

Canadian Artists and Producers
Professional Relations Tribunal



CANADA

Tribunal canadien des relations
professionnelles artistes-producteurs

Ottawa, 1 April 2004

File No.: 1340-03-002

Decision No. 048

**In the matter of a reference under section 41 of the *Status of the Artist Act*
involving Canadian Actors' Equity Association
and the National Capital Commission**

Decision of the Tribunal:

Dominic Girard is an artist covered by the scale agreement negotiated between the National Capital Commission and Canadian Actors' Equity Association.

Dates of hearing: January 16 and February 20, 2004

Quorum: John M. Moreau, Presiding Member
Moka Case, Member
Lyse Lemieux, Member

Reasons for decision

1340-03-002: In the matter of a reference under section 41 of the *Status of the Artist Act* involving Canadian Actors' Equity Association and the National Capital Commission

Introduction

[1] This decision concerns a reference under section 41 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter "the *Act*") involving the Canadian Actors' Equity Association ("Equity") and the National Capital Commission ("NCC") submitted to the Canadian Artists and Producers Professional Relations Tribunal ("the Tribunal") by Arbitrator David H. Kates on September 24, 2003. The question to be determined by the Tribunal is whether Dominic Girard, a person engaged by the NCC to be the master of ceremonies for the NCC's 2003 Winterlude Opening Ceremonies is an artist subject to the scale agreement negotiated between the parties.

Background

[2] Equity is an artists' association certified by the Tribunal on April 25, 1996 to represent throughout Canada (*In the matter of an Application for Certification filed by Canadian Actors' Equity Association*, 1996 CAPPRT 010, hereinafter Decision No. 010):

a sector composed of independent contractors engaged to perform the function of actor (including principal, chorus, journeyman, apprentice actor, mime, narrator, local jobber, swing/understudy, or extra), singer (including soloist, performer, ensemble studio artist, chorus member, apprentice, understudy/cover or extra), dancer (including guest artist, apprentice dancer or understudy/sharer), production stage manager, stage manager, assistant stage manager, stage management apprentice, stage director, assistant stage director, fight director, fight captain, choreographer, assistant choreographer, dance captain, ballet master or mistress, resident choreologist, coach or repetiteur in a live performance in theatre, opera, ballet, dance, industrial show, cabaret show or concert performance whether or not such performance or entertainment is presented in a theatre or elsewhere, with the exception of :

- (a) singers covered by the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada; and
- (b) independent contractors in the enumerated categories who are covered by the 1992 agreement between Canadian Actors' Equity Association and the Union des Artistes.

[3] Equity and the NCC concluded a scale agreement on or about January 21, 2003 where the NCC recognized at section 2.01 of the agreement that Equity was the exclusive bargaining agent for all artists identified in the certification order issued by the Tribunal on April 25, 1996.

[4] A dispute arose in January 2003 in connection with the engagement of Mr. Girard as master of ceremonies for the NCC's 2003 Winterlude Opening Ceremonies. Namely, the NCC took the position that the function of master of ceremonies was not covered under Equity's certification order and therefore not covered under the scale agreement. Equity argued that the NCC was engaging an actor to play the role of master of ceremonies and that he was therefore subject to the scale agreement negotiated by the parties. The dispute was referred to arbitration pursuant to the dispute settlement procedures contained in the scale agreement. Because the dispute concerned the applicability of a scale agreement to a particular artist, the arbitrator referred it to the Tribunal for determination in accordance with paragraph 41(1) of the *Act* which reads as follows:

An arbitrator or arbitration board shall refer to the Tribunal for hearing and determination any question that arises in a matter before it as to the existence of a scale agreement, the identification of the parties to it, or *the application of the agreement to a particular sector or artist*. [Our emphasis]

[5] After receiving arbitrator David H. Kates' letter, the Tribunal requested that the parties submit written representations outlining their respective positions. Each party was then given the opportunity to reply to the other's submissions. Equity also provided an edited copy of a videotape depicting the Opening Ceremonies. The Tribunal reviewed the materials and concluded that it had sufficient information to make a determination without holding an oral hearing. The panel convened on January 16 and February 20, 2004.

[6] In order to determine whether the scale agreement negotiated between the parties applies to Dominic Girard, the Tribunal must consider the following issues:

- (1) Whether Dominic Girard is an artist as defined in paragraph 6(2)(b) of the *Status of the Artist Act*;
- (2) Whether the function of master of ceremonies is a function included in Equity's certification order.

