Federal Court of Appeal  Cour d'appel fédérale

Date: 20130304

Docket: A-84-12

Citation: 2013 FCA 64

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

NATIONAL GALLERY OF CANADA

Applicant

and

CANADIAN ARTISTS' REPRESENTATION /
LE FRONT DES ARTISTES CANADIENS

and

REGROUPEMENT DES ARTISTES EN ARTS VISUELS DU QUÉBEC

Respondents

and

SOCIÉTÉ DU DROIT DE REPRODUCTION DES AUTEURS,
COMPOSITEURS ET ÉDITEURS DU CANADA

Intervener

Heard at Ottawa, Ontario, on September 5, 2012.

Judgment delivered at Ottawa, Ontario, on March 4, 2013.

REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	TRUDEL J.A.
DISSENTING REASONS BY:	PELLETIER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A. (dissenting reasons)

[1] The Canadian Artists and Producers Professional Relations Tribunal (the Tribunal) found that the National Gallery of Canada (the National Gallery) failed to bargain in good faith when it reversed its bargaining position and refused to bargain minimum fees for the right to use existing works with CARFAC/RAAV [see below] after having done so for many months. This decision, reported as *Canadian Artists' Representation (Re),* [2012] C.A.P.P.R.T.D. No. 053, (the Tribunal Reasons) is the subject of this application for judicial review.

[2] The issue before the Court is whether the Tribunal's conclusion that the National Gallery bargained in bad faith can be maintained. The National Gallery says that it cannot because the Tribunal erred in concluding that authorizing the use of existing works falls within the expression "provision of services" as that term is used in the definition of "scale agreement" in the *Status of the Artist Act*, S.C. 1992, c. 33 (the Act). The National Gallery also posits a conflict between the *Copyright Act*, R.S.C. 1985 c. C-42 and the Act, and takes the position that copyright matters must be dealt with using the mechanisms provided in the *Copyright Act*.

[3] For the reasons which follow, I am of the view that the definition of "services" is not determinative of this appeal. Whether the definition of "scale agreement" compelled it do so or not, the National Gallery agreed to negotiate minimum fees for the use of existing works and, indeed, carried on such negotiations for four years. The issue before the Tribunal was whether, in those circumstances, the National Gallery's reversal of its bargaining position and its refusal to continue

to bargain those items amounted to a failure to bargain in good faith. The Tribunal found it did. I agree. I would therefore dismiss the application for judicial review with costs.

RELEVANT STATUTORY PROVISIONS

[4] The balance of these reasons will be easier to follow if one has a grasp of the relevant portions of the Act. The Act begins with a recognition of the contributions of artists to Canadian society and a declaration of the rights of artists:

2. The Government of Canada hereby recognizes	2. Le gouvernement du Canada reconnaît :
(a) the importance of the contribution of artists to the cultural, social, economic and political enrichment of Canada;	a) l'importance de la contribution des artistes à l'enrichissement culturel, social, économique et politique du Canada;
(b) the importance to Canadian society of conferring on artists a status that reflects their primary role in developing and enhancing Canada's artistic and cultural life, and in sustaining Canada's quality of life;	b) l'importance pour la société canadienne d'accorder aux artistes un statut qui reflète leur rôle de premier plan dans le développement et l'épanouissement de sa vie artistique et culturelle, ainsi que leur apport en ce qui touche la qualité de la vie;
(c) the role of the artist, in particular to express the diverse nature of the Canadian way of life and the individual and collective aspirations of Canadians;	c) le rôle des artistes, notamment d'exprimer l'existence collective des Canadiens et Canadiennes dans sa diversité ainsi que leurs aspirations individuelles et collectives;
(d) that artistic creativity is the engine for the growth and prosperity of dynamic cultural industries in Canada; and	d) la créativité artistique comme moteur du développement et de l'épanouissement d'industries culturelles dynamiques au Canada;

(e) the importance to artists that they be compensated for the use of their works, including the public lending of them. [My emphasis.]	e) l'importance pour les artistes de recevoir une indemnisation pour l'utilisation, et notamment le prêt public, de leurs oeuvres. [Je souligne.]
3. Canada's policy on the professional status of the artist, as implemented by the Minister of Canadian Heritage, is based on the following rights:	3. La politique sur le statut professionnel des artistes au Canada, que met en oeuvre le ministre du Patrimoine canadien, se fonde sur les droits suivants :
(a) the right of artists and producers to freedom of association and expression;	a) le droit des artistes et des producteurs de s'exprimer et de s'associer librement;
(b) the right of associations representing artists to be recognized in law and to promote the professional and socio-economic interests of their members; and	b) le droit des associations représentant les artistes d'être reconnues sur le plan juridique et d'oeuvrer au bien-être professionnel et socio-économique de leurs membres;
(c) the right of artists to have access to advisory forums in which they may express their views on their status and on any other questions concerning them. [My emphasis.]	c) le droit des artistes de bénéficier de mécanismes de consultation officiels et d'y exprimer leurs vues sur leur statut professionnel ainsi que sur toutes les autres questions les concernant. [Je souligne.]

[5] The Act establishes the Tribunal and grants it the jurisdiction to certify artists' and producers' associations whose roles is to negotiate a scale agreement on behalf of those it represents. A scale agreement is defined as:

"scale agreement" means an agreement in writing between a producer and an artists' association respecting minimum terms and conditions for the provision of artists' services and other related matters;	*« accord-cadre »* Accord écrit conclu entre un producteur et une association d'artistes et comportant des dispositions relatives aux conditions minimales pour les prestations de services des artistes et à des questions connexes.

[6] Once a representative organization has given a producer notice to bargain, then:

32. Where a notice to begin bargaining has been issued under section 31,	32. Une fois l'avis de négociation donné, les règles suivantes s'appliquent :
(*a*) the artists' association and the producer shall without delay, but in any case within twenty days after the notice was issued, unless they otherwise agree,	*a*) sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai dont ils sont convenus, l'association d'artistes et le producteur doivent se rencontrer et entamer des négociations de bonne foi, ou charger leurs représentants autorisés de le faire en leur nom, et faire tout effort raisonnable pour conclure un accord-cadre;
(i) meet, or send authorized representatives to meet, and begin to bargain in good faith, and	
(ii) make every reasonable effort to enter into a scale agreement; and	

[7] The Tribunal has the authority to determine whether an artists representative organization has engaged in an unfair practice or has otherwise failed to comply with its obligations under the Act. In deciding those questions, and any other question which may come before it:

18. The Tribunal shall take into account	18. Le Tribunal tient compte, pour toute question liée :
(a) in deciding any question under this Part, the applicable principles of labour law;	a) à l'application de la présente partie, des principes applicables du droit du travail;

[8] Finally, the Tribunal's decisions are protected from review:

21. (1) Subject to this Part, every determination or order of the Tribunal is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act. .	21. (1) Sous réserve des autres dispositions de la présente partie, les décisions et ordonnances du Tribunal sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire que pour les motifs visés aux alinéas 18.1(4)*a*), *b*) ou *e*) de la *Loi sur les Cours fédérales* et dans le cadre de cette loi.
(2) Except as permitted by subsection (1), no determination, order or proceeding made or carried on, or purporting to be made or carried on, by the Tribunal shall be questioned, reviewed, prohibited or restrained on any ground, including the ground that the Tribunal did not have jurisdiction or exceeded or lost its jurisdiction, or be made the subject of any proceeding in or any process of any court on any such ground, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise.	(2) Sauf dans les cas prévus au paragraphe (1), aucune mesure prise ou censée prise par le Tribunal dans le cadre de la présente partie ne peut, pour quelque motif, y compris pour excès de pouvoir ou incompétence, être contestée, révisée, empêchée ou limitée ou faire l'objet d'un recours judiciaire, notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto.

