



Canadian Artists and Producers  
Professional Relations Tribunal

Tribunal canadien des relations  
professionnelles artistes-producteurs

Ottawa, January 23, 2006

File Nos.: 1330-04-001 and 1340-04-002

### Decision No. 50

**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 Tribunal allows the complaint and issues a declaration that the Writers Guild of Canada breached its duty of fair representation.

The Tribunal declares that there were no terms in the contracts between Mr. Stephen Petch and the Canadian Broadcasting Corporation more favourable to Mr. Petch in relation to further use of the dramatic scripts than those provided for under the Agreement between the Writers Guild of Canada (or its predecessor) and the CBC.

*Dates of Hearing:* April 29, 2005  
June 9 and 25, 2005  
July 21 and 22, 2005  
September 12 and 15, 2005  
November 7, 2005

*Quorum:* John M. Moreau, Presiding Member  
Marie Sénécal-Tremblay, Member  
John Van Burek, Member

## *Reasons for Decision*

1330-04-001 and 1340-04-002: In the matter of complaint filed under section 35 of the *Status of the Artist Act* involving Mr. Stephen Petch and Writers Guild of Canada and an application for determination filed pursuant to subsection 33(5) of the Act

### *Introduction*

[1] On November 15, 2004, Mr. Stephen Petch (“the complainant”) filed a complaint against the Writers Guild of Canada (“WGC”) alleging a breach of the duty of fair representation contrary to section 35 of the *Status of the Artist Act* (S.C. 1992, c. 33, hereinafter “the Act”) in respect to the negotiation of an unauthorized sale of his works by the Canadian Broadcasting Corporation (“CBC”). Mr. Petch claims that he was denied the opportunity to negotiate directly with the CBC despite the terms of his contract with the CBC. He also claims that, in addressing his claim through the grievance procedure in the Master Agreements between the CBC and the WGC, the WGC arbitrarily and in bad faith failed to address his claim for breach of copyright, failed to secure adequate compensation, failed to obtain copies of pertinent material and failed to request his, or any writer’s, approval of the terms of the settlement of the grievance.

[2] The complainant also filed an application pursuant to subsection 33(5) of the Act seeking a declaration that the terms of the contracts in question are more favourable than those provided under the applicable scale agreements.

[3] The complainant seeks the following resolution from the Tribunal:

1. a declaration pursuant to subsection 33(5) of the Act that the terms of the contracts in question between him and the CBC are more favourable than those provided for under the Agreement between the WGC (or its predecessor) and the CBC, in that:
  - the agreements do not deal with the issue of copyright but specifically state that copyright remains with the Writer, and
  - the contracts executed by the complainant provide that the rates, terms and conditions provided for in the agreements are minimums and the writer may negotiate over and above them.

### An Application for a Determination or Declaration

2. that the WGC be directed that writers with contracts such as those executed by him be entitled to negotiate directly with the CBC in circumstances such as those in the present cases.
3. that the WGC be directed that in any future negotiations with the CBC, no settlement be agreed to without the consent of the writers involved and

without the writers' receipt of a written document outlining the terms of the settlement.

[4] The WGC denied the complainant's allegations and requested that the Tribunal dismiss the complaint.

[5] The Tribunal invited the CBC, as an interested party, to file submissions. The CBC stated that it was not aware of any conduct that demonstrated a breach of the duty of fair representation by the WGC. The CBC indicated that it relies on the WGC's exclusive bargaining authority as granted by the Tribunal and that, in its view, the settlement constituted a full and final resolution of the grievance.

[6] On May 9, 2005, the WGC filed a motion to dismiss the application without a hearing alleging that a *prima facie* case had not been made out by the complainant that the WGC had breached its duty of fair representation and that the complaint had not been made in a timely fashion.

[7] On June 17, 2005, the Tribunal informed the parties that the WGC's motion to dismiss was rejected. The Tribunal was satisfied that the complainant had raised sufficient allegations to make a *prima facie* case that, if the allegations were found to be substantiated, could be held to constitute a breach of the duty of fair representation.

[8] Having reviewed the parties' submissions and after considering the opinions expressed by the parties, including those of the interested party, the CBC, the Tribunal concluded that a decision could be made on the basis of the written submissions.

## Background

[9] The WGC is an artists' association certified by the Tribunal on June 25, 1996 to represent throughout Canada (*The Writers Guild of Canada*, 1996 CAPPRT 016, hereinafter Decision No. 016):

[...] a sector composed of independent contractors engaged by any producer subject to the *Status of the Artist Act* as:

- (a) an author of a literary or dramatic work in English written for radio, television, film, video or similar audiovisual production including multimedia; or
  - (b) an author who adapts or translates literary or dramatic works originally written in a language other than English, as an English language script for radio, television, film, video or similar audiovisual production including multimedia;
- but excluding directors acting in their capacity as directors.

[10] Two scale agreements between the WGC and its predecessors and the CBC are relevant for the purpose of the complaint:

1. The Radio Agreement first dated 1980-82 and extended with several rates increases until 1998 ( the “Radio Agreement”); and
2. The Radio Agreement dated 1998-2000 ( the “1998 Agreement”), which is still in effect.

[11] These agreements contained a clause recognizing the WGC as the exclusive bargaining agent for all writers engaged by the CBC.

A101 The Canadian Broadcasting Corporation (the Corporation) recognizes the Writers Guild of Canada (WGC) as the exclusive bargaining agent pursuant to the certification order issued by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996.

[12] The complainant, is a writer who contracted with the CBC to write various scripts for radio. The scripts at issue were contracted between October 1981 and September 1993.

[13] Each contract between the complainant and the CBC granted the CBC the right to broadcast the script once over each of its owned or affiliated AM or FM radio stations in Canada within a period of three years. Any further use of the programs was stipulated to be on the basis of the conditions provided in the then current WGC/CBC Radio Agreement, and would be subject to payment to the writer of the applicable fees.

[14] In early January 2004, the complainant became aware that the CBC had sold some of his works, and those of other writers, to a satellite radio broadcaster, XM Satellite Radio Inc. (“XM Satellite”) without his permission. Through legal counsel he contacted the CBC and the WGC.

[15] On January 13, 2004, the CBC informed counsel for the complainant that the WGC had recently raised the issue relating to XM Satellite with the CBC and that, under its agreement with the WGC, the WGC was the proper representative of the complainant in this matter.

