



Canadian Artists and Producers  
Professional Relations Tribunal

Tribunal canadien des relations  
professionnelles artistes-producteurs

Ottawa, August 10, 2006

File No.: 1350-06-001

**Decision No. 051**

**In the matter of an application for review of Decision No. 050 (In the matter of a complaint under section 35 of the *Status of the Artist Act* and an application for determination filed under subsection 33(5) of the *Act* involving Mr. Stephen Petch and the Writers Guild of Canada)**

*Decision of the Tribunal:* The application for review is dismissed.

*Date of Hearing:* July 12, 2006

*Quorum:* David P. Silcox, Presiding Member  
John M. Moreau, Q.C., Member  
Lyse Lemieux, Member

## *Reasons for Decision*

1350-06-001: In the matter of an application for review of decision *Stephen Petch*, 2006 CAPPRT 050 filed by the Writers Guild of Canada

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### *Background*

[1] This decision concerns the application for review made to the Canadian Artists and Producers Professional Relations Tribunal (the “Tribunal”) under section 20(1) of the *Status of the Artist Act*, S.C. 1992, c. 33, (the “Act”), by the applicant, the Writers Guild of Canada (the “WGC”) on February 24, 2006. A panel of the Tribunal convened on July 12, 2006 and considered the application on the basis of written submissions.

[2] The application seeks a review of the Tribunal’s decision *Stephen Petch*, 2006 CAPPRT 050, hereinafter Decision No. 050, issued on January 23, 2006.

[3] In Decision No. 050, the Tribunal was faced with the issue of whether the WGC had breached its duty of fair representation, contrary to section 35 of the *Act*, in respect of the negotiation of an unauthorized sale of Mr. Stephen Petch’s work by the Canadian Broadcasting Corporation (the “CBC”). In that decision, the original panel allowed the complaint and issued a declaration that the WGC breached its duty of fair representation by acting in an arbitrary manner toward the complainant.

[4] The WGC is asking the Tribunal to review its decision on the following grounds:

1. The Tribunal breached its duty of procedural fairness and erred in law in
  - a. considering an issue not raised by either of the parties; namely, whether the WGC will be held to a higher standard of conduct based upon the nature of the grievance and the experience, sophistication and resources of the WGC;
  - b. failing to provide the WGC notice of the issue; and
  - c. failing to provide the WGC an opportunity to adduce evidence and make submissions in respect of the issue.
  
2. The Tribunal committed an error in law in finding that a lack of communication can be the sole basis for finding a breach of the duty of fair representation, where no prejudice has resulted.

3. The Tribunal committed a serious error of fact in finding a “lack of communication,” without facts to support this conclusion.

[5] The WGC requests that the declaration regarding its violation of section 35 be rescinded. Alternatively, it requests an opportunity to adduce evidence and make submissions with respect to the above-mentioned issues and, consequently, whether the WGC breached its duty of fair representation through a lack of communication with the complainant. The WGC does not seek to review any other aspect of Decision No. 050.

## *Positions of the Parties*

### *Summary of the WGC's Submissions*

[6] The WGC argues that administrative tribunals, making decisions that affect the “rights, privileges or interests of an individual”, have a duty to act fairly. As submitted by the WGC, whether rights, privileges or interests may be affected is determined by the nature of the proceeding and the remedial sanctions to which a party may be subject. It does not depend upon the remedy imposed at the end of a particular case. An allegation that an artist’s association breached its duty of fair representation goes to the core of its purpose and function. In this case, the WGC argues that the declaratory nature of the remedy has a great impact on the resources to be invested in individual communication with writers affected by grievances.

[7] According to the WGC, this duty to act fairly requires a tribunal to inform parties of the evidence it intends to rely on in its decision and to provide them with an opportunity to reply to the evidence and present arguments relating to it. This duty exists in common law, but is also alluded to at paragraph 19(1)(a) of the *Act*. A tribunal therefore cannot decide a case against a party without providing it an opportunity to address the issues giving rise to the tribunal’s view of the case.

[8] The WGC maintains that the Tribunal may take notice of facts within its specialized knowledge and the only facts which can be judicially noticed are those that are: 1) so well-known and accepted as not to be reasonably questioned; or 2) any fact or matter that can immediately and accurately be determined by resort to sources with unquestionable accuracy. Before taking judicial notice, parties should be given the opportunity to lead evidence and to make submissions on the appropriateness of judicial notice in the circumstances.