[9] In summary, the Act provides a framework, based on the labour relations model, for the conduct of negotiations between artists associations and producers with a view to providing, among other things, compensation for artists.

THE FACTS

[10] The Tribunal certified the Canadian Artists Representation/le Front des artistes canadiens (CARFAC) as the representative organization for Canadian visual artists outside Québec and Le Regroupement des artistes en art visuel du Québec (RAAV) as the representative organization for visual artists in Québec.

[11] Before proceeding, it is necessary to clarify an expression used in the balance of these reasons. The National Gallery uses the phrase "copyright-related issues" to refer to matters which can only be dealt with by the copyright holder (such as the granting of licences or assignments of copyright) or by someone authorized in writing by the copyright holder, as required by subsection 13(4) of the *Copyright Act*. For the sake of consistency, I will use the phrase "copyright-related issues" in the same way.

[12] In early 2003, CARFAC and RAAV (collectively, CARFAC/RAAV) each gave the National Gallery notice to bargain. Later in that year, CARFAC/RAAV advised the National Gallery that they would negotiate jointly.

[13] Given that the issue is whether the National Gallery failed to negotiate in good faith, I think it is important to set out, in some detail, the course of negotiations between the parties.

[14] The initial meeting between the parties was held on December 1, 2003. On January 5, 2004, Mr. Karl Beveridge, the spokesperson for CARFAC/RAAV's bargaining committee wrote to his

counterpart at the National Gallery, Mr. Daniel Amadei, setting out a list of items which CARFAC/RAAV wished to bargain:

> 1. Fees (this includes all fees as per the CARFAC fee schedule including exhibition, reproduction, web/virtual/digital, permanent collection, lectures, etc.)
>
> 2. All other payments (installation, meet the press, gallery talks, etc.)
>
> 3. Contracts (exhibition, commissions, web, performance, lecture, purchase (excluding sale price), etc.)
>
> The letter went on to say:
>
> You agreed to confirm in writing that these items are the items that we will be negotiating at the table. We additionally note that you have already agreed in principle to bargain the items listed above.
>
> Application Record, vol. 15 p. 2836

[15] It should be noted at this point that the right to exhibit (applicable to works created after June 7, 1988) and to reproduce original works of art are protected by copyright: see *Copyright Act*, paragraphs 3(1)(*a*) and (*g*).

[16] Mr. Pierre Théberge, the Director of the National Gallery, responded to this letter. The relevant portions of his response were:

> I confirm that Mr. Amadei has the authority to reach a tentative agreement with RAAV and CARFAC on the subjects that are under his authority. It is possible that some items to be discussed may require consultation with his colleagues or myself. Since we do not know the details of your intentions regarding some issues, we are uncertain if other NGC representatives will be involved. We are seeking legal advice, and wish to advise you that Mr. Amadei may be accompanied by a councillor.

> I understand that Mr. Amadei stated at your first meeting that although we are ready to discuss all items listed in your letter, it may not be in the NGC's authority to implement new programs or modify rules and procedure of existing structures.
>
> Application Record, vol 15, p. 2839

[17] This carefully worded response ("… Mr. Amadei has the authority to reach a tentative agreement … on subjects that are under his authority …") did not directly address the question raised by Mr. Beveridge. Notwithstanding Mr. Théberge's evasiveness, the issue of minimum fees was on the bargaining agenda from the beginning of the talks between the parties until the events giving rise to this application.

[18] This is confirmed by the fact that, on February 3, 2005, Mr. Amadei proposed the following topics for discussion at the meeting scheduled for February 23 and 24, 2005:

> 1. Contracts (Exhibition, Installation, and Performance)
> 2. Reproduction fees
> 3. Permanent Collection
> 4. Exhibition Fees
> 5. Other fees
>
> Application Record, vol. 15, p.2868

[19] The tenor of the negotiations can be seen in two draft scale agreements which are found in the Application Record, one dated June 1, 2006 (the 2006 Draft) (see Application Record, vol. 17, pp. 3234-3244), and the other dated October 20, 2007 (the 2007 Draft) (see Application Record, vol. 1, pp.114-123). A comparison of relevant terms in the two appears in the following table:

The 2006 Draft	The 2007 Draft
8:02 The NGG/CMCP [the National Gallery of Canada/ the Canadian Museum of Contemporary Photography] shall enter into a contract with all artists for the purposes of the activity for which the artist is engaged. The contract shall follow the Contracts attached to this Agreement.	7:04 When the NGC/CMCP enters into a contract with an artist, NGC/CMCP shall use one of the Relevant Contracts under this Agreement.
9:00 Minimum Fees	8:00 Minimum Fees
9:01Minimum fees for 2005-2006 as expressed herein shall apply immediately to (dates applicable for each year of agreement).	8:01 Minimum fees for 2006-2007 as expressed herein shall apply immediately to (dates applicable for each year of agreement).
9:02 (list fee schedule here or as attachment)	8:02 (list fee schedule here or as attachment)
	8:03 (rates for additional services)
9:03 Any artist engaged under this Agreement shall be free to negotiate remuneration above the minimum fees expressed herein.	8:04 Any artist engaged under this Agreement shall be free to negotiate remuneration above the minimum fees expressed herein.
12:00 Signing Powers	10:00 Signing Powers
12:01 A Contract must be signed by the proper signing officers of the NGC/CMCP. After completing the contract, the NGC/CMCP shall sign all three copies of the Contract in ink, and then obtain the signature of the Artist or Artist's authorized representative on the three copies. The Artist will retain one copy. The NGG/CMCP shall send one copy to CARFAC/RAAV (as outlined in clause 7:05) and one copy shall remain with the NGC.	10:01 When entering into a Relevant Contract, the NGC/CMCP shall sign all three copies of the Relevant Contract in ink, and then obtain the signature of the Artist or the Artist's authorized representative on the three copies. The Artist shall be given one executed copy of the Relevant contract. The NGC/CMCP shall send one copy to CARFAC/RAAV (as outlined in clause 7:09) and one copy shall with the NGC.
29:00 Copyright	25:00 Copyright

29:01 The artist or the legally recognized copyright holder retains copyright in the Artwork.	25:01 The artist or the legally recognized copyright holder retains copyright in the Artwork.
29:02 All rights not specifically granted to the NGC/CMCP are reserved to the artist or the legally recognized copyright holder.	25:02 All rights not specifically granted to the NGC/CMCP are reserved to the artist or the legally recognized copyright holder.
30:00 Moral Rights	26:00 Moral Rights
30:01 The Artist retains the Moral Rights in the Artwork.	26:01 The Artist retains the Moral Rights in the Artwork.
31:00 Secondary Rights	27:00 Secondary Rights
31:01 The Artist or the legally recognized copyright holder retains secondary copyright in the Artwork.	27:01 The Artist or the legally recognized copyright holder retains secondary copyright in the Artwork

[20] In the Application Record, there are also a number of model contracts which were being negotiated in parallel with the scale agreement. According to articles 8:02 and 7:04 respectively of the 2006 and 2007 Draft scale agreements, the model contracts were to be used when an artist contracted with the National Gallery. An example of such a contract is the contract for Public Communication by Telecommunication which appears at vol. 1, pp. 138-146 of the Application Record. The following terms of that contract cast some light on the items being negotiated:

> 2. The Artist, author, first owner and the current owner of the copyright on the works covered by this contract and described in section 3, provides the user of said works with a nonexclusive and nontransferable license to use them solely as described in section 4.
>
> 4. Copyright
>
> Reproduction rights for digital transfer

4.1 The Artist authorizes the National Gallery, in consideration of the payment of royalties stipulated in section 6.1 of this contract, to reproduce the works in a digital format for the sole purpose of communicating the work to the public by telecommunication, as described hereafter.