[16] In a detailed letter on March 10, 2004, counsel for the complainant advised the WGC that the complainant was seeking information from the CBC on the sale details to XM Satellite. While counsel acknowledged that the WGC has exclusive authority to bargain on behalf of artists in the sector, counsel stated that since this was a breach of copyright rather than just solely a matter of scale agreement, the complainant could maintain a claim outside the procedure set forth in the agreement. However, counsel stated that, for the time being, it was more practical for the WGC to pursue the matter through the procedure set out in the agreement but requested that the issues of rights renewal and copyright be fully addressed with the CBC.

[17] On March 16, 2004, the WGC filed a grievance on behalf of all affected writers pursuant to Article A6 of the 1998 WGC/CBC Radio Agreement, alleging that the scale agreement related to copyright had been violated because the CBC had sold their programs *prior* to negotiating and paying applicable distribution fees. On the same day, the WGC forwarded a copy of the grievance to the complainant.

[18] The grievance procedure governing the matter is set out at Article A6 of the 1998 WGC/CBC Radio Agreement reads as follows:

A 601 The Corporation agrees that Writers exercising their rights under the provisions of this Article do so without prejudice to their relationship with the Corporation or its agents.

A 602 A complaint of a minor nature may be discussed and settled at the time of its occurrence between the representative of the WGC and the representative of the Corporation. In the event that a satisfactory resolution of this minor complaint is arrived at, no further steps need to be taken.

A 603 A grievance which arises out of, or in connection with, the application or interpretation of this Agreement, must be submitted in writing to the Senior Corporate Talent Relations Officer, or to the Executive Director of the WGC, as the case may be. The written grievance shall be delivered to the appropriate officer of the other party within thirty (30) days of the occurrence giving rise to the grievance.

A written reply to the grievance shall be made within seven (7) calendar days of its receipt. A reply deemed unsatisfactory may be referred by the dissatisfied party to a grievance meeting within four (4) days of receipt of reply. The Committee will consist of any person(s) designated by each party to represent the Corporation and the WGC respectively for the purpose. Minutes of such meeting shall be kept and read and signed by both parties at the close thereof. Where the settlement of the grievance calls for payment or remedial action, instructions shall be given to make payment or take the required action as soon as the minutes recording the grievance and settlement are signed.

At grievance meetings, matters of common concerns may be discussed and recorded in the minutes of the meeting.

A 604 Extension of Time Limits: The time limits may be extended by mutual agreement between the parties.

A 605 The parties shall have the right to settle the grievance at the grievance meeting. The settlement, if any, shall be noted in writing and signed by those attending the grievance meeting, each of who shall receive a copy. The settlement shall be final and binding on all parties.

[19] On March 17, 2004, the CBC informed counsel for the complainant that the WGC had claimed jurisdiction in relation to this matter with the complainant's assent and that, given the CBC's agreement with the WGC, it would not negotiate the same matter with the complainant as it would compromise its negotiations and contractual relationship with the WGC and its entire membership.

[20] On March 23, 2004, the complainant advised the WGC that, although he disagreed with the WGC's position, he would await the outcome of the grievance procedure and possible arbitration. Through legal counsel, the complainant stated:

- a) that he was entitled to know the terms of the arrangements between the CBC and XM Satellite insofar as it dealt with his works;
- b) that both his contracts and the Master Agreements call for his agreement with regard to any royalty payments;
- c) that the CBC had no right to distribute those works unless the original rights are renewed; and, in addition,
- d) he asked the WGC to adequately protect his interests; and
- e) to keep him advised of the progress of the negotiations.

[21] On April 8, 2004, the WGC wrote to the CBC replying to a request for an extension to respond to the grievance from the CBC and requested the following information:

- a) a list of the names of the programs sold to XM Satellite;
- b) a list of the names of the writers known as of that date;
- c) an explanation as to why payment could not be made immediately to the known writers;
- d) whether the CBC informed XM Satellite that they had to desist broadcasting the relevant programs until the writers had been paid, and if so, to provide copies of such correspondence; and
- e) the length of the extension sought by the CBC to respond to the grievance.

[22] The same day, the WGC sent a copy of this letter to the complainant in an e-mail attachment. Separately, the WGC also sent an e-mail to several writers, including the complainant, to inform them that the WGC was in the middle of grievance proceedings against the CBC on their behalf. In his submission, the complainant stated that he never received a copy of this separate e-mail.

[23] On April 16, 2004, the CBC provided to the WGC a partial list of Radio Programs sold to XM Satellite, including the name of the writers involved together with the value of the sale to the CBC as of that date. The CBC also stated that there would be additional payments made to the CBC at the conclusion of its contract with XM Satellite.

[24] In the same correspondence, the CBC noted that the applicable scale agreement was silent on the licence period. The CBC stated that, in order to facilitate the payment to writers on a without prejudice basis, it was proposing payment of a non-recoupable fee of 10% of the original contract as a renewal fee for licensing purposes.

[25] On July 6, 2004, the complainant himself sent an e-mail to the WGC inquiring as to whether the CBC had responded to the WGC's letter of April 8, 2004 and if the WGC had any details on the CBC agreement with XM Satellite.

[26] On July 26, 2004, counsel for the complainant, while noting that she had not received any information since her letter of March 23, 2004, inquired whether the WGC was in a position to update the complainant on the status of the grievance and arbitration.

[27] On July 27, 2004, the WGC e-mailed the complainant directly to inform him of the CBC's offer of settlement of April 16, 2004 regarding the renewal fees and royalty payments

and indicated that, in the WGC's view, this was a fair offer subject to obtaining late payments penalties.

[28] On July 30, 2004, counsel for the complainant wrote to the WGC expressing a series of concerns, among them the difficulty to assess the reasonableness of any offer without knowing exactly what the CBC distributed to XM Satellite. Counsel also repeated their interest in pursuing avenues of redress outside of the grievance process.

[29] In an e-mail on August 9, 2004 and by letter dated August 13, 2004, the WGC replied to counsel for the complainant and explained the WGC's position with regard to the handling of the grievance, the settlement and the exclusivity of the WGC as bargaining agent for all writers contracted in their jurisdiction, which the WGC stated included the complainant. The WGC informed the complainant that the CBC was offering to settle the issue on a basis consistent with the distribution fees in both current and previous agreements, and that the additional non-recoupable fee of 10% was to compensate writers for not paying them at the initial time of sale. The WGC also indicated that it had requested the CBC to pay a late payment penalty and that the CBC had agreed to do so.