[9] In this case, the WGC argues that the Tribunal, of its own motion, considered two factors not put to it by the parties and to which the parties had no opportunity to make submissions:

1. The resources and experience of the WGC as an artists’ association; and

2. Whether the nature of the grievance, involving questions of copyright, should give rise to a higher standard of representation.

[10] The WGC maintains that the parties' submissions made no mention of these factors. The Tribunal therefore had to take notice of facts relating to the WGC's experience and resources and to the nature of the grievance. The WGC submits that the Tribunal's conclusion on this matter does not meet the aforementioned test regarding facts that may be judicially noticed, nor do the facts fall under the Tribunal's specialized knowledge.

[11] Regarding the WGC's experience and resources, the Tribunal relied on its 1996 decision in which it certified the WGC. The WGC maintains that the information is now dated, the parts of the decision quoted by the Tribunal do not even address the issue of resources, and the question of resources is not addressed in the Tribunal's analysis. Ten-year-old findings of facts based on different issues are not a proper substitute to a proper inquiry into the experience and resources of the WGC.

[12] Regarding the nature of the grievance, the WGC maintains that virtually all compensation provisions of the scale agreement are related to copyright. Not all grievances can involve matters of primordial importance without trivializing the very notion. A determination as to whether the grievance pertained to a critical job interest can only be made following an analysis of the structure of the scale agreement and the significance of the infringed articles.

[13] The WGC refutes the argument that the issue in question is "the standard to which the Guild should be held." Such an expansive definition of the issue can include almost anything the Tribunal chooses to turn its mind to without prior warning. According to the WGC, a requirement that a responding party "shadow box" every argument it can anticipate *might* be of interest to the Tribunal would result in voluminous factual and legal submissions which would undermine the informal and efficient processes of the Tribunal.

[14] The WGC argues that there is no case law to support the Tribunal's finding that the lack of communication from the bargaining agent to the member, when this lack causes no prejudice to the member, can constitute, on its own, a ground for a finding that the duty of fair representation has been violated. Indeed the case law relied upon by the Tribunal would indicate the contrary. The notion of prejudice is relevant in determining whether there is a breach and not only in determining what the remedy to the breach should be.

[15] The WGC maintains that, in its findings, the Tribunal singled out the failure to address the complainant's requests for information about the terms of sale of his material to the satellite radio station and the status of the grievance related to this sale. Prior to arbitration the WGC has no means to compel

production of such information from the CBC and it did not have specific information regarding the specific value of the sale of the complainant's work. The WGC could not have withheld information it never had. According to the WGC, the evidence shows that it responded to the complainant's request for information on many documented occasions.

*Summary of Mr. Stephen Petch's Submissions*

[16] Mr. Petch, the complainant (respondent in this application), maintains that the issue before the Tribunal was whether the WGC's conduct was arbitrary. The standard of conduct to which the WGC is to be held is merely a facet of that issue, not a new issue.

[17] Even if it constituted a new issue, there was no requirement of procedural fairness on this point. The kinds of prejudice (deportation, confinement) that resulted from the breach of procedural fairness in the adduced case law are not present here. The Tribunal's decision is merely a declaration and entails no penalty.

[18] Regarding the WGC's experience and resources, Mr. Petch remarks that the WGC itself stated it had a bargaining relationship with the CBC since the early 1960's. Mr. Petch also notes that it was the WGC that submitted its certification decision into the record. Even though it now claims the material is "dated", the relationship and activities mentioned did exist. Mr. Petch submits that while the WGC argues the absence of evidence of its resources, and implies that it hasn't the resources to maintain individual communications with all the writers involved in the grievance, it does appear however that it does have sufficient resources to defend its position in this case.

[19] Regarding the gravity of the grievance, Mr. Petch maintains that while it is true that most matters covered by the scale agreement are related to copyright, the issue at hand is related to a violation of copyright which is of key importance to a writer.

[20] Mr. Petch disagrees with the WGC's argument that the above-mentioned error was the sole basis for the Tribunal's finding of a breach of the duty of fair representation. The Tribunal referred to situations where the lack of communication was but one of the factors to be considered. Mr. Petch maintains that the Tribunal's finding was also based on failures to keep him apprised of the grievance process, to communicate details of the settlement and to preserve his opportunity to pursue further action. Mr. Petch also maintains that although the Tribunal did not specifically refer to a prejudice, being deprived of the opportunity to even agree to settlement of the infringement of his copyright constitutes a prejudice.