Right of communication to the public
4.2 The Artist grants the National Gallery, in consideration of the payment of royalties stipulated in section 6.2 of this contract, a license for the following public communication of the works (please check) …

5. Moral Rights

5.1 In addition to the caption information of the works following museum standards, the sign "©", the name of the Artist and the year of creation of the works must be listed legibly and accompany the works that are communicated to the public. This information must appear immediately next to the works or in a section devoted to credits, it being acknowledged by the National Gallery that failure to list this information completely and legibly in conjunction with the works is prejudicial to the Artist and shall give rise to monetary compensation.

6. Remuneration and mode of payment

6.1 The Artist grants the license of reproduction for digital transfer in consideration of the amount of _____$ for each work transferred, for a total of _____$, plus any applicable taxes.

6.2 The Artist grants the license for public communication in consideration of the amount of _____$ for each work communicated to the public, for a total of _____$, plus any applicable taxes, for the following use(s).

6.3 The National Gallery will pay the Artist according to the following terms:
- 6.3.1 Date(s) of payment, installment(s): _____
- 6.3.2 Conditions, if applicable (example, advance) _____:
- 6.3.3 Verification of accounting records, frequency envisaged: _____
- 6.3.4 Compound interest of 1% a month (12.66% a year) will be charged on any amount past due.

8. Ownership of the works

It is expressly agreed that this contract in no way transfers ownership of the works to the National Gallery or to anyone else.

12. Mediation and Arbitration

> In case of litigation, the parties agree to use the mediation and arbitration processes prescribed in the CARFAC-RAAV/NGCL-CMCP Collective Agreement signed _____ 2007.

[21] A fair reading of these contractual provisions shows that the parties did negotiate the issue of minimum fees for the use of existing works. They also show that CARFAC/RAAV do not purport to deal with their members' interests in copyright in any way. In fact, both the draft scale agreements and the model contracts stipulate that the artist's rights remain the artist's. In addition, CARFAC/RAAV do not receive any amounts from producers on behalf of their members by way of royalties or otherwise. Any licensing of copyright takes place only in the contract between the National Gallery and the artist.

[22] Whatever reservations the National Gallery may have had about the inclusion of minimum fees in a scale agreement, prior to October 2007 the negotiations consistently dealt with them.

[23] The Tribunal found that :

> [123] The parties had an established practice for their bargaining meetings, of exchanging agenda, draft scale agreements and contracts prior to their meetings to allow each party the opportunity to review and make comments prior to their meetings.
> …
> [128] Witnesses testified that the negotiations involved drafting versions, discussing changes, incorporating those changes into a new draft, with a different colour, and then confirming those changes in the next round. Draft collective agreements dated June 6, 2006 (*Exhibit 31*) and October 20, 2007 (*Exhibit 15*) were submitted to the Tribunal, as well as draft contracts to be appended to the collective agreement (*Exhibit 9*) which all included language related to minimum fees, such as temporary exhibition fees and reproduction fees.

[24] Negotiations continued on this basis as long as Mr. Amadei was the National Gallery's spokesperson.

[25] In May 2007, the National Gallery advised CARFAC/RAAV that Mr. Amadei had left the institution and that its spokesperson, going forward, would be Mr. Guy Dancosse. At the relevant time, Mr. Dancosse was a lawyer who practiced his profession from the Montreal office of Gowling Lafleur Henderson (Gowlings).

[26] In June 2007, Mr. Dancosse asked a lawyer in his firm to provide a legal opinion for the National Gallery. Referring to an earlier decision Tribunal decision amending CARFAC's certification order (*Canadian Artists Representation (Re)*, [2003] C.A.P.P.R.T.D. No. 8 (QL) (Decision No. 047)), Mr. Dancosse pointed out in his instructions to the lawyer:

Et le Tribunal semble faire la distinction importante disant que bien que ceci donne un droit à CARFAC de faire des demandes dans cette sphère élargie, ceci ne force en rien le producteur a accepter telle demande dans une entente à intervenir. En d'autres mots, chaque partie à une négociation demeure libre de demander, de refuser et de contre proposer ce qu'ils veulent et ce avec quoi ils ont prêts à vivre.	The Tribunal appears to draw an important distinction to the effect that while this allows CARFAC to make demands within this widened sphere, this in no way obliges the producer to include such demands in an eventual agreement. In other words, each party to the negotiations remains free to demand, to refuse, or to counter-offer as it wishes and according to what it can live with.
Par exemple, rien n'empêcherait le Musée de demander une clause disant que c'est l'auteur qui conserve ses droits d'auteurs et que ces derniers ne sont pas du tout couverts ou visés par une entente cadre avec CARFAC. Le client a reçu des opinions de trois	For example, nothing would prevent the Gallery from demanding a clause saying that the author retains copyright and that copyright is not in any way covered or within the scope of a scale agreement with CARFAC. The client has received opinions from three

avocats à ce sujet, qui ne semblent pas répondre clairement à sa question. Il nous demande de lui en fournir une qui serait plus claire.	lawyers on this subject, which do not appear to answer its question clearly. It has asked us to provide an opinion which is clearer.
Application Record, vol. 16, p. 3078	(Translation by the Court)

[27] As I read these instructions, Mr. Dancosse understood that the Tribunal's position that the scope of negotiations is determined by the parties, as set out in Decision No. 47, meant that the National Gallery could take the position that minimum fee schedules for existing works were not negotiable. I observe that this position does not depend on the definition of "services"

[28] In July 2007, Gowlings provided the National Gallery with its opinion. Its conclusions may be summarized as follows. Firstly, a union which is not authorized to do so in writing cannot deal with copyright-related issues. This is because only the holder of copyright or a person authorized in writing by the holder can authorize others to do that which s. 3 of the *Copyright Act* reserves to the holder of the copyright.

[29] The author of the opinion relied on the decision of the Copyright Board in *Public Performance of Sound Recordings* case (*Re)*, [1999] C.B.D. No. 3, to support her conclusion. In that case, the Copyright Board, in dealing with an application for a tariff, decided that a union could not rely upon its constitution or its bargaining mandate in order to exercise the rights of a collective society, that is, grant licenses on behalf of its members and collect royalties for distribution to its members. The opinion concluded from this that the National Gallery could refuse to negotiate copyright-related issues with CARFAC/RAAV if the latter did not have specific written

authorization from their members, which CARFAC/RAAV admitted not having. This conclusion assumes that CARFAC/RAAV proposed to grant licenses with respect to works whose copyright was held by their members and that CARFAC/RAAV intended to collect royalties on behalf of their members. Neither of these assumptions were true at the time the opinion was prepared.

[30] The opinion's second conclusion was that the Act confers on representative organizations the exclusive right to negotiate with respect to labour relations but not with respect to copyright-related issues. This conclusion was said to flow from the provisions of the *Copyright Act* dealing with collective societies and the absence of any reference to copyright in the sections of the Act which set out the Tribunal's powers. The opinion went on to state that previous Tribunal decisions which found that representative organizations can negotiate copyright matters are not binding on the National Gallery since the Tribunal is not a court of law and its decisions do not bind the Courts.

[31] The opinion's ultimate conclusion was that, on the basis of the reasoning set out above, the National Gallery could "legitimately refuse to discuss with CARFAC and RAVV [sic] with respect to copyright issues": Application Record, vol. 16, p. 3087.