[30] The WGC also informed counsel for the complainant that each writer would receive details of the sale including the calculations with their cheques from the CBC.

[31] On August 19, 2004 the WGC confirmed its settlement agreement with the CBC in an e-mail and stated that, in the case of any future sales, the WGC would also require the CBC to first obtain written permission from writers contracted prior to September 1998.

[32] In September 2004, the complainant stated that he received a settlement cheque directly from the CBC without any backup documentation or details on how the amount was calculated.

[33] Counsel for the complainant wrote a letter to both the CBC (September 17, 2004) and the WGC (September 23, 2004) indicating her frustration at having been unable to obtain from either the WGC or the CBC information on the sale forming the basis of the grievance, and asking for a copy of the written settlement agreement.

[34] In response, the CBC provided counsel for the complainant with the information on the sale to XM Satellite and referred counsel to the WGC for the terms of the settlement.

[35] On October 4, 2004, the WGC advised counsel for the complainant that there was no actual signed settlement agreement, as the matter had been settled through an exchange of e-mails and informed counsel of the terms of the settlement.

[36] On November 15, 2004, the complainant filed the present complaint and application for determination.

### *Positions of the parties*

#### *Summary of the Complainant's Position*

[37] The complainant submitted that the WGC failed to comply with its scale agreement and that it acted arbitrarily and in bad faith in failing to advance any claim for breach of copyright on behalf of the writers while at the same time claiming exclusive bargaining agency, even though the scale agreements clearly state that copyright remains with the writer. The complainant submitted that, as a result, writers were not permitted to negotiate their own claims for breach of copyright. He also submitted that the WGC failed to deal adequately or at all with the issue of distribution rights, and that the WGC had failed to obtain his and other affected writers' agreement to the terms of the settlement achieved with the CBC.

[38] While he initially wished to negotiate directly with the CBC, the complainant stated that he reluctantly agreed that the WGC handle the grievance, while requesting that the issue of copyright be addressed. In his view, it was not.

[39] The complainant argued that the CBC domestic licence broadcasting rights had to be renewed in order for the CBC to be allowed to sell the programs. As the complainant had not extended any further licence, he felt that the CBC breached his copyright in selling the works in question. The complainant submitted that, because the licence had expired, the essential nature of this dispute is one of copyright. He took the position that the WGC's collective bargaining agency does not extend to copyright and that, as a consequence, the WGC could not claim exclusive bargaining agency over this dispute.

[40] The complainant submitted that the grievance ultimately resulted in the CBC making certain payments to writers in connection with the sale of programs to XM Satellite. Despite repeated communications with the WGC, he submitted that he was not provided with any information on the negotiations, or as to how the figures were determined for payment to each affected writer, nor was he asked to approve the payment amounts.

[41] The complainant stated that he was not asked for copies of his contracts and that the WGC apparently did not take into account any of the factors contained in the scale agreement in effect in 1988-93 and repeated in the letters written on his behalf by counsel. He further stated that the WGC conducted the negotiations without obtaining a copy of the sales agreement between the CBC and XM Satellite; without knowing what, in fact, was the subject of the sale; without investigating whether or not the sale was made for market price or for a token amount, which would require a further step-up fee; and without addressing the issue of breach of copyright.

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

[42] The WGC submitted that pursuant to subsection 28(5) of the *Act* and its certification by the Tribunal on June 25, 1996, it has the exclusive authority to bargain on behalf of artists in the sector. In accordance with paragraph 18(a) of the *Act*, the nature of the WGC's authority as exclusive bargaining agent must be determined in accordance with the principles of labour law. This requires that producers refrain from dealing directly with artists, except as specifically contemplated by the *Act* and the scale agreement.



[43] The WGC argued that artists' associations have considerable discretion with respect to the processing of a grievance. This discretion must be exercised in good faith, objectively, and honestly, after a thorough study of the grievance, taking into account the significance of the grievance and the interests of the affected members and the association as a whole.

[44] The WGC submitted that the role of the Tribunal is not to assess the "correctness" of any decision made by an association, but whether it was the result of a rational decision-making process. In support of this position, the WGC made reference to *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509 and *Bukvich v. Canadian Union of United Brewery Workers*, [1982] OLRB Rep. January 35.

[45] The WGC stated that when it became aware that the CBC had sold programs based on the works of several writers, including those of the complainant, prior to obtaining the writers' approval, as required by the scale agreement, it brought the matter promptly to the attention of the CBC. As this was a matter of concern to many writers, and given the fact that the CBC had already made the sale, the WGC submitted that it believed that the best result could be achieved on behalf of all affected writers with one unified voice. The WGC submitted that the settlement of this matter would serve as precedent for all other negotiations with or on behalf of other writers. The WGC stated that it made clear to both the CBC and the complainant that it would take carriage of this matter.

[46] The WGC submitted that there is nothing in the application, even if the allegations were accepted (and the WGC does not accept them), which would constitute a flagrant error or uncaring attitude required to establish arbitrary representation. As the application does not disclose, on its face, a violation of section 35, it must be dismissed.

[47] The WGC submitted that, as the exclusive bargaining agent for 85 writers affected by this matter, it had the authority and the duty to act on behalf of all affected writers with one unified voice. The WGC submitted that to act on behalf of its members goes to the core of its certification under the *Act*, and cannot be a breach of its obligation under section 35.

[48] The WGC submitted that, as provided for in the scale agreement, the fact that the CBC had not obtained the individual writers' agreement prior to the sale was the subject matter of the grievance. In its view, once the CBC had made the sale without the writers' permission, the issue became not whether writers would agree to the sale, but what was the proper compensation for a violation of their rights and the scale agreement.

[49] The WGC submitted that it received all information required, including the identity of the affected writers, the contracts involved and the amount of the sale to XM Satellite and that it was in regular contact with the complainant and his counsel, one of 85 writers affected by the sale. The WGC submitted that it was not required to obtain the complainant's consent to settle the grievance (nor that of all 84 other affected writers). The WGC submitted that the amount received by the complainant and other writers is commensurate with comparable scale agreement entitlements and is reasonable.

*Summary of the CBC's Position*

[50] The CBC submitted that, pursuant to the certification of the WGC by the Tribunal, it has relied and continues to rely on the exclusivity of the WGC's bargaining authority in scale agreement negotiations with the WGC as well as in the administration of the agreement and the resolution of disputes arising from the scale agreement. This includes the negotiation and resolution of all issues falling within the scope of the WGC's jurisdiction as granted by the Tribunal.