Main arguments advanced by the parties

[7] The NCC submits that the function of master of ceremonies is not encompassed by Equity's certificate because the functions enumerated in the sector description are part of a creative work or play a direct contribution in the production of a creative work as envisioned in the statutory context of the *Act*. In addition, these functions are exercised in a "live performance in theatre, opera, ballet, dance, industrial show, cabaret show or concert performance ..." and the function of master of ceremonies is not a composite part of such a live performance. Masters of ceremonies are not engaged in implementing the director's artistic vision, or in shaping or refining an artistic production. In addition, there is no specific mention of masters of ceremonies in Decision No. 010.

[8] The NCC notes that the wording of paragraph 6(2)(b) of the *Act* emphasizes the requirement that the independent contractor must play a role in a creative performance and it would be untenable to suggest that Mr. Girard was playing such a role in the Winterlude

Opening Ceremonies. The videotape provides clear evidence that Mr. Girard was not “performing” in the sense contemplated by paragraph 6(2)(b) of the *Act*.

[9] In Equity’s view, Mr. Girard was required to “perform” and he was paid for this display or presentation of his work before an audience and that, as a member of Equity, he is recognized to be an artist by other artists as set out in section 5, sub-paragraph 6(2)(b)(ii) and paragraph 18(b) of the *Act*. In addition, the use of language such as “performing or acting in any manner” found at sub-paragraph 6(2)(b)(ii) demonstrates Parliament’s intention to have the *Act* applied to a broad definition of functions performed by artists. Mr. Girard provided a direct contribution in the production of the creative work. The videotape shows that Mr. Girard’s role was the creative thread that held the production together. The actor engaged as master of ceremonies clearly is part of the process of shaping and refining the production.

[10] The NCC disputes Equity’s assertion that the function of master of ceremonies is encompassed by the term “actor” as this is contrary to the traditionally understood characteristics of the function of an actor. In its view, an actor is a person engaged in playing a character in theatrical productions. A master of ceremonies is generally understood to be a function of playing host or event coordinator. It is also commonly associated with the role of “genial host” who is responsible for ensuring that an event runs smoothly and that participants in the event are introduced in a complimentary and professional manner. The individual engaged is identified to the audience by his or her own name and has prescribed tasks such as thanking sponsors, reading announcements and introducing upcoming acts. In the case at hand, Mr. Girard was aware of the importance of not deviating from the text to ensure that the corporate messaging objectives were achieved. The NCC did not want Mr. Girard to display acting skills to create a character or imbue a script with an interpretation.

[11] In the NCC’s view, individuals who offer their services as masters of ceremonies are rarely from the community of actors. They are often known as toastmasters or sometimes play the role of disk jockey. Teachers, comedians and event organizers have been hired by the NCC to be masters of ceremonies at other events. Actors have also been engaged because of their genial nature or their capacity to smoothly perform the task of introducing performers or dignitaries. However, it would diminish the function of actor to suggest that the function of master of ceremonies is subsumed within this profession.

[12] Equity asserts that the fact that “master of ceremonies” is not specifically referenced in Decision No. 010 is because the parties considered it to be a role or a part as opposed to an independent function. While there may be masters of ceremonies at social events, the Winterlude Opening Ceremonies is a production contemplated by the *Act* and the role of master of ceremonies required the skills of an actor to make the event an artistic production as opposed to a private social event. The occupation of the master of ceremonies is not relevant as many artists have other occupations.

[13] Equity submits that its sector includes artists who are engaged to perform the function of master of ceremonies which is a role or a part that artists are engaged to perform or play in certain types of productions. It is not an independent function. The artists are

performing the function of actor. Equity further submits that the list of inclusions following the function of actor in the certification order is not exhaustive.

[14] Both parties presented arguments regarding the history of professional relations and the community of interest. The NCC noted that Equity has not historically represented masters of ceremonies as those persons are not usually members of any organization although some may belong to the Toastmasters Association. The fact that someone engaged to be a master of ceremonies is a member of Equity does not bring the function within its jurisdiction. The function of masters of ceremonies is akin to that of tour manager where members of Equity perform that function but are not regarded as falling within the scope of the sector description.

[15] In addition, the NCC asserts that masters of ceremonies do not share a community of interest that exists among other artists in the sector. They are not hired by reason of their acting skills and they do not create a character. Mr. Girard was not called upon to display any of his skills as an actor in his role as master of ceremonies. He exhibited skills such as a personable nature and a capacity to introduce the various artistic productions which comprised the event.

