



Canadian Artists and Producers
Professional Relations Tribunal

Tribunal canadien des relations
professionnelles artistes-producteurs

Ottawa, December 10, 2007

File: 1350-07-001

Decision No. 52

**In the matter of the application for review by the American Federation of
Musicians of the United States and Canada – Request under subsection 45(3)
of the *Procedural Regulations of the Canadian Artists and Producers
Professional Relations Tribunal***

Decision of the Tribunal:

The application for review is granted.

Date of hearing: November 29, 2007

Quorum: Peter Annis, Presiding Member
Lyse Lemieux, Member
Michael Laleune, Member

Reasons for decision

1350-07-001: In the matter of the application for review by the American Federation of Musicians of the United States and Canada – Request under subsection 45(3) of the *Procedural Regulations of the Canadian Artists and Producers Professional Relations Tribunal*

Background

[1] This decision concerns the application for review made to the Canadian Artists and Producers Professional Relations Tribunal (hereinafter the “Tribunal”) under subsection 45(3) of the *Procedural Regulations of the Canadian Artists and Producers Professional Relations Tribunal* (hereinafter the “Regulations”), by the applicant, the American Federation of Musicians of the United States and Canada (hereinafter the “AFM”) on April 27, 2007. A panel of the Tribunal convened on November 29, 2007 and considered this application on the basis of the written submissions.

[2] The AFM is requesting that the Tribunal review and modify the description of the “sectors” contained in the two Certification Orders made by the Tribunal on January 16, 1997 pursuant to its decision *In the Matter of an application filed by the American Federation of Musicians of the United States and Canada, 1997* CAPPRT 019 (hereinafter “Decision No. 019”), which is as follows:

certification to represent a sector composed of all members of the American Federation of Musicians of the United States and Canada who are independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of instrumental musician, conductor, vocalist or arranger, with the exception of:

- a. artists within the scope of the certification issued to the Canadian Actors’ Equity Association by the Canadian Artists and Producers Professional Relations Tribunal on April 25, 1996 and subject to the 1996 understanding between Canadian Actors’ Equity Association and the American Federation of Musicians of the United States and Canada;
- b. artists within the scope of the certification issued to the ACTRA Performers Guild by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996 and subject to the agreement between the ACTRA Performers Guild and the American Federation of Musicians of the United States and Canada dated May 14, 1996;
- c. artists within the scope of the certification issued to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996;
- d. artists when represented by Local 406 of the American Federation of Musicians of the United States and Canada, known as the *Guilde des musiciens du Québec*, under the terms of the agreement dated October 23, 1996 between the American Federation of Musicians of the United States and Canada and the *Guilde des musiciens du Québec*.

and:

certification to represent, for pension purposes only, a sector composed of those members of the American Federation of Musicians of the United States and Canada who are independent contractors engaged by any producer subject to the *Status of the Artist Act* to perform the function of music composer, with the exception of music composers within the scope of the certification issued to the Société professionnelle des auteurs et des compositeurs du Québec by the Canadian Artists and Producers Professional Relations Tribunal on May 17, 1996.

[3] The proposed modification would (1) remove the reference to “members” of the AFM from the definition of the sectors in respect of which the AFM has been certified, and (2) add “leader” to the list of functions in the sector definition that presently includes “instrumental musician, conductor, vocalist or arranger”.

[4] In accordance with subsection 46(1) of the *Procedural Regulations*, the Tribunal gave the following notice that it has received the application for review of certification orders from the AFM:

The AFM is seeking to modify the description of its sectors and has requested that the Tribunal amend its certification orders to read as follows:

...a sector composed of **all independent contractors** engaged by any producer subject to the *Status of the Artist Act* to perform the function of instrumental musician, conductor, **leader**, vocalist or arranger, with the exception of:

- a. artists within the scope of the certification issued to the Canadian Actors' Equity Association by the Canadian Artists and Producers Professional Relations Tribunal on April 25, 1996 and subject to the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada;
- b. artists within the scope of the certification issued to the ACTRA Performers Guild by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996 and subject to the agreement between the ACTRA Performers Guild and the American Federation of Musicians of the United States and Canada dated May 14, 1996;
- c. artists within the scope of the certification issued to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996;
- d. artists when represented by Local 406 of the American Federation of Musicians of the United States and Canada, known as the *Guilde des musiciens du Québec*, under the terms of the agreement dated October 23, 1996 between the American Federation of Musicians of the United States and Canada and the *Guilde des musiciens du Québec*.

and:

... for pension purposes only, a sector composed of **independent contractors** engaged by any producer subject to the *Status of the Artist Act* to perform the function of music composer, with the exception of music composers within the scope of the certification issued to the Société professionnelle des auteurs et des compositeurs du Québec by the Canadian Artists and Producers Professional Relations Tribunal on May 17, 1996. [emphasis added]

[5] The public notice was published in the *Canada Gazette* on June 16, 2007. The notice was also published in *Playback* and *Particles/Particules* (a publication of the Canadian Conference of the Arts). The notice was posted on the Tribunal's website and a copy was sent to the parties that took part in the proceedings leading to the Tribunal's original certification of the AFM, issued pursuant to Decision No. 019, which also had been identified by the applicant as potential interested parties: the *Guilde des Musiciens du Québec*, the ACTRA Performers Guild, the Canadian Broadcasting Corporation, the National Film Board, the Canadian League of Composers, the Guild of Canadian Film Composers, the Canadian Musical Reproduction Rights Agency Limited, the Canadian Music Publishers Association, the Songwriters Association of Canada and the *Union des Artistes*.