[51] The CBC submitted that if the submissions of the complainant regarding the scope of the WGC's negotiating authority were accepted, it would fundamentally alter the nature of the relationship between artists' associations and producers under the *Act*.

[52] The CBC submitted that it entered into good faith negotiations with the WGC, as the exclusive bargaining agent regarding the settlement of this grievance. Accordingly, it advised the complainant that counsel should direct its inquiries in this regard to the WGC.

[53] It is the CBC's position that the settlement reached between the CBC and the WGC of the WGC Grievance in August of 2004 constituted a full and final resolution of all issues relating to or arising out of the WGC Grievance.

[54] The CBC submitted that it was not aware of any conduct which demonstrates a breach of the duty of fair representation pursuant to section 35 of the *Act* by the WGC in its representation of its members in connection with the negotiations surrounding the settlement of the grievance and the final settlement reached. The CBC also submitted that, in the alternative, if the Tribunal determines that the WGC has violated its duty of fair representation pursuant to section 35 of the *Act*, any such liability arising therefrom is solely the liability of the WGC and not the CBC.

### *Analysis*

[55] The main issue before the Tribunal is whether the WGC breached its duty of fair representation.

[56] The relevant provisions of the *Status of the Artist Act* (the "*Act*") are found at sections 35 and 53 which state the following:

35. An artists' association that is certified in respect of a sector, or a representative thereof, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the artists in the sector in relation to their rights under the scale agreement that is applicable to them.

53. (1) Any person or organization may make a complaint in writing to the Tribunal that

- (a) a producer, a person acting on behalf of a producer, an artists' association, a person acting on behalf of an artists' association, or an artist has contravened or failed to comply with section 32, 35, 50 or 51; or
- (b) a person has failed to comply with section 52.

(2) A complaint under subsection (1) shall be made to the Tribunal within six months after the date that the complainant knew, or in the opinion of the Tribunal ought to have known, of the action or circumstances giving rise to the complaint.

[57] The duty of fair representation exists as a counterpart to the artists' association exclusive authority to bargain on behalf of artists in that sector. When the Tribunal certifies an artists' association, the association becomes the exclusive representative of artists in that section with their relations with producers. Subsection 28(5) of the *Act* states:

28. (5) After certification of an artists' association in respect of a sector,  
(a) the association has exclusive authority to bargain on behalf of artists in that sector;  
(b) the certification of any association that previously represented artists in the sector is revoked in so far as it relates to them; and  
(c) the association is substituted as a party to any scale agreement that affects artists in the sector, to the extent that it relates to them, in place of the association named in the scale agreement or its successor.

[58] This relationship involves the negotiation and signing of a scale agreement. All scale agreements negotiated under the *Act* must contain a provision for final settlement of disputes. Subsection 36(1) states:

36. (1) Every scale agreement must contain a provision for final settlement without pressure tactics, by arbitration or otherwise, of all differences between the parties or among artists bound by the agreement, concerning its interpretation, application, administration or alleged contravention.

[59] The scheme of the *Act* differs from traditional labour law in that individual negotiation can take place between an artist and a producer in respect to terms and conditions of engagement that are more favourable than those contained in the scale agreement.

33. (4) A scale agreement applies notwithstanding any inconsistency with a contract between an artist and a producer, but it shall not be applied so as to deprive an artist of a right or benefit under the contract that is more favourable to the artist than is provided for under the agreement.

[60] The Tribunal has commented on this provision in *The Writers Union of Canada*, 1998 CAPPRT 028 at paragraph 62:

Under the *Status of the Artist Act* regime, artists retain control over the decision whether to accept a commission from a producer or to allow a particular producer to use one of their works. The artist remains free to negotiate individual contracts above the minimum, but no producer may offer less than the terms set out in the scale agreement to which the producer and the artists' association have agreed. For the use of the work, the artist receives, directly from the producer, either the remuneration prescribed by the scale agreement or whatever greater amount the artist has been able to negotiate. To enforce the right to payment under the scale agreement, the artist has recourse to the dispute resolution procedure provided in the agreement and the resources of the certified artists' association.

[61] As directed by paragraph 18(a) of the *Act*, the Tribunal has turned to the jurisprudence from the courts and labour boards for guidance on the duty of fair representation. 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;

### *Preliminary Issue*

[62] The WGC raised a preliminary issue with respect to whether the complaint was made in a timely fashion as defined in subsection 53(2) of the *Act*.

[63] Essentially, the WGC argued that the complainant was aware from the outset that the WGC had taken carriage of the matter. The complainant was represented by counsel at all material times and was aware of the WGC's intention to pursue the matter on his behalf as of February 2004, if not sooner, but a complaint was not filed until November 15, 2004.

[64] In response, the complainant argued that the complaint was filed in a timely manner in accordance with subsection 53(2) of the *Act*. The complainant argued that it was not evident that the WGC would ignore the complainant's position regarding renewal rights in the early exchange of correspondence with the WGC. He submitted that it was only in August 2004, when the WGC advised him of the CBC proposal of "one time non-recoupable fee of 10% of the contract for writers with expired rights", that the situation became evident that his agreement was not going to be solicited.

[65] The Canadian Industrial Relations Board (the "Board") jurisprudence is instructive on this issue. It has ruled that the duty of fair representation commences as soon as there is a possibility of discipline and extends to the conduct of the grievance process through to its final conclusion (*Anne Marie St-Jean*, [1999] CIRB no. 33; *Brian L. Eamor* (1996), 101 di 76; 39 CLRBR (2d) 14; and 96 CLLC 220-039 (CLRBR no. 1162) upheld by *C.A.L.P.A. v. Eamor* (1997); CLRBR (2d) 51). The Board has also ruled that it can review the union's conduct even if a grievance has been settled or incorporated in a consent award.

[66] The Tribunal shares this view and finds that the duty applies throughout the grievance process to its final conclusion. The evidence shows that the CBC proposal was communicated to the complainant by e-mail on July 27, 2004, that the complainant received a settlement cheque in September 2004 and that the last exchange of correspondence between the complainant and the WGC on the issue of renewal fees took place on October 4, 2004.

[67] Therefore, based on the foregoing, the Tribunal finds that the complaint dated November 15, 2004 was properly filed within the six-month time limit as required in subsection 53(2) of the *Act*.