[16] Equity submits that, historically, artists engaged to perform the role of master of ceremonies by other producers have been covered by scale agreements with Equity and worked under Equity contracts, several of which Equity provided in its materials. Artists playing the role of master of ceremonies employ actors' skills. In the videotape provided, it is clear that Mr. Girard was engaged by the NCC because of his specific skills as an actor. His role was to entertain the audience much like a comedian through timing, artistic expression and improvisation. Artists engaged as masters of ceremonies clearly have a community of interest with artists covered by Equity's certification order and scale agreements. The role of master of ceremonies requires the artist to display his or her acting skills. It is not simply a case of an individual reading a speech or a list of introductions.

[17] Regarding the contracts filed by Equity, the NCC submits that it is not known whether the organizations in question were willing to accommodate the request of a particular independent contractor or of Equity to have an Equity contract cover an engagement for reasons unrelated to the application of the sector. As well, it is not known whether any of these individuals was called upon to "perform" in a fashion beyond the traditional function of master of ceremonies.

Issue 1: Is Dominic Girard an artist as defined in paragraph 6(2)(b) of the Status of the Artist Act?

[18] The following sections of the legislation are relevant in determining the first issue:

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.

[...]

18. The Tribunal shall take into account

[...]

(b) in determining whether an independent contractor is a professional for the purposes of paragraph 6(2)(b), whether the independent contractor

- (i) is paid for the display or presentation of that independent contractor's work before an audience, and is recognized to be an artist by other artists,
- (ii) is in the process of becoming an artist according to the practice of the artistic community, or
- (iii) is a member of an artists' association.

[19] In its submissions, the NCC has indicated that, in addition to actors, it often hires teachers, comedians and event organizers to be masters of ceremonies in the events it organizes. It should be noted that not all individuals engaged by a federal producer to participate in a production are necessarily “artists” for the purposes of the *Status of the Artist Act*. The legislation applies to “independent contractors determined to be *professionals* according to the criteria set out in paragraph 18(b) [...]” (Our emphasis). It is therefore unlikely that someone whose primary occupation, for example, is teaching or event organizing could be considered a “professional” under the legislation unless they meet one of the criteria set out in paragraph 18(b) cited above.

[20] In the instant case, the parties agree that Mr. Girard is an independent contractor, that he is a professional actor and a member of Equity. Although membership in an artists’ association is not a determinative factor, it is, however, an indication that the individual has attained a professional status for the purposes of paragraph 18(b) of the *Act*. Consequently, the Tribunal finds that Mr. Girard is an artist as defined under paragraph 6(2)(b) of the *Act*.

Issue 2: Is the function of master of ceremonies included in Equity’s certification order?

[21] In order to determine whether an artist is covered under a scale agreement, the Tribunal must focus on the “duties” carried out by the artist in light of the intended scope of the certification order. As the Tribunal noted in *Application for certification filed by the Association des réalisateurs et réalisatrices du Québec et al.*, 1997 CAPPRT 024, at para.

40, “[...] a job title does not necessarily determine the sector to which that person belongs; one must examine the duties that the person actually performs.[...]”. Accordingly, it would be inappropriate to conclude that masters of ceremonies are not covered under Equity’s certification order on the basis that it is not one of the enumerated functions or job titles.

[22] Equity’s certification order may be summarized as follows: a sector composed of actors, singers, dancers, production stage managers, stage managers, assistant stage managers, stage management apprentices, stage directors, assistant stage directors, fight directors, fight captains, choreographers, assistant choreographers, dance captains, ballet masters or mistresses, resident choreologists, coaches or répétiteurs in live performance in theatre, opera, ballet, dance, industrial shows, cabaret shows or concert performances presented in a theatre or elsewhere. It is clear from the sector description that the certification order is intended to cover individuals who either “perform” or “direct” in some manner in live performances, subject to the exclusions regarding the American Federation of Musicians of the United States and Canada and the Union des artistes (“UDA”).

[23] The relevant scale agreement, the National Capital Commission Events Agreement (the “Agreement”), appears to have been negotiated to cover various events put on by the NCC and is not specific to the event in question. At section 10.02, the Agreement sets out the minimum fees to be paid and the types of artists that are covered. These include performers, stage managers, directors and choreographers. None of these terms are defined in the Agreement.