[21] Mr. Petch maintains that there was indeed a failure to communicate on the part of the WGC. The WGC only communicated with him once without being prompted and when prompted the WGC never addressed the issues he raised.

*Summary of the CBC's Submissions*

[22] The CBC, which was an intervenor in the complaint, was given an opportunity to make submissions on the application for review. The CBC maintains that the application for review should be denied. The only basis for the application for review is that an error of law or serious error of fact was committed. The CBC argues that the WGC has the burden to demonstrate serious reasons or even exceptional circumstances which could throw the findings of the original panel into serious doubt. Mere disagreement with the Tribunal's analysis of the facts or interpretation of the law is not a ground for review.

[23] According to the CBC, the WGC has miscast the issue that is at the heart of its application, namely, the standard of representation to which it should be held. The WGC's submissions make ample reference to the fundamental importance of copyright issues to its role as an artists' association. The CBC states that the question of an appropriate test to determine the aforementioned standard was also addressed in the WGC's submissions.

[24] In applying the principles of labour law, the Tribunal chose to place significant importance on two decisions of the *Canadian Industrial Relations Board* (the "Board") rather than fully accept the WGC submissions. Although neither party chose to rely on these cases, they were available to all parties at the time of the hearing. The Tribunal could therefore rely upon these cases without seeking further input from the parties.

[25] Regarding the WGC's experience and resources, the CBC maintains that in relying on the WGC's certification decision, the Tribunal did not err in law. To argue this would mean that facts that form the very basis of the WGC certification were misrepresented at the time. There is no evidence to show that the WGC's situation has since deteriorated to a point where the Tribunal's conclusions regarding its experience and resources were wrong.

[26] According to the CBC, the Tribunal made no error in law in its interpretation of the case law. The CBC argues that a breach of the duty of fair representation is merely that: a breach regardless of ensuing prejudice. The prejudice flowing from a finding that a breach has occurred goes to the extent of the remedy ordered by the Tribunal. The lack of serious prejudice resulted in declaratory relief only being ordered.

[27] The CBC submits that the WGC's arguments on this issue amount to no more than a disagreement with the way the Tribunal interpreted the facts before it.

This is not sufficient ground upon which to base a reconsideration application. In coming to its conclusion, the Tribunal relied solely on the facts before it.

### *Issues*

[28] The WGC's application raises the following issues:

1. Did the Tribunal breach its duty of procedural fairness?
2. Did the Tribunal commit an error of law in finding that the WGC breached its duty of fair representation?
3. Did the Tribunal commit a serious error of fact in its interpretation of the facts before it?

### *Analysis*

[29] The WGC's application for review is submitted pursuant to section 20 of the *Act*, which states:

(1) The Tribunal may uphold, rescind or amend any determination or order made by it, and may re-hear any application before making a decision.

[30] The Tribunal's review power is explained further at section 45 of the *Canadian Artists and Producers Professional Relations Tribunal Procedural Regulations*, SOR/2003-343, (the "*Regulations*"):

45. (1) Subject to subsection (3), any person affected by a determination or order of the Tribunal may, within 30 days after the date of the determination or order, make an application for a review of the determination or order.

(2) The application must be based on the grounds that

(a) the Tribunal's determination or order contains an error of law or a serious error of fact; or  
(...)

[31] The *Canada Labour Code*, R.S.C. 1985, c. L-2, has a provision similar to the review provisions of the *Act* and its *Regulations*. This provision has been interpreted by the 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 Corporation*, [2000] CIRB no. 94; and 72 CLRBR (2d) 305).