### *Was the dispute in question one arising out of the scale agreement?*

[68] As section 35 of the *Act* stipulates, the duty owed by an artists' association to any of the artists in the sector must be in relation to their rights under the scale agreement applicable to them.

[69] The parties do not dispute that the complainant is within the sector represented by the WGC. However, the complainant is of the view that the WGC's collective bargaining agency does not extend to copyright and that the question at issue is not one of breach of the scale agreement, but rather an infringement of copyright.

[70] The complainant argued that the WGC's role is limited to instances where the right to distribute has already been granted to the CBC in writing. In the instant case, he argued that because the licence had expired, the essential nature of this dispute was one of copyright and did not involve the scale agreement and therefore the WGC could not claim exclusive bargaining agency for this dispute. According to the complainant, the real issue is the extent of the "authority to bargain" provided by the *Act*.

[71] The WGC disagreed. The WGC took the position that the scale agreement is the mechanism through which producers licence writers' copyright. The WGC stated that it is fully authorized to negotiate scale agreement terms relating to copyright and, as a result, the dispute in question is one arising out of the scale agreement.

[72] In support of its argument, the WGC submitted that the intersection of copyright and collective bargaining was addressed at the time of its certification, when several copyright collectives intervened (see *The Writers Guild of Canada*, 1996 CAPPRT 016). The only restriction placed upon the WGC's ability to negotiate terms of copyright licensing and assignment was that it not interfere with the collection of royalties by the copyright collectives named in that decision.

[73] The WGC submitted that the entire subject of the scale agreement is the licensing of copyright to the producers and that the fact that the CBC sold these programs prior to negotiating and paying the writers was the very subject of the grievance. Accordingly, the grievance raised issues within the scope of the agreement and the jurisdiction of the WGC.

[74] The WGC submitted that, in or around December 2003, it became aware that the CBC had sold several programs based on the works of many WGC members, including those of the complainant, to XM Satellite. The WGC stated that to have properly obtained the rights for such distribution the CBC had two options:

- a. Under the original scale agreement, come to an agreement with the writer on the terms and conditions of such sale, by paying no less than 10% of the "Distributor's Gross", as required by Articles A1602, A2002 and A 2007. Although there is no obligation upon the CBC, the writer would be free to attempt to negotiate a further amount in respect of the "rights to distribute the program for foreign broadcast purposes";
- b. Under the Archival provision of the 1998-2000 scale agreement, notify the WGC of the intended use of the program and agree with the writer that he will be entitled to at least 10% of Distributor's Gross Revenue. Under this option, no further fee would be due to the writer as the right to distribute is "deemed" to be reacquired by the CBC without further payment, per Appendix A, section 2.

[75] The text of the grievance states the following: “At issue is the fact that the copyright of the writers of these dramas has been violated because the CBC sold their programs *prior* to negotiating and paying applicable distribution fees.”

[76] The CBC submitted that this is a question related to the interpretation of the Radio Agreement. The CBC stated that if the submissions of the complainant were accepted regarding the scope of the WGC’s negotiating authority, this would alter the nature of the relationship between artists’ associations and producers under the *Act*. The CBC submitted that such an interpretation would fundamentally undermine the exclusivity required under the *Act* that was granted to the WGC by the Tribunal and on which the CBC has relied and continues to rely.

[77] Both the complainant and the WGC presented extensive submissions to the Tribunal on the issue of copyright and how the matter is dealt with in the scale agreements negotiated between the WGC and the CBC. The Tribunal has carefully reviewed all the submissions filed by the parties.

[78] The relationship between the *Copyright Act* and the *Status of the Artist Act* has been the subject of close interest since the statute’s coming into force in 1995. The Tribunal has had opportunities to consider and comment on the interrelations of these two statutes in previous decisions. The relationship has always been viewed as a complementary one, as set out in *The Writers Union of Canada*, 1998 CAPPRT 028:

[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' association’s 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.

[79] The right to use an existing work is a service that the artist, who holds the copyright in that work, may provide to a producer. Representing artists’ interests in this fundamental socio-economic right is an appropriate activity for a certified artists’ association. [1998 CAPPRT 028, paragraph 61]

[80] Both scale agreements specify that copyright remains vested with the writer (Article A5 in the 1988-91 Agreement [extended to 1998] and Article C3 in the 1998-2000 Agreement.) The scale agreements then provide the mechanism through which the CBC

acquires licenses for certain uses of the writer's work upon the payment of the prescribed fee, including the right to distribute to third parties.

[81] In the 1988-91 Agreement, Article A1601 provides that upon the payment of at least the minimum fees set out in the agreement, the CBC was entitled to broadcast a program on its own stations for a period of three years. The Agreement also set out how these rights can be renewed and how the CBC can acquire further rights, including commercial sales and non-broadcast use.

[82] In the instant case, the Tribunal finds the dispute concerning the acquisition and distribution of rights is a matter related to the interpretation of the scale agreement.

[83] Based on the foregoing, the Tribunal finds that the matter falls within the ambit of the scale agreement and that the WGC is the exclusive bargaining agent to deal with any grievance arising out of the scale agreement.

### *Duty of Fair Representation*

[84] The duty of fair representation is a fundamental part of Canadian labour legislation. It exists as a counterpart to the union's exclusive authority over the negotiation and administration of the collective agreement and the power it yields in representing its members as a single entity vis-à-vis the employer/producer. Applied to the *Act*, the artists' association's exclusive authority is counterbalanced by the duty provided at section 35 of the *Act* to treat all members of its representative sector fairly.

[85] Fair representation provisions are present in almost all Canadian labour relations legislation and have been the subject of longstanding interpretation by labour boards and the courts. Section 35 in the *Act*, is modelled on section 37 of the *Canada Labour Code* (R.S.C. 1985, c. L-2) (the "*Code*"). The Supreme Court of Canada has interpreted section 37 of the *Code* and established the *five* principles that govern a union's duty of fair representation in *Canadian Merchant Guild* [1984] 1 S.C.R. 509 at p. 527:

- (1) The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
- (2) When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
- (3) This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
- (4) The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
- (5) The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[86] The Tribunal has previously stated in *Christopher (Re)*, 2002 CAPPRT 038 that these governing principles apply likewise to artists' associations in the bargaining sector that the association has been certified to represent.

[87] The Tribunal's role in a complaint under section 35 of the *Act* is to review the association's decision-making process, not the merits of the grievance. The standard of conduct applies to the manner in which the association exercised its internal decision-making authority in relation to the complainant's concerns.