[32] Two observations can be made about this opinion. The first is that it was written as though negotiations between the National Gallery and CARFAC/RAAV had not yet begun. It did not recognize that, for the past four years, the parties had been engaged in negotiating a schedule of minimum fees and finalizing model contracts which would be used when individual artists negotiated with the National Gallery for the use of their works.

[33] The second is that the opinion did not recognize that the question of whether the National Gallery could refuse to negotiate minimum fee schedules for existing works going forward, after having negotiated those items for four years, was a labour relations question and not a question of the rights of the parties under the *Copyright Act*. This flows from paragraph 18(a) of the Act which directs the Tribunal to dispose of the questions coming before it by reference to the applicable principles of labour law.

[34] Returning to the sequence of events, the National Gallery provided the Gowlings' opinion to CARFAC/RAAV in July 2007. On October 29-31, 2007, the parties met for the first time following CARFAC/RAAV's receipt of the opinion. On October 29, the parties reviewed the last draft of the scale agreement. That draft included minimum fees for the use of existing works and model contracts. On October 30, 2007, the National Gallery invited Mr. Gilles Daigle (a Gowlings lawyer, but not the author of the Gowlings opinion) to present the Gowlings opinion. Mr. Daigle attended the meeting as a copyright specialist. His position was that he had no mandate to resolve the conflict between the parties, nor was he in a position to deviate from the position that the National Gallery was taking with respect to the negotiation of minimum fee schedules for existing works.

[35] Following the discussion with Mr. Daigle, the National Gallery presented a revised draft scale agreement to CARFAC/RAAV in which all references to the minimum fees for the use of existing works had been removed. The services contemplated by the National Gallery's draft agreement were limited to exhibition planning and production, including consultation, installation, openings, lectures and talks, and commission for new works.

[36] The following day, Mr. Beveridge, on behalf of CARFAC/RAAV read a prepared statement indicating that the National Gallery's proposal meant that the latter was not prepared to consider CARFAC/RAAV's position on the inclusion of a minimum fee schedule in a scale agreement. Mr. Dancosse responded by reading the National Gallery's own written statement which affirmed the National Gallery's willingness to consider means by which fee schedules could be negotiated through the current bargaining process.

[37] Further communications between the parties ensued. On January 29, 2008, the National Gallery advised CARFAC/RAAV that "we can discuss binding exhibition rights fee schedules for temporary exhibitions only for artists you specifically represent in compliance with the Copyright Legislation." The National Gallery added: "In the present state of our laws, your certificate to bargain collectively is limited to services and cannot automatically extend to Copyright matters. This position is based on legal opinions advising us so." On my reading of the record, this is the first indication that the National Gallery was defending its position on the basis that the scope of negotiations was limited by the expression "provision of services" in the statutory definition of "scale agreement".

[38] On April 22, 2008, CARFAC/RAAV filed their complaint that the National Gallery had failed to bargain in good faith.

THE DECISION UNDER REVIEW

[39] The Tribunal rendered its decision on February 16, 2012. It began by reviewing the terms of the CARFAC and RAAV certification orders. It then reviewed the facts, quoting extensively from the Agreed Statement of Facts filed by the parties. The Tribunal identified the three issues which it was to decide:

1. Whether the complaint was filed within the six-month period set out in subsection 53(2) of the *Act*?

2. Whether copyright matters are a proper subject for collective bargaining and inclusion in a scale agreement under the *Act*?

3. Whether the National Gallery breached its duty to bargain in good faith pursuant to section 32 of the *Act*?

[40] The Tribunal resolved the issue of timeliness in CARFAC/RAAV's favour. That issue is not contested before us so nothing more need be said about it.

Whether copyright matters are a proper subject for collective bargaining and inclusion in a scale agreement under the *Act*?

[41] The Tribunal then addressed the issue of whether copyright matters were a proper subject for collective bargaining and inclusion in a scale agreement.

[42] This issue arises from the definition of "scale agreement" in the Act which is reproduced below for ease of reference:

"*scale agreement"* means an agreement in writing between a producer and an artists' association respecting minimum terms and conditions for the provision of artists' services and other related matters;	« *accord-cadre* » Accord écrit conclu entre un producteur et une association d'artistes et comportant des dispositions relatives aux conditions minimales pour les prestations de services des artistes et à des questions connexes.

[43] The Tribunal began its analysis by quoting extensively from one of its earlier decisions, *The Writers Union of Canada*, 1998 C.A.P.P.R.T. No. 028 (Decision No. 028). In that matter, the Department of Canadian Heritage (DCH) and the Department of Public Works and Government Services Canada (PWGSC) argued that the certification order in the Writer's Union's favour did not give the latter the right to negotiate fees for the use of pre-existing works. DCH and PWGSC made the same argument as is being made in this case. They claimed that copyright is property, not a service. According to them, the bargaining regime established by the Act applies only to commissioned works; and, fees related to the use of existing works must be dealt with under the collective administration scheme provided in the *Copyright Act*.

[44] In Decision No. 028, the Tribunal rejected these arguments. It found that the Act complemented the regime provided in the *Copyright Act* by providing artists with an additional mechanism to obtain compensation for their works. The Tribunal put considerable emphasis on the *Act*'s stated objective of improving the socio-economic status of artists. Had Parliament intended to withdraw copyright from the scope of bargaining, it could have done so. The Tribunal noted that the Act contains no restriction on the scope of bargaining, which is consistent with the labour law principle that parties to a collective bargaining relationship can bargain any subject matter which they wish to bargain.

[45] In Decision No. 028, the Tribunal also dealt with the argument that copyright is property and not a service. It observed that copyright is a "bundle of rights", including an interest in a particular type of property, the work itself. The Tribunal rejected the notion that copyright is merely a form of property - a "good"- because creators of artistic works have a fundamental socio-economic right whose exclusion from the scheme created by the Act would be contrary to the objects of the *Act*.

[46] The Tribunal continued its review of Decision No. 028 by noting that under the *Copyright Act*, artists had two options when dealing with copyright: they could manage it themselves or they could rely on collective societies. In order to take advantage of collective societies, artists have to assign them their rights. The collective society then manages the artist's copyright in common with that of all its other members, usually, but not necessarily, through the tariff scheme administered by the Copyright Board. The collective society is responsible for collecting the applicable royalties and distributing them to the artists it represents.

[47] The Act provides artists with a third option: that of negotiating collectively with respect to the minimum terms and conditions upon which the artist will provide their services, and other related matters. In that context, the Tribunal considered that "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, and representing artists in this fundamental socio-economic right is an appropriate activity for a certified artists' association.": paragraph 61 of Decision No. 028, cited above, as quoted in the Tribunal Reasons at paragraph 88. [My emphasis.]

[48] The Tribunal concluded its lengthy quotation from Decision No. 028 by pointing out that under the *Act*, artists retain control over the copyright in their work and contract directly with producers for the use of their works. Artists may negotiate for a higher fee than that bargained by their representative organization, but no producer may offer an artist conditions less favourable than those agreed to in the scale agreement. Artists receive payment directly from the producer and, in the event of a disagreement, they may enforce payment through the arbitration provisions of the scale agreement.

[49] The Tribunal went on to note that it had confirmed this position in, Decision No. 047, cited above.

[50] After reviewing the evidence, the Tribunal observed that artists associations have negotiated nearly 180 scale agreements since they have been certified. It noted that it has become a standard in the cultural sector that copyright matters are negotiated in scale agreements. According to the Tribunal, it is unusual for a scale agreement between an artists' association and a producer not to contain stipulations relating to the use of artistic works. In the Tribunal's view, it would be inconsistent with the purpose of the Act if scale agreements could not contain terms related to copyright.