[32] The Board also had the following to say about the use of the reconsideration power in its decision in *Canadian Broadcasting Corporation* (1991), 86 di 92; and 92 CLLC 16,006 (CLRB no. 897)

(...) Let us repeat what was said recently in *CanWest Pacific Television Inc. (CKVU)* (1991), 84 di 19 (CLRB no. 847), to the effect that reconsideration of decisions is the exception rather than the rule. The Board's primary concern is the finality of its decisions and the onus is therefore on an applicant to satisfy the Board that there are serious grounds which warrant the setting aside of the original decision. The primary function of a reconsideration panel is to screen applications with these policies in mind. Applications will not proceed past this initial screening stage if they do not provide new facts or circumstances which, if they had been known at the time, could have resulted in the Board arriving at a different conclusion. Applications alleging error in law or policy that do not contain something substantial, which throws the interpretation applied by the original panel into serious doubt, will meet the same fate. Mere disagreement with the Board's analysis of the facts or with the interpretation of law or policy applied by the Board are not grounds for a review by the full Board sitting in plenary.

[33] Similarly, the Board wrote in *591992 BC Ltd.*, [2001] CIRB no. 140

The finality of its decisions is of primary concern to the Board. Thus, the rescinding of an original panel's decision remains the exception rather than the rule. The applicant has the burden of proving that there are serious reasons, or even exceptional circumstances, that would justify the reconsideration of a decision. The grounds raised by the employer in the present matter do not appear to warrant re-opening of the case.

[34] The Tribunal agrees with these interpretations and, accordingly, will not interfere lightly with its findings.

*Did the Tribunal breach its duty of procedural fairness?*

[35] In its application for review, the WGC claims that the Tribunal, in applying a heightened standard of representation to the WGC's conduct, breached its duty of procedural fairness by considering two factors not put to it by any of the parties: the relative level of experience of the WGC as an artists' association and the nature of the grievance. The WGC claims that the Tribunal erred in law, within the meaning of s. 45(2)(a) of the *Regulations*, by failing to give the parties notice of the above two factors and by failing to give the parties an opportunity to respond to those factors.

[36] The WGC also argues that since the Tribunal considered case law not referred to by the parties and since this case law raised considerations that had at no time been alluded to by the parties, this constitutes a breach of the duty of procedural fairness.



[37] The relevant provisions of the *Act* are as follows:

19. (4) The Tribunal may take notice of facts that may be judicially noticed and, subject to subsection (5), of any other generally recognized facts and any information that is within its specialized knowledge.

19. (5) The Tribunal shall notify the parties and any intervenor in the proceeding before it of its intention to take notice of any facts or information, other than facts that may be judicially noticed, and afford them an opportunity to make representations with respect thereto.

[38] In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, Justice L'Heureux-Dubé acknowledged that there is a right to procedural fairness before administrative tribunals, which includes the right to be heard, but that the legislative framework must be considered in order to determine whether it changes this right. The duty of fairness is a variable standard, which will depend on the nature of the matter to be decided, and the statutory provision related to it. Subsection 19(4) of the *Act* permits the Tribunal to take notice of facts that may be judicially noticed, and under subsection 19(5), the Tribunal is not required to inform the parties of its intention to do so.

[39] The Tribunal may accordingly take notice of legislation, regulations, jurisprudence, well-known and indisputable facts and take them into consideration in its decisions.

[40] As directed by paragraph 18(a) of the *Act*, the Tribunal took into account the applicable principles of labour law. Paragraph 18(a) of the *Act* states as follows:

18. The Tribunal shall take into account  
(a) in deciding any question under this Part, the applicable principles of labour law;  
(...)

[41] The Tribunal has turned to the jurisprudence from the courts and labour boards for guidance on the duty of fair representation. The consideration of principles applicable in other spheres of labour relations and their application in the context of the *Act*, did not involve the introduction of evidence.

[42] The original panel's determination, in regards to the nature of the grievance and more specifically the appropriateness of the heightened standard of representation ultimately decided by the Tribunal, was based on existing case law available to the parties at the time they formulated their arguments. The fact that neither party referred to these decisions did not prevent the Tribunal from relying on them. In determining matters before it, the Tribunal cannot be limited to the cases that are referred to by the parties and doing so does not constitute a denial of natural justice.

[43] As for the evidence regarding the level of experience of the WGC as an artists' association, the Tribunal's referral to earlier decisions should not be considered a denial of natural justice. A labour relations board is entitled to rely upon its previous findings in its dealing with the parties when those findings of fact are relevant to the issues before a board. Taking into account past events between the parties permits it to have a better understanding of the facts.

[44] Here, it was the WGC which submitted, in paragraph 2 of its response to the complaint, that "the CBC and the WGC (and its predecessors since ACTRA) have enjoyed a collective bargaining relationship since the early 1960s resulting in scale agreements which have been in effect during all material time frames."