[6] The deadline to file written representations with respect to this request was July 16, 2007.

[7] Written representations were received from the following organizations:

- the National Film Board (hereinafter "NFB"),
- the Guild of Canadian Film Composers, and
- the Canadian Broadcasting Corporation (hereinafter "CBC").

[8] The AFM was then provided with an opportunity to comment on the representations received. It filed written comments on July 27, 2007.

[9] An oral hearing was scheduled for November 19, 2007. Prior to the hearing, the participants held discussions with a view to resolving some of their differences. As a result of these discussions, on November 14, 2007, the AFM sought leave to amend its request. It sought to withdraw its proposal to make changes to its certification order in respect of music composers.

[10] With respect to the other certification, the AFM proposed that the description of the sector be modified so that it read as follows:

...a sector composed of **all independent contractors who are professional artists under the *Status of the Artist Act*** engaged by any producer subject to the Status of the Artist Act to perform the function of instrumental musician, conductor, **leader**, vocalist or arranger, with the exception of:

- a. artists within the scope of the certification issued to the Canadian Actors' Equity Association by the Canadian Artists and Producers Professional Relations Tribunal on April 25, 1996 and subject to the 1996 understanding between Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada;
- b. artists within the scope of the certification issued to the ACTRA Performers Guild by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996 and subject to the agreement between the ACTRA Performers Guild and the American Federation of Musicians of the United States and Canada dated May 14, 1996;

- c. artists within the scope of the certification issued to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996;
- d. artists when represented by Local 406 of the American Federation of Musicians of the United States and Canada, known as the *Guilde des musiciens du Québec*, under the terms of the agreement dated October 23, 1996 between the American Federation of Musicians of the United States and Canada and the *Guilde des musiciens du Québec*. [emphasis added]

[11] For greater clarity, the AFM noted that the amendment to the AFM's request is the addition of the words "**who are professional artists under the *Status of the Artist Act***".

[12] In light of these discussions, and of the proposed amended request of the AFM, the affected parties, the CBC, the Guild of Canadian Film Composers and the NFB, informed the Tribunal that they were withdrawing their objections.

[13] After canvassing the views of the parties, on November 16, 2007 the Tribunal granted the AFM leave to amend its application as requested and informed the AFM and the affected parties that it was to decide this matter on the basis of the written material presently before it.

Submissions

The AFM

[14] In support of its application for review the AFM submitted that the request to include "leader" is, in essence, a technical amendment. The sector currently includes "conductors" but the AFM states that it has historically represented "leaders" as well as "conductors". For example, the scale agreement between the AFM and the NFB defines both "musician" and "leader". Also, the agreements between the AFM and the CBC (television and radio) define the term "leader and/or Conductor".

[15] According to the AFM, the term "conductor" generally refers to a person who leads or co-ordinates a group of symphonic or classical musicians while the term "leader" refers to a person who performs the identical function but with respect to musicians who perform different musical genres.

[16] In regards to the reference to "members", the AFM recognized in its application for review that the description of the sectors contained in the Tribunal's certification orders were, in essence, those proposed by the AFM in its original application. Nevertheless, a review of the certification orders issued by the Tribunal since January 1996 reveals just how anomalous those descriptions are, compared to all other bargaining orders issued by the Tribunal.

[17] The AFM argues that no sector should be defined by reference to membership in an artists' association. Doing so has the potential to undermine stable collective bargaining and creates the undesirable possibility of fragmented bargaining structures as it might create multiple, parallel sectors.

The Guild of Canadian Film Composers

[18] The Guild of Canadian Film Composers informed the Tribunal that its intervention was now unnecessary as a result of the AFM withdrawing its request to modify its certification in respect of music composers.

The NFB

[19] The NFB also informed the Tribunal that it has no objection to the amended application. However, it noted that its current scale agreement with the AFM already defines leader which in French is translated as "chef d'orchestre" in their agreement. "Chef d'orchestre" already appears in the current certification order as a translation of "conductor". According to the NFB this may create confusion.

The CBC

[20] The CBC also informed the Tribunal that with the amended application, the CBC's objections to the application have been substantially addressed and withdrew its objection.

Issues

[21] The application for review raises the following issues

- (a) Should the Tribunal add the term "leader" in the description of the sector?
- (b) Should the Tribunal remove reference to membership?

Analysis and conclusion

Should the Tribunal add the term "leader" in the description of the sector?