[24] Equity asserts that Mr. Girard was playing a role in that he had to entertain the audience much like a comedian through timing, artistic expression and improvisation. As well, Equity has stated that Mr. Girard was the “creative thread that held the production together.” The NCC disagrees and claims that as master of ceremonies he was identified to the audience by his own name, that he had prescribed tasks such as ensuring that the event ran smoothly and that participants were introduced in a complimentary and professional manner. In addition, he was not to deviate from the text to ensure that the corporate messaging objectives were achieved.

[25] The Tribunal viewed the edited videotape of Mr. Girard’s work. We note that Mr. Girard was called by his name and that he was not wearing any particular costume, other than a winter jacket as this activity was held outside. The ceremonies started with speeches from local dignitaries introduced by an NCC employee and a local newsperson. After this portion of the evening was completed, Mr. Girard was introduced and the entertainment portion of the evening commenced. Mr. Girard set the tone by enthusiastically welcoming the audience as well as the special guests from the sponsoring agencies, the NCC and CJOH, a local television station. Although Mr. Girard referred to a script of some kind, it was clear that he was very comfortable in the role of master of ceremonies. Besides welcoming and thanking the various performers and keeping the program on time, he filled in the gaps with spontaneous comments. There were some glitches in the timing of the fireworks and he filled in the time by leaving the podium and interacting with individuals in the audience. His manner was friendly and the show ran smoothly despite the glitches.

[26] In its submissions, the NCC provided information about the work of an actor and that of a master of ceremonies. Some of the relevant portions are reproduced below:

From the Canadian Oxford Dictionary:

Actor: **1** a person who acts a part in a play, film etc. **2** a person whose profession is performing such parts. **3** a person skilled at embodying or portraying characters in theatrical productions [...]

From the *Oxford Companion to the Theatre*:

Actor, Actress, Acting: [...] Yet the true actor still needs to be a little of everything—singer, dancer, mimic, acrobat, tragedian, comedian—and to have at his command a good physique, a retentive memory, an alert brain, a clear, resonant voice with good articulation and controlled breathing [...]

From *Toastmasters International*:

[...] Being a successful Master of Ceremonies requires, preparation, a friendly manner and ability to adjust to/ad lib as necessary to ensure a successful event.

[...]

1. As Master of Ceremonies you are responsible for introducing every speaker and others who are playing a role in the program at the event. A proper introduction is important to the success of a speaker's presentation so have a good introduction prepared prior to the event for all key speakers. The more important the role played by the individual, the more extensive your introduction should be.

2. Once you have completed your introduction of a speaker, lead the applause for the speaker and continue applauding until they reach the lectern/podium.

3. The M.C. serves as the informal "timekeeper" for the speaker. If a speaker is exceeding their allotted time, you can slip them a note asking them to please finish quickly.

4. When the speaker has finished this/her [sic] presentation lead the applause until the speaker is seated.

5. Before you proceed on to the next portion of the program it is appropriate to thank the speaker for their presentation. If possible make reference to some aspect of the talk which you found particularly important or moving (this shows that you were listening and also confirms the value of the speaker's presentation).

[...]

An essential skill of an M.C. is the ability to make comments which "bridge" between segments of the meeting. Prior to the meeting, try to prepare some remarks which might be used to bridge between segments or comments or anecdotes which could be used if there is a delay or disruption in the program. [...]

[27] While it cannot be said that Mr. Girard was portraying a character or that he helped to shape the production, he did, however, entertain the audience through his comic timing and improvisation, skills required of performers generally. This was not a private social

event or a conference but an important entertainment venue where well-known performers were appearing. The NCC has stated that it did not engage Mr. Girard because of his acting skills but rather because of his genial nature and personality. We do agree that there is no requirement that a master of ceremonies be an actor or someone professionally trained, however we reject the notion that someone totally inexperienced could carry out the function in the context of this type of production. In our view, Mr. Girard was required to “perform” as that term is envisaged in sub-paragraph 6(2)(b)(ii) of the *Act*.

[28] As mentioned above, the videotape clearly demonstrates that Mr. Girard had a friendly manner, that he made the proper introductions, that he was able to make comments to “bridge” from one segment to another and to deal with unexpected events. He had a script because the NCC wanted “to ensure that corporate messaging objectives were achieved” although he appeared to be improvising in many instances.

[29] We must now determine whether the wording of Equity’s certification order is broad enough to include artists who perform in a such a manner.

