artists who identify themselves as craftspeople rather than visual artists.

[3] A public notice of this application was published in the *Canada Gazette* on May 31, 2003 as well as in *La Presse*, *the Globe and Mail*, *the Gazette*, *le Courrier de la Nouvelle-Écosse*, *l'Acadie Nouvelle*, *le Franco*, *l'Express (Toronto)*, *l'Eau Vive*, *la Liberté*, *l'Express du Pacifique*, *la Voix acadienne*, *le Gaboteur*, *l'Aurore boréale*, *l'Aquillon* and in *Particules* (a message service for members of the Canadian Conference of the Arts). The deadline for receipt of interventions was set for June 27, 2003.

[4] Interventions were received from the P.E.I. Crafts Council, the Alberta Craft Council, the Nova Scotia Designer Crafts Council, the National Gallery of Canada ("NGC") and the Canada Council for the Arts ("CCA").

[5] A panel of the Tribunal convened on October 29, 2003 to consider this application based on the written submissions of the parties.

Parties' Submissions

Application for review

[6] In its application filed on April 28, 2003, CARFAC set out the reasons in support of its request. Essentially, the present wording of its sector description has limited its ability to enter into negotiations. CARFAC submits that producers with whom they have attempted to negotiate have taken the position that they would only consider negotiating terms and conditions related to “commissioned” works of art. Since institutions rarely commission works, there is very little to negotiate with producers subject to the *Act*. CARFAC is of the view that the current wording of its sector description is unduly limiting. The proposed rewording would allow it to pursue negotiations and would be consistent with the wording of other sector descriptions granted by the Tribunal.

The P.E.I., the Nova Scotia and the Alberta Crafts Councils

[7] The three Crafts Councils indicated that they had not been notified of the application, advising that they would oppose CARFAC’s request because, in their view, CARFAC was not the most representative association for the sector. They also requested that the Tribunal extend the delay for the filing of interventions.

[8] The Tribunal Secretariat informed the Crafts Councils that the Tribunal’s notification practice when dealing with applications for certification or applications for review such as this one is to provide notice through public mediums of communication. With respect to the question of representativity, the Secretariat informed the Crafts Councils that CARFAC was seeking to amend the wording of the sector. It was not seeking to change the artists it currently represents and, therefore the present application was not the appropriate forum in which to contest CARFAC’s representativity.

[9] Upon receiving this information from the Secretariat, the P.E.I. and the Alberta Crafts Councils replied that they would not submit any further representations nor request an extension of the deadline. No further representations were received from the Nova Scotia Designer Crafts Council.

The National Gallery of Canada

[10] In a letter dated June 26, 2003, the NGC agreed that CARFAC’s certification as currently worded left little opportunity for negotiation with federal producers. It noted that it would support the expansion of CARFAC’s certification to include the engagement of artists to install works, give talks or otherwise provide services beyond a commissioned work of art. However, the NGC was concerned that CARFAC wants to negotiate all transactions between a federal producer and an artist, including the licensing of copyright. The NGC noted that “other related matters” contained in the definition of “scale agreement” in section 5 of the *Act* might be expanded to include matters dealing with copyright and there could be potential for overlap and confusion between the *Act* and the *Copyright Act*.

The Canada Council for the Arts

[11] In a letter dated June 27, 2003, the CCA submitted that CARFAC's requested amendment to the sector description was unnecessary and that the Tribunal did not have the jurisdiction to amend the sector as requested. According to the CCA, the application failed to distinguish between the purpose of a certification order, which is limited to the determination of a suitable sector and related issue of representativeness, and between the determination of the subject matter for collective bargaining. The CCA argued that the Tribunal's jurisdiction with respect to the issuance of a certification order does not extend to the determination of subject matter for collective bargaining.

[12] The CCA also noted that CARFAC left out the word 'artistic' that is found in its current certification order from its proposed sector description. As no reason for the proposed deletion was given, the CCA noted that it could have been the result of an inadvertent error.