[88] This position was well set out by the Board in *McRae Jackson (Virginia) et al.* [2004] CIRB no. 31, at paragraphs 11 and 12 (hereinafter *McRaeJackson*)

This is not an appeal of the union's decision not to refer a grievance to arbitration but an assessment of the union's conduct as to how it handled a grievance (*John 95*; and 73 CLRBR (2d) 132 upheld by *Canadian Council of Railway Operating Unions v. Robert Adams et al.*, judgment rendered from the bench, no. *Presseault*, [2001] CIRB no. 138; and *Robert Adams*, [2000] CIRB no. A-719-00, February 13, 2002 (F.C.A.)). The Board rules on the union's decision-making process and not the merits of grievances (*Gaétan Coulombe*, [1999] CIRB no. 25).

Although the Board does not rule on the merits of an employee's grievance, it may review the facts of a grievance in order to understand whether the union's investigation reflected the worthiness and seriousness of an employee's case (*Raynald Pinel*, [1999] CIRB no. 19, and *Robert Adams, supra*). (*McRaeJackson supra, paragraph 12*)

[89] It is clear that the role of the Tribunal in a duty of fair representation complaint is not to review the outcome of the grievance, nor to substitute its judgement for that of the association. However, as stated above, the Tribunal may review the facts of a grievance to determine whether an artists' association investigation has adequately reflected "the worthiness and seriousness" of the grievance.

[90] The Board has also commented on how it will review a union's conduct. In *André Cloutier* (1981). 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16, 018 (CLRB no. 319), the Board stated:

... the Board, ...must in every case, analyse first the nature of the grievance filed, second, the characteristics of the bargaining agent and third, the steps taken by the bargaining agent in fulfilling its duty toward the complainant member of its bargaining unit.

[91] In *Brenda Haley* (1981), 41 di311; [1981] 2 Can LRBR 121; and 81 CLLC 16, 096 (CLRB no. 304), a plenary decision of the then CLRB, the Board reviewed the history of its decisions as of that date and found that the Board implicitly endorsed the concept of stricter enforcement of the duty in the grievance arbitration process when a "critical job interest" of an individual is at stake. The Board noted:

There was no effort to exhaustively list critical job interests. The examples of discharge, discipline and seniority were cited. This concept is a useful instrument to distinguish circumstances where the balance between the individual and union



or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning. [*emphasis added*]

[92] In *Robert Adams*, [2000] CIRB no. 95; and 73 CLRBR (2d) 132, a more recent decision, the Board commented further on the criteria for assessing a duty of fair representation at paragraph 52:

First, the Board recognized that a grievance that affects the career of a worker must be dealt with more rigorously by the union and by the Board. Second, the Board's decision concerning the reasonable steps take by the union will take into account the union's experience and resources. Third, the Board will look at the practices, policies and criteria applied by the union in settling the grievance...

#### *The Issue of Bad Faith*

[93] The question before the Tribunal is to determine whether or not the WGC breached its duty of fair representation through, as alleged by the complainant, bad faith or arbitrary conduct in its handling of the complainant's grievance.

[94] Bad faith conduct has been defined as acting on the basis of ill-will or hostility, or singling out particular individuals for unfair treatment. (*Walter Prinesdomu* [1975] OLRB Rep. May 444, at paragraph 24).

[95] A union must not act in bad faith; that is, with improper purpose. Examples of this conduct have been found to include the personal feelings of union officers influencing whether or not a grievance should be pursued; conspiring with the employer to have an employee disciplined or terminated; or, putting the ambitions of a group of employees who support a union official ahead of the interests of an individual employee. (*McRaeJackson*, *supra* at paragraph 27)

[96] The complainant has not demonstrated that the WGC acted in a hostile manner toward him. There is no evidence that the WGC acted differently with the complainant and singled him out for unfair treatment in any way. Even though the parties disagreed on how the matter should have been handled, there is no evidence that would allow the Tribunal to conclude that the WGC acted in bad faith. Therefore, the Tribunal finds that the WGC did not act in bad faith in its representation of the complainant.

#### *The Issue of Arbitrary Conduct*

[97] The concept of arbitrariness has been the subject of much legal analysis. In *McRae Jackson*, *supra*, at paragraph 29, the Board described arbitrariness as actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's

arguments or that fail to determine whether the issues raised by its members have a factual or legal basis.

[98] In *James H. Rousseau* (1995), 98 di 80; and 95 CLLC 220-064 (CLRB no. 1127) the Board described arbitrary conduct as:

.... a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization. [*emphasis added*]

[99] The Board has held that differences of opinion between a member of the bargaining unit and a union concerning the precise meaning of an article of a collective agreement are not, in and of themselves, a basis to find a violation of the duty of fair representation. (*Van Uden (Re)* [1998] CLRB no. 1223) In addition, while union officials can make honest mistakes, the law does not condone all good faith action. In certain instances, the perfunctory action or inaction can be such as to go beyond incompetence or simple negligence and, in fact, to constitute a failure to represent.

[100] Communication has been the subject of considerable comment in the context of duty of fair representation complaints. The jurisprudence has established that failures in communication, while regrettable, are not, per se, determinative of a violation of the duty of fair representation. (*Luc Gagnon* (1992), 88 di 52 (CLRB no. 939)

[101] However, a breach of the duty of fair representation has been found where the lack of communication resulted in a situation which prejudices the position of the grievor, or where, combined with other factors, it amounts to arbitrary conduct in the processing of the grievance.

[102] In *Jacqueline Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550) the Board pointed out the following:

Although the lack of communication between the union and Brideau in the instant case did not result in a violation of section [37], this does not mean that the Board does not consider communication to be an element that can never give rise to a section [37] violation.

In handling a grievance and dealing with the employer, it is incumbent on the union to ascertain, from all necessary sources, the facts giving rise to the grievance. These facts can be elicited from either the grievor, other persons knowledgeable about the incident (as Dolci was in the instant case) or documentary evidence.

Although the grievor may be the best source of information, and it is generally prudent to communicate with the grievor to review the facts and circumstances surrounding the grievance, there is no obligation to do so providing the union has, from its other sources, gathered all the necessary information and the grievor cannot be of further assistance.

[...]