[51] The Tribunal then referred to its reasons in Decisions No. 028 and No. 047 where it was pointed out that the fact that an artists' association negotiates minimum fees for copyright licenses did not make the association the artist's agent for the purpose of granting licenses or assignments of copyright for the artists' works. Artists retained the right to license the use of their works unless

they had assigned their rights to a collective society, in which case, the producer would deal with the collective society.

[52] The Tribunal concluded this portion of its analysis by stating that it is not up to the Tribunal to decide what parties to a bargaining relationship may bargain.

Whether the National Gallery breached its duty to bargain in good faith pursuant to section 32 of the *Act*?

[53] The Tribunal began its discussion of this issue by referring to the arbitral and judicial jurisprudence on the obligation to bargain in good faith. In particular, the Tribunal relied on certain comments of the Supreme Court of Canada in *Royal Oak Mines Inc v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 (*Royal Oak Mines*), at paragraph 45:

> If a party proposes a clause in a collective agreement, or conversely, refuses even to discuss a basic or standard term, that is acceptable and included in other collective agreements in comparable industries throughout the country, it is appropriate for a labour board to find that the party is not making a "reasonable effort to enter into a collective agreement".

[54] This led the Tribunal to examine the course of negotiations between the parties. Based on its review, the Tribunal found that minimum fees schedules and model contracts were discussed and were included in draft scale agreements from the beginning of the negotiations. The Tribunal also found that, at the first meeting attended by the National Gallery's new negotiating team following the departure of Mr. Amadei, the National Gallery tabled a proposed scale agreement from which all previous references to minimum fees had been removed. The Tribunal concluded that the content of the National Gallery's proposal, the fact that it was presented without prior notice and

without any reasonable alternatives represented an uncompromising position which the National Gallery should have known would be unacceptable to CARFAC/RAAV.

[55] The Tribunal also concluded that, notwithstanding the National Gallery's insistence that the parties were not at an impasse, "the failure to negotiate or to discuss the inclusion of matters relating to copyright, including binding minimum fees in the scale agreement created a rigid stance resulting in the failure to conclude an agreement": see Tribunal Reasons at paragraph 148.

[56] The Tribunal found the National Gallery's exclusive reliance on the Gowlings opinion, to justify its position, was evidence of its rigid stance.

[57] The Tribunal's final conclusion on the issue of failing to bargain in good faith is found in the following three paragraphs of the Tribunal Reasons:

> [150] The Tribunal agrees with CARFAC/RAAV that there was no reasonable expectation that the inclusion of minimum fees for the use of artistic works in a scale agreement would have been agreed upon by the NGC. The Tribunal further agrees with CARFAC/RAAV that the NGC was impasse bargaining in that there was no realistic possibility that the NGC would change its position concerning the inclusion of matters related to use of artistic works in a scale agreement.
>
> [151] The Tribunal agrees with the principles expressed by the Supreme Court of Canada in *Royal Oak Mines* that putting forward such a proposal and taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of the duty to bargain in good faith.
>
> [152] The NGC ought to have known that putting forward this revised version of the scale agreement and taking such a rigid stance would be unacceptable to CARFAC/RAAV and this in the Tribunal's view amounts to a failure to bargain in good faith.

[58] The Tribunal therefore made a declaration that the National Gallery had violated section 32 of the Act by failing to bargain in good faith. The Tribunal also reaffirmed the principle set out in its Decisions No. 028 and No. 047 to the effect that copyright matters are appropriate for collective bargaining "while respecting the rights of the copyright collectives such as SODRAC".

STATEMENT OF ISSUES

[59] The National Gallery identified three issues arising from the Tribunal's decision:

1. Did the Tribunal err in law and exceed its jurisdiction or refuse to exercise its discretion in declaring that copyright could be the subject matter of a scale agreement under the *Act*?

2. Did the Tribunal err in fact and in law in concluding that the National Gallery had not negotiated in good faith?

3. What is the appropriate standard of review for each of these questions?

[60] The intervener SODRAC purported to take no position as between the parties, insisting only that if the Tribunal's order is maintained, the reservation with respect to the rights of collective societies should be maintained.

[61] In my view, the first issue is the standard of review. The next issue to be considered is whether the Tribunal's finding that the National Gallery failed to bargain in good faith can be supported on the appropriate standard of review. I believe that this issue should be considered first because that is the determination which the National Gallery is challenging. The question of the interpretation of the expressions "provision of services" and "prestations de services" arises only

because the National Gallery has raised it as a defence to complaint that it has failed to bargain in good faith.

ANALYSIS

Standard of Review

[62] The National Gallery argues that since the interpretation of "provision of services" or "prestations de services" raises "questions regarding the jurisdictional lines between two or more competing specialized tribunals" i.e. the Tribunal and the Copyright Board, it should be reviewed on the correctness standard, as provided at paragraph 61 of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*).

[63] With respect to the Tribunal's finding that the National Gallery had failed to bargain in good faith, the latter argues that the Tribunal's errors in the assessment of the evidence make the decision unreasonable.

[64] In my view, the interpretation of the phrase "provision of services" raises no jurisdictional conflict. CARFAC/RAAV do not purport to be collective societies. They do not hold themselves out as granting licenses to copyright nor as collecting fees with respect to the use of works in which copyright subsists. The draft scale agreements, as well as the model contracts, all make it clear that the artists alone determine whether a license is to be granted to a producer. CARFAC/RAAV simply bargain with producers with a view to ensuring that, if a license is granted, the producer may

not pay less for that license than the minimum fee set out in the scale agreement, though the artist may bargain for more.

[65] The National Gallery's position on this issue rests on a mischaracterization of the content of the agreements which its representatives were engaged in negotiating prior to its change in position.

[66] That said, the question remains as to whether the "provision of services" includes authorizing others to do that which the holder of the copyright has the exclusive right to do.

[67] This is a question of law which must be decided by a tribunal in the course of construing its home statute. As the Supreme Court indicated in *Dunsmuir*, cited above, and in a number of cases since (*Smith v. Alliance Pipeline Ltd*, [2011] 1 S.C.R. 160, at paragraph 28, and *Celgene Corp v. Canada (Attorney General)*, [2011] 1 S.C.R. 3 at paragraph 34, to name but two), the decision of a tribunal interpreting its home statute will normally be reviewable on the standard of reasonableness. See also the majority reasons in *Alberta (Information and Privacy Commissioner v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (*Alberta Teachers' Association)*.

[68] Even without the benefit of this jurisprudence, the standard of review analysis leads to the same conclusion. The Tribunal is a specialized tribunal charged with administering a labour relations scheme governing relations between artists and producers in the federal sphere. The decisions of the Tribunal are protected by a strong privative clause (section 21 of the *Act*) which is substantially the same as the privative clauses found in the *Public Service Labour Relations Act*, S.C. 2003 c. 22 s. 2, at section 51, and the *Canada Labour Code*, R.S.C. 1985, c. L-2, at section 22.

Finally, the decisions of the Tribunal have a strong policy component, given the guiding principles set out in sections 2 and 3 of the *Act*. All of these factors support the conclusion that the standard of review of the Tribunal's interpretation of the phrase "provision of services" is reasonableness.

[69] As for the finding that the National Gallery failed to bargain in good faith, the application of a legal standard to a set of facts is a question of mixed fact and law. In this case, the Tribunal identified the legal test for bargaining in good faith and applied it to the course of bargaining between the parties. The National Gallery did not identify an extricable question of law, focusing instead on the Tribunal's weighing of the evidence. The standard of review of a question of mixed fact and law in this context is reasonableness: see *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paragraph 78.