[45] The WGC also referred to its experience, expertise and resources in order to establish that they were best suited to handle Mr. Petch's grievance by stating at paragraph 25 of its original response that

(...) given the fact that the CBC had already made the sale, the best result could be achieved for all writers if they spoke to the CBC with one voice, utilizing the experience, expertise and resources of the WGC. Allowing the CBC to deal individually with writers to resolve issues around violation of the scale agreement would potentially allow it to exploit the relative weaker position of individual writers, to establish poor settlements which would compromise the broader interests of writers and the WGC.

[46] The facts considered by the Tribunal were on the face of the record and not ones that it took judicial notice of. The Tribunal did not engage in an independent search for further evidence or data. Both parties have had full opportunity to present their version of the case. The Tribunal took no new facts into consideration.

[47] The Tribunal finds that the WGC did not raise a substantial matter which could throw the interpretation applied by the original panel into serious doubt.

[48] Consequently, the Tribunal is of the opinion that the WGC was not deprived of its right to be heard and that there was no breach of the duty of procedural fairness.

*Did the Tribunal commit an error of law in finding that the WGC breached its duty of fair representation?*

[49] The WGC argues that the Tribunal established an erroneous standard of bargaining agent representation. The WGC submits that there is no basis in labour law jurisprudence to support the argument that a lack of communication with a member that causes no prejudice can, in and of itself, constitute a breach of the duty of fair representation.

[50] The original panel clearly reviewed the labour law jurisprudence dealing with the duty of fair representation, including issues of communication, and applied the case law in the context of the legislation. In the framework of the legislation and of the particular circumstances of this case, the Tribunal gave weight to a factor often considered by other tribunals in similar cases, albeit as one of a group of factors to be considered, namely, the lack of communication between a bargaining agent and its member.

[51] As stated in paragraph 105 of Decision No. 050, “More recently, in *Robert Adams, supra*, the Board after reviewing, *Luc Gagnon and Jacqueline Brideau, supra*, as well as *Ronald Shanks* (1996), 100 di 59 (CLRB no. 1157) concluded at paragraph 53 that:

On this jurisprudence is founded the principle that even if poor communication does not inevitably lead to a violation of section 37, the union’s actions should be assessed in each case.”

[52] In defining the applicable standard of representation to the duty of fair representation pursuant to section 35 of the *Act*, the Tribunal is interpreting its own legislation. It is for the Tribunal, within its jurisdictional competence, to determine which factors are relevant for consideration in particular cases.

[53] The Tribunal is of the view that the WGC’s arguments on this issue amount to no more than a disagreement with the original panel’s findings. As stated in *Canadian Broadcasting Corporation and ACTRA, supra*, mere disagreement with the way the Board interpreted the facts before it and its legislation is not ground for a review.

[54] For these reasons, the Tribunal finds that the arguments on this issue are not grounds for a review.

*Did the Tribunal commit a serious error of fact in its interpretation of the facts before it?*

[55] The Tribunal’s finding of fact regarding the lack of communication, as stated at paragraph 125 of the decision, was that:

(...) the WGC’s reply to communications during this period never addressed the complainant’s requests as related to the sale of his works one way or another, either by providing the information requested or part of the information requested or, alternatively, by stating why it would not be doing so.

[56] The WGC’s arguments are that no information regarding the sale of Mr. Petch’s work was available to it at any relevant times and that there were communications between the parties at other times regarding the status of the grievance.

[57] It is clear from the quote above that the Tribunal's finding of a lack of communication was specifically related to the lack of forthcoming information regarding the sale of Mr. Petch's work, or, alternatively, why such information was unavailable.

[58] That there was no information available or that information on another subject was provided does not make the Tribunal's finding erroneous. It merely shows that the WGC has a different view as to which evidence is relevant in deciding the issue.

[59] The Tribunal finds that the WGC did not raise serious grounds which would warrant the setting aside of Decision No. 050.

### *Decision*

[60] The Tribunal finds that it is not appropriate to review Decision No. 050 on the grounds submitted. For all of these reasons, the WGC's application is dismissed.

Ottawa, August 10, 2006

David P. Silcox  
Presiding Member

John M. Moreau, Q.C.  
Member

Lyse Lemieux  
Member