[30] The UDA, an association whose sector mirrors in part, although in a different linguistic context, Equity’s jurisdiction, includes only two actual job titles in its certification order – choreographers and performers (*supra*, at par. 131 and 132). Its sector description reads as follows:

[...] a sector composed of all choreographers and performers who are independent contractors engaged by any producer subject to the *Status of the Artist Act* throughout Canada, to choreograph, perform, sing, recite or act in any manner whatsoever in a literary, musical or dramatic work, or in a mime, variety, circus or puppet show:

- i) broadcast, presented or performed in Quebec;
- ii) broadcast, presented or performed in Canada outside Quebec and intended for a French-speaking audience,

[...]

Given the particular drafting of this certification order, many types of performers with different job titles could potentially be included. Naturally, only those artists who meet the criteria set out in paragraph 18(b) of the *Act* would be in the sector.

[31] Equity’s certification order is not drafted in such a manner. Certain functions or job titles such as “actor” include an enumeration beside it (*e.g.* principal, chorus, mime, narrator etc.). However, in Decision No. 010, at paragraph 2, we note that the sector Equity initially sought to represent was worded in a broader fashion. The text of the Public Notice reads as follows:

[...] a sector composed of artists engaged in the preparation and presentation of live theatrical performances and entertainments except where, by specific agreement between the Canadian Actors’ Equity Association and l’Union des Artistes, the Canadian Actors’ Equity Association recognizes the jurisdiction of l’Union des Artistes in this sector.

[32] In addition, the following passage from Decision No. 010 at paragraph 8 is also relevant:

During the course of the oral proceeding, the applicant provided the Tribunal with additional detail as to the specific professional classifications of performers which it wishes to have included in the sector. These are:

- a) **in theatre**, actors (including principals, chorus, journeymen, apprentice actors, singers, dancers, mimes, narrators, local jobbers, swings/understudies and extras), production stage managers, stage managers, assistant stage managers, stage management apprentices, directors, assistant directors, choreographers, assistant choreographers, dance captains, fight directors, fight captains;
- b) **in opera**, singers, dancers, actors (including soloists, performers, ensemble studio artists, chorus members, apprentices, understudy/covers and extras), stage directors, assistant stage directors, ballet masters and mistresses, production stage managers, stage managers, assistant stage managers, choreographers, assistant choreographers and fight directors;
- c) **in ballet**, dancers, narrators, singers, guest artists, local jobbers, covers, understudy/sharers, student apprentices, apprentice dancers, choreographers, stage managers, assistant stage managers, ballet masters and mistresses, resident choreologists, coaches and repetiteurs.

[33] It is clear from both these excerpts that Equity sought to represent a range of performers engaged in theatrical performances and entertainments. As mentioned in paragraph 8, *supra*, Equity provided a list of professional classifications of performers to the Tribunal at the certification hearing. In its Reasons, the Tribunal chose to include the professional classifications in the certification order which were more descriptive rather than the general wording that had appeared in the Public Notice. It should be noted however that, in both instances, all of the artists covered are engaged in activities described in subparagraph 6(2)(b)(ii) of the *Act*. In our view, this is an indication that the scope of Equity's sector may be broader than the functions that are listed in the final certification order.

[34] The enumeration after "actor" in the certification order as presently drafted includes, for example, "mimes" and "narrators". Although these functions may require many of the same skills as those of an actor, individuals who practice these professions may not be "actors" as that word is understood in a strict sense. However, they are performers. Equity has stated that Mr. Girard's role "was to entertain the audience much like a comedian through timing, artistic expression and improvisation." The job title "comedian" is not included in Equity's certification order. Again, these individuals and the community may not see them as actors but no one would deny that they are performers. In our view, this is another indication that the list of enumerated functions is not exhaustive.

[35] The NCC submitted that masters of ceremonies do not share a community of interest with the artists in Equity's sector. We would agree that someone engaged to act as master of ceremonies or toastmaster at a conference or a private social event may not share a community of interest with the artists in Equity's sector. Furthermore, as discussed in paragraph 19 above, we have indicated that the *Act* applies only to those artists deemed to be "professionals" as defined in paragraph 18(b) of the *Act* and we have found that Mr. Girard clearly falls within that category. Consequently, we find that masters of ceremonies and the other artists included in Equity's sector share a community of interest.

Decision

[36] Having determined that the list of functions enumerated in Equity's certification order is not exhaustive, that Mr. Girard is a professional self-employed artist engaged to perform in some capacity in a live entertainment presentation, the Tribunal finds that master of ceremonies is a function covered under Equity's certification order and, consequently, Dominic Girard is a performer covered by the scale agreement negotiated between the NCC and Equity.

Ottawa, 1 April 2004

John M. Moreau
Presiding Member

Moka Case
Member

Lyse Lemieux
Member