Is the Tribunal's decision that the National Gallery failed to bargain in good faith reasonable?

[70] The statutory basis for the obligation to bargain in good faith is found in section 32 of the Act set out earlier in these reasons. As pointed above, the Act directs the Tribunal to have regard for the applicable principles of labour law. In addressing the question of whether the National Gallery bargained in good faith, the applicable principles of labour law include the jurisprudence which deals with bargaining in good faith.

[71] As the lengthy exposition of the facts shows, the National Gallery engaged in negotiations with CARFAC/RAAV over a period of four years in the course of which minimum fees were always on the table. Whatever reservations the National Gallery may have had about its obligations,

it did, in fact, bargain with respect to minimum fees. This is apparent from the portions of the draft scale agreements reproduced earlier in these reasons as well as the draft model contracts. This continued until October 30, 2007, when the National Gallery's new bargaining team presented the Gowlings legal opinion and resiled from its earlier positions on minimum fees.

[72] The Tribunal's critical findings of fact on the issue of bargaining in good faith are found at paragraphs 145 - 148 of its decision:

> [145] The evidence presented to the Tribunal however also demonstrates that minimum copyright fees and draft contracts related to the use of artistic works were part of the discussions and included in the draft scale agreements since the beginning of negotiations.
>
> [146] The revised draft scale agreement presented to CARFAC/RAAV on October 30, 2007 removed all the matters related to the use of copyright works which CARFAC/RAAV was mandated by its members to negotiate within the parameters of the *Act*.
>
> [147] The content and the manner in which the NGC presented the revised draft to CARFAC/RAAV without prior notice, without reasonable alternatives, in the Tribunal's view was an uncompromising position that the NGC should have known would be unacceptable to CARFAC/RAAV.
>
> [148] The Tribunal finds that although the NGC insisted the parties were not at an impasse and there were still issues to be negotiated, the failure to negotiate or to discuss the inclusion of matters related to copyright, including binding minimum fees in the scale agreement created a rigid stance resulting in the failure to conclude an agreement.

[73] The observation that the National Gallery should have known that its position would be unacceptable to CARFAC/RAAV is a reference to the decision of the Supreme Court of Canada in *Royal Oak Mines*, cited above, in which the issue of bargaining in bad faith was explored. The Tribunal took particular note of the Supreme Court's position that "putting forward a proposal, or

taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement [to bargain in good faith]": see *Royal Oak Mines*, at paragraph 43. In the same decision, the Supreme Court also noted that the conduct of bargaining must be assessed objectively, that is, by reference to the practice in the industry. This gives weight to the Tribunal's comments, at paragraph 99 of the Tribunal Reasons, that "it has become a standard in the cultural sector that these matters [matters related to copyright and fees] are included in scale agreements."

[74] The Tribunal saw the National Gallery's reliance upon the Gowlings opinion as evidence of its rigid stance. The Tribunal may have been influenced by the fact that the Gowlings opinion was the fourth opinion which the National Gallery had received on this subject, and that it came from the National Gallery's chief negotiator's own firm. The Tribunal's use of the phrase "rigid stance" is another reference to paragraph 43 of the Supreme Court's decision in *Royal Oak Mines*, cited above, where the taking of a rigid stance is found to be incompatible with the obligation to make every reasonable effort to conclude a collective agreement.

[75] The Tribunal's position, it seems to me, can be summarized as follows. Having agreed to negotiate minimum fees for the use of existing works, the National Gallery could not refuse to continue to do so. This conclusion flows from the jurisprudence cited by the Tribunal and from its findings of fact. This conclusion does not turn on whether CARFAC/RAAV's certification orders gave them the right to negotiate minimum fees, or, as a result, whether the National Gallery could be compelled to negotiate minimum fees. Whether it could be compelled to do so or not, the National Gallery agreed to negotiate minimum fees. Once it agreed to do so, and did so for four

years, the National Gallery could not refuse, in good faith, to continue those negotiations for the reasons which it gave.

[76] In light of the Tribunal's findings of fact, which in my view are not open to challenge on any standard of review, and the jurisprudence on which it relied, the Tribunal's conclusion that the National Gallery had failed to bargain in good faith was reasonable, as that term has been used in *Dunsmuir*, cited above, at paragraph 61. The decision and the Tribunal's reasoning process are justifiable, transparent (in the sense that there are no unexplained leaps in logic), and intelligible. Furthermore, "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, cited above, at paragraph 47.

Is the Tribunal's conclusion that the National Gallery failed to bargain in good faith based on an error of law?

[77] The error of law alleged by the National Gallery is that matters related to copyright and minimum fees for the use of existing works of art do not comprise "services" as that term is used in the definition of "scale agreement" in the Act and, for that reason, fall outside CARFAC/RAAV's mandate. For the reasons given above, I do not believe that this issue affects the outcome of the analysis as to whether the National Gallery negotiated in good faith. However, if negotiations are to resume, the parties may benefit from greater certainty on this issue.

[78] The National Gallery objects to the Tribunal's conclusion that it failed to bargain in good faith, saying that it is based on an error of law, namely that the definition of "scale agreement" and, in particular, the phrase "provision of services" or "prestations de services" do not include

copyright-related issues because copyright is property and not services and therefore, these matters fall outside the scope of a scale agreement. It follows that the National Gallery cannot be found to have bargained in bad faith for refusing to discuss something which CARFAC/RAAV did not have the authority to bargain.

[79] The National Gallery seeks to bolster this argument by raising questions related to the provisions of the *Copyright Act*, and an alleged conflict between it and the *Act*.

[80] The National Gallery's position on "provision of artists services" is based on the performing arts model, where a producer and an association can negotiate a minimum fee for a performance, which is clearly a service. I acknowledge that the French version of the Act which uses the phrase "prestations de services" is consistent with this view of the meaning to be given to the phrase. Contrasting this type of service to that of licensing existing works, the National Gallery argues that since copyright is a form of property, transactions involving copyright are not contracts for the provision of services but rather contracts involving property or goods, or so the argument goes.

[81] There are two interrelated questions here. What is the service and who provides it? The Tribunal has been clear, ever Decision No. 028, that the artist is the provider of services and that the services include the granting others the right to use works in which the artist holds the copyright. Representative associations simply negotiate some of the terms on which those services will be provided. This is clear from the following passage from Decision No. 28:

> …In the Tribunal's view, 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, and representing

> artists' interests in this fundamental socio-economic right is an appropriate activity for a certified artists' association. As an example, the artists' association may seek to negotiate with a producer provisions regarding the minimum fee to be offered to an artist in the sector for the use of one of his or her works in a new medium or as the basis for an adaptation.
>
> [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.
>
> Decision No. 028, cited above, at paragraphs 61-62.

[82] The Tribunal came to this conclusion on the basis of a textual and contextual analysis of the whole of the *Act*, as reflected in paragraphs 57 and 58 of Decision No. 28:

> [57] In the Tribunal's view, the *Status of the Artist Act* was intended to complement and supplement the regime provided in the *Copyright Act*. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work, thereby enhancing and promoting artists' freedom of choice as to how they will exploit the fruits of their creative talents.
>
> [58] The statute must be given an interpretation that will fulfill Parliament's intention of improving the socio-economic status of artists in Canada. The Act mandates certified artists' associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the *Act*. Parliament did not expressly exclude matters related to copyright from the ambit of collective bargaining. Indeed the Act contains no express limitation on an artists' associations' right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[83] There is nothing surprising in the finding that granting a license to use a work is a service provided by an artist to a producer. The fact that copyright is property does not preclude a finding that granting another the right to use that property is a service. One need only think of hotels and car rental agencies as examples of property owners who provide a service by allowing others to use their property. Thus, the granting of a license is a service provided by the artist, as contemplated by the definition of "scale agreement".