CARFAC's reply

[13] In its reply, CARFAC confirmed that the deletion of the word 'artistic' was an oversight and that it should remain in its certification order. CARFAC submitted that there is no question that the requested amendment is within the jurisdiction of the Tribunal, since the term it seeks to amend is contained in the very definition of the sector it represents. In support of its application, CARFAC reiterated that the vast majority of certifications issued by the Tribunal make no reference to the specific arrangement by which artistic work is provided. According to CARFAC, a reading of the decision which granted CARFAC its certification makes it clear that the Tribunal had no intention of limiting the scope of CARFAC's representation rights to a particular type of engagement.

[14] CARFAC also welcomed the NGC's support of its application. On the potential for overlap and confusion between the *Act* and the *Copyright Act*, CARFAC noted that the Tribunal has already concluded in previous decisions that there need not be any conflict between them, and that it is appropriately left to the parties to delineate the matters to be included in collective bargaining.

Issues

[15] This matter raises two issues:

- (a) Does the Tribunal have the jurisdiction to amend the order?
- (b) If so, should the Tribunal amend the wording as requested by CARFAC?

Analysis and Conclusion

Does the Tribunal have the jurisdiction to amend the order?

[16] Subsection 20(1) of the *Act* provides that “[t]he Tribunal may uphold, rescind or amend any determination or order made by it, and may rehear any application before making a decision.” The Tribunal has interpreted that provision as giving it the authority needed to amend its own decisions (see: *UDA/APASQ*, 1998 CAPPRT 025; *Conseil des métiers d’art du Québec*, 1998 CAPPRT 026 and *Writers’ Union of Canada*, 2002 CAPPRT 039).

Should the Tribunal amend the wording of CARFAC’s Certification Order as requested by CARFAC?

[17] The Tribunal has reviewed the proposed wording of the sector, having regard to the argument made by CARFAC. The Tribunal notes that the NGC in its submission agrees with CARFAC that the certification order, as currently worded, leaves little opportunity for CARFAC to negotiate with federal producers. The Tribunal also notes that both the NGC and the CCA raise concerns about overlap between the *Act* and the *Copyright Act* and that by granting the requested amendment, the Tribunal could broaden the scope of negotiations, thus forcing the parties to bargain matters dealing with copyright.

[18] With respect to the relationship between the *Copyright Act* and the *Act*, the Tribunal has already commented on this issue in *The Writers Union of Canada*, 1998 CAPPRT 028 and sees no reason to alter its position:

[57] In the Tribunal’s view, the *Status of the Artist Act* was intended to complement and supplement the regime provided in the *Copyright Act*. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work, thereby enhancing and promoting artists’ freedom of choice as to how they will exploit the fruits of their creative talents.

[58] The statute must be given an interpretation that will fulfill Parliament’s intention of improving the socio-economic status of artists in Canada. The *Act* mandates certified artists’ associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the *Act*. Parliament did not expressly exclude matters related to copyright from the ambit of collective bargaining. Indeed the *Act* contains no express limitation on an artists’ associations’ right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[19] The CCA is correct in asserting that the Tribunal, and labour boards generally, cannot dictate the subjects the parties may bargain. The proposed amendment may enlarge the scope of CARFAC's bargaining but would not result in the determination of what subject matters can or cannot be bargained. Parties would remain free to put forth any proposals they wish, and would be free to accept, reject or put forth counter-proposals.

[20] After considering all the written representations of the applicant and the intervenors, the Tribunal finds that the requested change to the wording of CARFAC's sector description is reasonable and will bring the sector description in line with other sectors. The parties will themselves determine the subject matters to be included in a scale agreement.

[21] As subsection 20 (1) of the *Act* gives the authority to the Tribunal to amend an order, we are taking this opportunity to express the sector description in a manner that is consistent with other certification orders that have been granted. The sector shall henceforth be as follows:

...a sector composed of all independent professional visual and media artists in Canada who are authors of original artistic works of research or expression in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-based media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type engaged by a producer subject to the *Status of the Artist Act*, excluding:

a) artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997 as amended June 26, 1998;

b) artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;

c) artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996;

d) artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and

e) artists covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and

f) artists who identify themselves as craftspeople rather than visual artists.

A new certification order will be issued to confirm the amendment to CARFAC's sector description.

Ottawa, December 9 , 2003

Marie Senécal-Tremblay

Moka Case

John Van Burek