Thus, there is no obligation to communicate with the grievor but if the lack of communication results in a situation which prejudices the position of the grievor, then that omission can result in a violation of section [37]. [*emphasis added*]

[103] In *Luc Gagnon, supra*, the Board held as follows:

In fact, if the Board concluded that poor communication between a union and an employee did not constitute generally a violation of section 37, it is mainly because it had determined, rightly in these cases, that the union's conduct in the actual processing of the grievance still met the minimum requirements of the Code.

... past Board decisions reveal that if a lack of communication "is not per se a violation of a union's duty of fair representation" (*Clarence R. Young* (1989, 78 di 117 (CLRB no. 753, p. 121) it is nevertheless a factor the Board must often take into account in properly assessing a union's conduct.

[104] In *Serge Gervais*, [1983] CLRB no. 418, the Board stated that extreme care should be taken by a union to ensure a grievor is fully aware of any decision affecting his rights so that all avenues of redress can be pursued if desired:

There can be little doubt that in matters as important as this to an individual, extreme care must be taken to ensure that person is fully aware of the union's decision and its implication so that all avenues of redress can be explored if desired. Little should be left to chance; proper procedures should be developed (if they do not already exist) and followed to ensure that there is no question that a grievor knows the position of its union with regard to a grievance filed by him.

[105] More recently, in *Robert Adams, supra*, the Board after reviewing, *Luc Gagnon* and *Jacqueline Brideau, supra*, as well as *Ronald Shanks* (1986), 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.

### *Analysis of the WGC's conduct*

[106] The degree of scrutiny afforded by the Tribunal will vary depending on the seriousness of the matter and the association's sophistication, experience and resources in dealing with these matters. Accordingly, the Tribunal's assessment of the artists' association process is a contextual one. Once established, it is against this backdrop, that the artist's association's actions will be examined.

[107] Complaints dealing with matters of dismissal and seniority are typical examples of cases where the Board has examined the unions' processes more rigorously. In *Bukvich v. Canadian Union of United Brewery Workers, supra*, at paragraph 28, the level of importance attached to seniority rights in collective bargaining regimes was described as follows:

The weight of authority supports the view put forward by counsel for the complainants that special considerations attach to any decisions by a union that

alters or abrogates the job security of employees. That is especially true in relation to seniority rights. Seniority rights, built up over time, usually over a number of successive collective agreements, represent an employee's stake in critical interests such as promotion, pension rights and his rights of layoff and recall. The concept of seniority comes as close as any to approximating a form of industrial relations property right for the individual employee, and its consideration by labour boards in fair representation complaints is particularly instructive. (*emphasis added*)

[108] In the unique labour-cultural milieu of the *Status of the Artist Act*, any scale agreement disputes that involve licensing of copyright are considered to be of primordial importance by the parties to the scale agreement. Indeed, these types of issues can be paralleled to those which involve questions of seniority in collective agreements subject to federal and provincial labour regimes. "A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry and from employer to employer". In the cultural milieu, scale agreement matters dealing with issues of copyright are, in the Tribunal's view, to use the language of *Brenda Haley, supra*, "a matter of critical job interest".

[109] The Tribunal will next consider the artists' association's experience and resources. In *John Presseault*, [2001] CIRB no. 138, at paragraph 35 the Board held that:

In deciding whether to intervene, the Board will consider the union's level of sophistication, its resources and its expertise. The Board will be more demanding if a union has the means to rely on experienced and competent representatives and to seek independent legal opinions in order to guide its decisions. [...]

[110] The WGC and the CBC have a long history of collective bargaining dating back to the 1960s. In its response to the present complaint, the WGC stated:

The CBC and the WGC (and its predecessors since ACTRA) have enjoyed a collective bargaining relationship since the early 1960's, resulting in scale agreements which have been in effect during all material time frames.

The WGC went on to list the collective agreements that are relevant to the time period of the complaint since 1980.

[111] In its application for certification under the *Act*, the WGC provided further information on the history of its professional relations. In the *Writers Guild of Canada*, 1996 CAPPRT 016, this was described as follows:

[35]The applicant indicated that the history of the WGC extends back to the 1950s, when a group of artists consisting of radio, television, film and video writers came together as the Canadian Council of Authors and Artists (CCAA), a predecessor to the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA). Signing its first collective agreement in 1961, the WGC has remained active to the present time despite various changes of name. In 1991, the Writers Guild of Canada was established as an autonomous guild within ACTRA. In 1995, the WGC became an independent organization constitutionally separate from ACTRA. On behalf of its members, WGC deals with industrial relations, collective bargaining and issues of policy. The number of scale agreements filed with the Tribunal attests to the WGC's ability to negotiate on behalf of its members.

[36] Since 1961 when it signed its first collective agreement, there has been a consistent history of professional relations between the WGC or its predecessor organization and producers of radio, television, film and video. On behalf of its members, WGC has established scale agreements with producers ensuring rates of pay and fair working conditions. WGC has lobbied in the areas of copyright, taxation and policy issues, as they arise. The WGC's Directory of Members indicates the broad range of writing activities represented by its members and speaks to the many ways in which writers identify themselves as writers across media and genres.

[112] It is clear from the foregoing that the WGC is a well established and experienced artists' association with a collective bargaining relationship spanning some 40 years with the CBC.

[113] Given the experience of the WGC as an artists' association, coupled with the evidence that the present dispute deals with issues of copyright, and having reviewed all of the above evidence, the Tribunal finds that the subject matter at hand is a "matter of critical job interest". Accordingly, the artists' association's conduct will be subject to a greater degree of scrutiny by the Tribunal.

[114] The evidence shows that the WGC sought information from the CBC on the exact nature of the sale to XM Radio. It also shows that when it did not receive the information, the WGC launched a grievance pursuant to the provisions of the scale agreement. The complainant's counsel advised that, despite their disagreement with the position of the WGC, they were prepared to await the outcome of the grievance procedure and possible arbitration.

[115] The complainant alleged that the WGC reached a settlement without concern for his interests, did not ask for copies of his contracts, did not investigate the circumstances of the sale and failed to determine if the issues raised by the complainant had a legal basis. He also alleged that the WGC failed to keep him informed on the progress of the negotiations and to seek his agreement to the settlement. The complainant further submitted that there was no signed settlement agreement between the WGC and the CBC to clarify the settlement reached between the parties. In addition, from the outset of the exchange of correspondence between the parties, it was evident that the complainant was concerned with preserving his rights to make a claim directly against the producer outside the procedure set forth in the scale agreement.