[84] Nor is there anything unusual about the fact that representative organizations seek to negotiate the minimum fees and conditions upon which their members will provide services, including licenses to use existing works. The definition of scale agreement specifically refers to minimum terms and conditions. Surely, fees are either a term or a condition which an artist may attach to the grant of a license. The terms of the model contracts quoted above show that fees are indeed one of the terms of the license granted by the artist.

[85] The fact that a representative organization negotiates minimum fees does not make it the agent of the artist for the purpose of granting licenses. In the present case, the terms of the draft scale agreements and the model contracts make it clear that no fees are payable unless an artist grants the National Gallery a license to use his or her work in a specified way. The setting of fees is not one of the matters which are specifically and exclusively reserved to the artist in section 3 of the *Copyright Act* and is therefore not a matter referred to in subsection 13(4) of the *Act*. The National Gallery's argument on this issue is based on a mischaracterization of the very agreements which it negotiated for four years.

[86] All of this leads to the conclusion that the Tribunal's decision on the interpretation of "provision of services" is reasonable. The Tribunal's reasoning is intelligible, is internally consistent and is within the range of possible outcomes, having regard to the facts and the law. The law, in this context, includes the jurisprudence according to which an expert tribunal interpreting its home statute is entitled to deference: see *Alberta Teachers' Association,* cited above, at paragraph 39. The fact that a decision is reasonable does not mean that reasonable people could not come to another conclusion. It simply means that if the Tribunal has chosen one reasonable interpretation out of a number of equally reasonable interpretations, its choice is entitled to be respected by the Court.

[87] I conclude by pointing out that the interpretation given to the expression "provision of services" by the Tribunal does not create a conflict between the Act and the *Copyright Act*. The draft scale agreements and the model agreements as well, contemplate that only the artist has the right to grant licenses to use his or her work. If the artist has assigned his or her rights to a collective society, then that artist cannot contract with the National Gallery with respect to rights which he or she no longer has. The National Gallery must be able to know which artists it can contract with and which it cannot. These are practical problems for which there are practical solutions. They are not a reason for depriving the Act its full scope.

CONCLUSION

[88] For the reasons set out above, I would dismiss the application for judicial review with costs to the respondent Canadian Artists' Representation/Le Front des artistes canadiens and Le

Regroupement des artistes en arts visuels de Québec. No costs are awarded to or against the respondent Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada.

"J.D. Denis Pelletier"

J.A.

NOËL J.A. (reasons for judgment)

[89] I have read the reasons of my colleague, and with respect, I have reached the opposite conclusion. The issue in this case is whether the National Gallery's refusal to negotiate a scale agreement pertaining to matters relating to copyright - specifically minimum fees with respect to the use of existing works - can support the Tribunal's finding that it failed to bargain in good faith. In my view it cannot as the Tribunal had no authority to compel such negotiations, let alone deal with them. Labour law principles do not alter this limitation. The fact that the National Gallery came to this realization when the parties were well into the bargaining process is of no consequence as jurisdiction cannot be conferred by consent. The finding by my colleague that the director of the National Gallery acted with "evasiveness" is not one that was made by the Tribunal and I do not believe that his letter alerting CARFAC/RAAV to the fact that some of the issues being negotiated may not be within "the [National Gallery]'s authority" (Appeal Book, Vol. 15, p. 2839), warrants such a label. Furthermore, the National Gallery formalized its bargaining position on October 30, 2007 – not on January 29, 2008 - (Tribunal Reasons at paragraph 146) and based on the Tribunal's own words, it is the rigid stance taken by the National Gallery from that juncture onwards that "amounts to a failure to bargain in good faith" (Tribunal Reasons at paragraph 152).

BACKGROUND

[90] The Tribunal assumed jurisdiction to approve a "scale agreement" involving rights assigned by copyright holders to CARFAC/RAAV on the basis that these assignments constitute a "provision of … services" within the meaning of the definition of "scale agreement" in section 5 of the Act.

However, the Tribunal made it clear that its decision does not bind collective societies to which such rights have previously been assigned under the *Copyright Act* (Tribunal Reasons at paragraph 104).

[91] This concession is the only reason why SODRAC, in its capacity of intervener, takes the position that it can live with the decision of the Tribunal (SODRAC's memorandum, paras. 6, 8, 9, 14, 15, 16, 28, 29 and 82). However, the comprehensive arguments that it has brought forth make it clear that the decision of the Tribunal, insofar as it remains applicable to copyrights held by unrepresented artists, cannot stand.

ANALYSIS AND DECISION

[92] The question that must be answered is the one posed by SODRAC at paragraph 78 of its memorandum:

> [TRANSLATION]
> [Can] provisions dealing solely with the use of a work that is not the result of a provision of services [be included] in the scale agreement, [as defined in section 5]?

[93] The question so raised is one of statutory construction. In this respect it is useful to recall that there is only one applicable principle: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer Driedger, *Construction of Statutes* (2d ed. 1983) at p. 87, as cited in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow*

Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103).

[94] My colleague has assessed the decision of the Tribunal on this question on a standard of reasonableness. However, given that the Tribunal's finding of bad faith is premised on the assumption that the matters being negotiated were matters which CARFAC/RAAV were mandated to negotiate "within the parameters of the Act" (Tribunal Reasons at paragraph 146), it is clear that the Tribunal's finding of bad faith cannot stand if the National Gallery correctly asserts that these matters were outside these parameters.

[95] As SODRAC explains, this is the first time that the Tribunal has ruled at the negotiation stage (as opposed to the certification stage) on a scale agreement pertaining to pre-existing works, - *i.e.* works which are not the result of a provision of services by an artist for a producer - (SODRAC's memorandum, para. 34). In asserting that the Act applies in this context, CARFAC/RAAV rely on the judgment of the Supreme Court in *Desputeaux v. Éditions Chouette (1987) Inc.*, 2003 SCC 17, and the so-called "quasi-constitutional" nature of the Act to argue that it applies despite the obvious conflicts with the *Copyright Act* which this can entail (CARFAC/RAAV's memorandum, para. 54):

> Although Desputeaux arises out of a different context, it still affirms that there is nothing peculiar about the *Copyright Act* which insulates it from the impact of other legislation. To the contrary, the legislative scheme enacted by Parliament contemplates that such matters will be the subject of bargaining in spite of the *Copyright Act*.
>
> [My emphasis.]

[96] Neither the Supreme Court in *Desputeaux* nor the statute at issue in that case, recognize an artist association's right to interfere in transactions affecting copyrights held by its members. However, that decision does highlight the distinction that exists in the world of artistic creation between agreements pertaining to existing works and those dealing with commissioned works.

[97] In Quebec, there are two statutes governing the professional status of artists. The one at issue in *Desputeaux* was the *Act respecting the Professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, R.S.Q., c. S-32.01 (commonly called "Bill 78"). The other is the *Act respecting the Professional status and conditions of engagement of performing, recording and film artists*, R.S.Q., c. S-32.1 (commonly called "Bill 90").

[98] In *Writers Guild of Canada AZ-95149605*, the Commission de reconnaissance des associations d'artistes et de producteurs du Québec (the Commission) was asked to define the respective scope of these statutes (*Writers Guild of Canada*, pp. 13-19):

> [TRANSLATION]
> In the context of Bill 90, producers retain the services of artists, on the basis of their talents, for the purpose of creating works with them. Thus, when a producer retains the services of an artist, there is no work yet in existence, since the work materializes over time as various provisions of services are completed . . .
>
> In the context of Bill 78, artists create their works on their own initiative; nobody retains their services for this. . . . [T]his is a purely commercial relationship, the concept of provision of services being completely absent from Bill 78, in letter and spirit.
>
> [Emphasis by SODRAC.]