[22] The *Status of the Artist Act* (S.C. 1992, c.33, hereinafter "the *Act*") creates a scheme for the certification of artists' associations to represent sectors composed of artists. The term "artist" is defined in section 5 of the *Act* as "an independent contractor described in paragraph 6(2)(b)". Paragraph 6(2)(b) creates essentially three categories of artists: specified creators of works, viz., authors and directors of audiovisual works (subparagraph 6(2)(b)(i)); performers and directors of performers

(subparagraph 6(2)(b)(ii)); and contributors in the performing arts, that fall within a professional category prescribed by regulation (subparagraph 6(2)(b)(iii)).

[23] As stated above, the AFM has submitted that the term “conductor” generally refers to a person who leads or co-ordinates a group of symphonic or classical musicians, while the term “leader” refers to a person who performs the identical function but with respect to musicians who perform different musical genres.

[24] In Decision No. 019, in including “conductors” in the sector, the Tribunal noted the following:

Conductors

[18] Conductors are persons who lead or co-ordinate a group of musicians, and who may also select or audition individual players. The AFM has historically represented conductors. Its scale agreement with the CBC, for example, contains terms and conditions relative to these professionals. The Tribunal raised a concern regarding the managerial functions performed by conductors. This concern arose from the direction contained in subsection 18(a) of the *Act*, which requires that the Tribunal take into account the applicable principles of labour law. One of these principles is that supervisors should not be included in the same bargaining unit as those whom they supervise.

[19] The applicant has persuaded the Tribunal that the freelance conductors who are subject to the *Status of the Artist Act* do not perform managerial functions in the sense that this term is commonly understood in the labour relations milieu. For example, freelance conductors do not have responsibility for the discipline of musicians; this responsibility rests with symphony management. Accordingly, the Tribunal finds that it is appropriate to include conductors in the same sector with instrumental musicians.

[25] The AFM has submitted in evidence a copy of its scale agreement with the NFB, which defines both “musician” and “leader” and contains terms and conditions relative to both groups of professionals. Article 2 of the NFB-AFM Agreement provides the following definitions:

MUSICIAN - means a person other than the leader performing as an instrumentalist in a group or orchestra

LEADER – means the director or any group or orchestra, who shall select the musicians and sign the contract(s) with the producer on behalf of the musicians.

[26] The CBC-AFM Agreement provides the following definition:

“Leader and/or conductor” is the director of any Orchestra or choral group whose responsibilities include engaging, representing and signing the contract on behalf of the Musicians, and the performance of the Musicians on the engagement.

[27] The Tribunal accepts the AFM’s submission that this is in effect a technical amendment and is satisfied that “leader” falls within the definition of performers and directors of performers at subparagraph 6(2)(b)(ii) of the *Act*. Since the AFM has historically represented “leaders” as well as “conductors”, the Tribunal finds it appropriate to include these artists in the proposed sector. To avoid any confusion, “leader” will be added to the text of the French version of the new certification order.

Should the Tribunal remove reference to membership?

[28] As mentioned above, the AFM recognized in its application for review that the description of the sectors contained in the Tribunal’s certification orders were, in essence, those proposed by the AFM in its original application. However, according to the AFM, a review of the other certification orders issued by the Tribunal reveals just how anomalous this description is. The AFM states that in Decision No. 19, the Tribunal’s finding was in respect of a sector that included both members and non-members.

[29] The AFM argues that no sector should be defined by reference to membership in an artists’ association. The AFM submits that “defining a sector by reference only to an association’s members renders the statutory requirement in s. 28 (1) of the *Act* that an artists’ association demonstrate that it is the association most representative of the artists of that sector somewhat perfunctory.”

28(1) Certification

28. (1) Where the Tribunal is satisfied that an artists’ association that has applied for certification in respect of a sector is the most representative of artists in that sector, the Tribunal shall certify the association.

[30] The AFM is correct in saying that no other association has been certified to represent only its own members. The Tribunal has stated in the past that:

In order to allow as many artists as possible to enjoy the benefits of the *Status of the Artist Act*, the Tribunal prefers sector definitions that include all artists in a given discipline, as opposed to definitions that include only the members of an association. (1997 CAPPRT 020 (*GMQ*), para. 36)

[31] In Decision No. 019 the Tribunal determined that the AFM was the association most representative of the sector composed of instrumental musicians, conductors, vocalists and arrangers.

[46] Given the history of the AFM's representation of performing musicians, the description of its activities, the acknowledgement of its jurisdiction by producers such as the CBC and the NFB and other artists' associations, and in the absence of any challenge to the representativeness of the AFM, the Tribunal accepts the evidence presented and finds the AFM to be the association most representative of the sector composed of instrumental musicians, conductors, vocalists and arrangers.

[32] Accordingly, the Tribunal is of the opinion that the AFM's request to represent a sector composed of **all independent contractors who are professional artists under the *Status of the Artist Act*** engaged by any producer subject to the *Status of the Artist Act* to perform the function of instrumental musician, conductor, **leader**, vocalist or arranger, with the exception mentioned above should be granted.

[33] A new certification order will be issued to reflect this decision.

Ottawa, December 10, 2007

Peter Annis
Presiding Member

Lyse Lemieux

Michael Laleune