[116] In March 2004, through legal counsel, the complainant made clearly articulated requests for details and information regarding the sale of his works and asked to be kept advised of the progress of the negotiations. These requests were made again in July 2004, some four months later. On both occasions, the complainant also made clear his interest in maintaining a claim vis-à-vis the CBC and/or XM Satellite outside the process set forth in the scale agreement.

[117] Despite the complainant's repeated requests for information on the sale of his works, and his repeated requests to be kept apprised of the negotiations, it was only after the

complainant had received a settlement cheque in September 2004 that he became aware that a final settlement had been reached.

[118] The complainant's counsel's correspondence to both the CBC and the WGC recorded the complainant's surprise and frustration at having been unable to obtain from either party information on the sale forming the basis of the grievance, and asked for a copy of the written settlement agreement consistent with the 1998-2000 Scale Agreement which states:

A 603 - Where the settlement of a grievance calls for payment or remedial action, instructions shall be given to make payment or take the required action as soon as the minutes recording the grievance and settlement are signed.

A 605 - The parties shall have the right to settle the grievance at the grievance meeting. The settlement, if any, shall be noted in writing and signed by those attending the grievance meeting, each of whom shall receive a copy. The settlement shall be final and binding on all parties.

[119] In response, the WGC advised the complainant's counsel that no signed agreement had been formalized but that the matter had been resolved through an exchange of emails. After the fact, in a letter dated October 4, 2004, the WGC provided the terms of settlement and advised that the information (royalty reports) provided by the CBC to the complainant contained the relevant information on the sale.

[120] Thus, it was only after the WGC had concluded a settlement with the CBC, and after the complainant had received his settlement cheque, that he was finally provided with the information on the details of the sale of his works.

[121] In the final analysis, the Tribunal must determine whether the complainant has established that the WGC's actions, and in particular its omission to respond to his repeated requests for information, for the status of negotiations and for the terms of settlement were of such a nature as to qualify as arbitrary.

[122] It is without dispute that the parties exchanged communications on their opposing and differing interpretations of the operation of the scale agreement. This is well documented in the evidence. Differences of opinion between a member of the bargaining unit and a union concerning the precise meaning of an article of a collective agreement are not in and of themselves a basis to find a violation of the duty of fair representation. (*Van Uden (Re)* (1998), 106 di 89 (CLRB no. 1223))

[123] The actions of an artists' association that may be appropriate in one context, may be found to be inappropriate in another. In this case, the WGC was faced with requests from a concerned member of the association who had retained legal counsel to assist him in communicating his concerns. Through counsel, over a span of some six months, the complainant repeatedly sought to obtain information as it related to the sale of his particular works; to be kept apprised of the grievance process as it unfolded; to see details of the settlement once the matter had been settled; and to preserve his opportunity to pursue further actions outside the scale agreement.

[124] The Tribunal has considered all of the evidence and arguments that were put before it by the parties with care. As stated earlier, an allegation of breach of duty of fair representation involving issues of communication must be examined contextually. In consequence, the Tribunal finds that the degree of seriousness of the issue being grieved here is a critical factor in its analysis. Issues of copyright go the core of professional relations between artists and producers and must be treated with careful diligence when they arise. This is the time to follow established procedures in order to ensure that there is no question that the grievor knows the position of its association; little should be left to chance or to informality.

[125] The evidence is 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. The WGC must therefore shoulder the responsibility for its failure to address the complainant's legitimate concerns. Providing the information requested by the complainant after the fact falls short of the conduct one would expect from an experienced artists' association under these circumstances.

[126] The legitimate concerns of a member of the association on an issue of considerable importance raised in an appropriate manner before an experienced artists' association warranted a greater degree of care than was shown. The seriousness of the matter being grieved, the experience of the artists' association, the lack of response to the repeated requests for information voiced by the complainant's counsel, leads the Tribunal to conclude that this failure to properly address the clearly articulated concerns of the complainant, unintended as that failure may have been on the part of the WGC, nevertheless amounts in our view to arbitrary conduct.

### *Decision*

[127] For all of the foregoing reasons, the Tribunal allows the complaint and hereby issues a declaration that the WGC breached its duty of fair representation by acting in a manner that is arbitrary.

[128] The Tribunal finds that the remedies requested by the complainant do not flow from a violation of section 35 of the *Act*. Therefore, based on the evidence before us, the Tribunal finds that the declaratory relief as stated above is the appropriate disposition to deal with the matters at issue.

### ***Application pursuant to subsection 33(5) of the Act***

[129] The complainant also made an application under subsection 33(5) of the *Act*. This provision must be read with subsection 33(4) of the *Act*.

33.(4) A scale agreement applies notwithstanding any inconsistency with a contract between an artist and a producer, but it shall not be applied so as to deprive an artist of a right or benefit under the contract that is more favourable to the artist than is provided for under the agreement.

33.(5) The Tribunal shall assess what is more favourable to the artist pursuant to subsection (4) in relation to each right and benefit, and shall compare the elements of each right or benefit under the scale agreement with the elements of each under the contract.

### *Analysis*

[130] The complainant is a writer who contracted with the CBC to write various scripts. The scripts at issue were contracted between October 1981 and September 1993.

[131] Each contract between the complainant and the CBC granted the CBC the right to broadcast the script once over each of its owned or affiliated AM or FM radio stations in Canada within a period of three years. Any further use of the programs was stipulated to be on the basis of the conditions provided in the then current WGC/CBC Radio Agreement, and would be subject to payment to the writer of the applicable fees. In the February 8, 1984 contract the grant of rights specifically referred to Articles A1601(a), (b) and (c), A19 and 20. In the 1991-1993 contracts this was extended to include Articles A21 and A22.

[132] Each of the contracts submitted by the complainant contained the following disposition at the outset:

The rates, terms and conditions of the CBC-ACTRA Agreements are minimum rates, terms and conditions, and the writer/contractee may negotiate over and above such minimums in respect to such matters as, but not limited to fees, residuals and such other terms and conditions as may be pertinent to this engagement.

### *Decision*

[133] Based on the foregoing, the Tribunal finds that the contracts in question did not contain any other provisions in relation to further use or renewal. In the instant case, the Tribunal declares that there were no terms specified in the complainant's contracts with the CBC concerning further use of the dramatic scripts that were more favourable than those contained in the agreement.

Ottawa, January 23, 2006

John M. Moreau

Marie Sénécal-Tremblay



Presiding Member

Member

John Van Burek  
Member