[99] This distinction is equally fundamental in the present case. Where a scale agreements pertains to commissioned works ("œuvres commandées", to use the French phrase), no copyright is

involved since the work does not exist at the time the agreement is signed. Consequently, the "provision of … services" required to realize the commissioned work and the rights of use that an artist may assign with respect to the contemplated work do not entail any possible conflict with the *Copyright Act*. I note that the provision of artists services to produce commissioned works is a common practice in the art world, as is evidenced by Bill 90 and by the Act itself which applies to specified producers that "engage one or more artists to provide an artistic production" (paragraph 6(2)(*a*) of the Act).

[100] Conflicts with the *Copyright Act* only arise where one seeks to extend scale agreements to works that are created otherwise than in the context of a commission, as the Tribunal did in this case.

[101] CARFAC/RAAV argue that there is no conflict with the *Copyright Act*, since the Tribunal only intended to impose [TRANSLATION] "minimum standards" in the form of mandatory royalties (CARFAC/RAAV's memorandum, paras. 16 and 49). I agree with SODRAC when it says that any mandatory royalty, even a minimum one, is central to copyright (SODRAC's memorandum, para. 46). Requiring artists to charge a minimum royalty for the use of their work bares consequences which are as significant as imposing any royalty since it means that the artists concerned cannot ask for less, even if this is the only way in which they can usefully exploit their copyright.

[102] In extending the application of the Act to works made otherwise than in the context of a commission, the Tribunal distorted the words used by Parliament. No linguistic gymnastics can justify the assertion that the assignment of a copyright is a "provision of artists' services".

[103] A copyright is not a "service" under any acceptation, be it at civil law, at common law, under the *Copyright Act*, or according to the plain meaning of the word be it in English or French. A copyright consists of rights recognized and protected by law owned by an artist in relation to his or her work (section 3 of the *Copyright Act*). The result is that the assignment of such rights gives rise to a transfer of property. No one would think of describing a transfer of property as a "provision of … services".

[104] The analogy drawn by my colleague with a hotel or a car rental agency in order to justify the reading made by the Tribunal rests on the fact that the services being provided in such cases also involve a license to use property *i.e.* the premises and the room in the case of the hotel and the car in the case of the car rental agency. The difficulty in the present case arises because the license given by an artist to a producer to use existing works is not linked to any service.

[105] The importance of this distinction can be illustrated by the wording of section 5 which defines a scale agreement as one which sets out "minimum terms and conditions for the provision of artists' services and other related matters;" [My Emphasis.] As SODRAC has pointed out, the emphasized words give rise to the residual question which follows (SODRAC's memorandum, para. 78):

> [TRANSLATION]
> The question which arises here relates to the inclusion in the scale agreement of provisions pertaining solely to the use of a work that is not the result of a provision of services. In other words, can a scale agreement be constituted by residual questions, without addressing the main question (the provision of services).

[106] To ask the question is to answer it. There is nothing to which the assignment of a right to use a work can relate unless the assignment is made in the context of a "provision of … services", which is not the case in the matter before us.

[107] In my respectful view, there is no rational basis for the proposition that absent such services (Tribunal Reasons at paragraph 103):

> … the right to use an existing work is a service that the artist who holds the copyright . . . may provide to a producer. . .
>
> [My emphasis.]

[108] The phrase "provision of … services" has a plain meaning which when read contextually contemplates the creation of artistic works for specified producers. Of particular significance in this regard is paragraph 6(2)(*a*) which sets out the scope of application of the part of the Act with which we are concerned:

Application	Application
6.(1) This Part is binding on Her Majesty in right of Canada	6.(1) La présente partie lie Sa Majesté du chef du Canada.
(2) This Part applies	(2) La présente partie s'applique :
(*a*) to the following organizations that engage one or more artists to provide an artistic production, namely,	*a*) aux institutions fédérales qui figurent à l'annexe I de la *Loi sur l'accès à l'information* ou à l'annexe de la *Loi sur la protection des renseignements personnels*, ou sont désignées par règlement, ainsi qu'aux entreprises de radiodiffusion – distribution et programmation comprises – relevant de la compétence du Conseil de la
(i) government institutions listed in Schedule 1 of the *Access to Information Act* or the schedule to the *Privacy Act*, or prescribed	

	by regulation, and	radiodiffusion et des
(ii)	broadcasting undertakings, including a distribution or programming undertaking, under the jurisdiction of the Canadian Radio-television and Telecommunications Commission; and	télécommunications canadiennes qui retiennent les services d'un ou plusieurs artistes en vue d'obtenir une prestation;

[My emphasis.]

[109] When read in context, it can be seen that a "scale agreement" contemplates the imposition of minimum conditions for the provision of such services and for compensation for the use of the works thereby created, including their public lending (Section 2(*e*)). Significantly, these goals can be attained without giving rise to any conflict with the rights protected by the *Copyright* Act.

[110] As noted, the Tribunal attempted to defuse the conflict which arises from its proposed interpretation by declaring that its decision is not binding on artists who are represented by a collective society. However, copyrights held by artists who are not so represented are equally worthy of protection and the conflict, insofar as they are concerned, remains whole when regard is had to subsection 13(4) of the *Copyright Act*.

[111] According to this provision, an assignment of copyright cannot take place without written authorization. It is common ground that CARFAC/RAAV have not been provided with a written authorization by the artists on whose behalf they purport to act in matters involving copyright.

[112] According to CARFAC/RAAV, it was open to the Tribunal to ignore this requirement. They argue that the implementation of the Act had the implicit effect of repealing this requirement, and presumably any other conflicting provision of the *Copyright Act*. In support for this argument, CARFAC/RAAV, rely on the position taken by the Tribunal in its earlier decision (Decision No 28, paras. 49 to 53), to the effect that the Act is a sort of "human rights legislation" comparable to those at issue in *Canada (Attorney General) v. Druken*, [1988] F.C.J. No. 709 and *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 which take precedence when conflicts arise (CARFAC/RAAV's memorandum, para. 40).

[113] However, as SODRAC has demonstrated, this argument cannot withstand scrutiny (SODRAC's memorandum, paras. 49 to 55). It suffices to say that the labour relations statutes to which the Act should be compared according to CARFAC/RAAV have never been recognized as quasi-constitutional legislation and the Act does not advance any of the fundamental principles that are the hallmark of so-called quasi-constitutional statutes. In short, nothing suggests that the Act should be read as repealing the requirements of conflicting statutes especially since in our case it is entirely possible to construe the Act in a way which avoids such conflicts.

[114] Indeed, the fact that no harmonization provision has been enacted is testimony to the fact that no conflict was envisaged. It can be safely assumed that such measures would be found in the Act or the *Copyright Act* or both if the two statutes were intended to deal with copyrights as was held by the Tribunal.

[115] I therefore conclude that matters relating to copyright, including the imposition of minimum fees for the use of existing works, do not come within the parameters of the Act and that therefore, the Tribunal had no authority to compel the parties to negotiate such matters. Beyond this, the National Gallery could not validly agree to a scale agreement affecting copyrights. It follows that the National Gallery's refusal to pursue negotiations relating to these matters cannot be attributed to a failure to negotiate in good faith.

[116] I would therefore allow the application for judicial and set aside the decision of the Tribunal holding that the National Gallery of Canada failed to negotiate in good faith, the whole with costs.

"Marc Noël"

J.A.

"I agree
Johanne Trude J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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