ARTS COMPANIES SHOULD EXAMINE CONTRACTUAL RELATIONSHIPS

Ottawa, November 15, 2002 - The Canadian Conference of the Arts continues its dialogue with national arts service organizations, the Canada Customs and Revenue Agency, the Department of Canadian Heritage, and other stakeholders, to resolve the perceived move by CCRA to increasingly view performing arts companies as employers. (See CCA Bulletin 31/02, dated October 2, 2002.)

During these deliberations, some concern has been expressed regarding the actual contracts under which many of the artists are hired. It would appear that these sometimes inadvertently give the appearance of a contract **of** services (ie: an employer/employee relationship) when in fact the intent is to have a contract **for** services. In addition, where the artists themselves have been confused about which type of contract they are engaged under, applications for EI by such artists have triggered many of the audits of performing arts companies, with the unfortunate result that many such companies have been deemed employers rather than engagers.

According to a recent article in the Globe and Mail ("When is a Freelance on Staff?", November 13), CCRA is currently "conducting about 80,000 investigations a year into freelance working arrangements to determine if they're really employer/employee relationships.... most result after a contract ends and the person tries to collect employment insurance benefits. Self-employed workers don't make EI contributions and therefore aren't eligible to collect such benefits - a fact that some aren't aware of or are trying to fight." The article further states that CCRA will be hiring "6000 new employees over the next few years, many of whom will be in tax collection" - an indication that "the independent contractor relationship will come under even closer scrutiny".

It is incumbent on companies to ensure the artists they engage are fully aware of the type of contract they have signed: a contract **of** services (employer/employee) or a contract **for** services (engager/independent contractor). With a contract of services, there is the possibility of access to EI provided the artist has worked enough hours to qualify. Under a contract for services, no such application should be considered. Further examination of contracts is being done by lawyers at the present time, under the aegis of a group of major performing arts companies, and CCA is hopeful that this exercise will provide information of use to all arts organizations in the near future.

What can companies do to ensure their contracts set out the conditions clearly, and that the language reflects the true relationship between company and artist? The following is taken from a summary provided by the law firm of Sack Goldblatt Mitchell which was contracted by the CCA:

"The more control the cultural organization exerts over the individuals who render services to it, and the more rules and benefits are stipulated by the organization representing the individuals, the more likely it is that the CCRA or the courts will find that the relationship is properly characterized as an employer/employee relationship, rather than an engager/independent contractor relationship.

For example, the more that the cultural organization determines the role to be played by the individuals, establishes the rehearsal schedule, requires attendance, requires the individuals to perform the services personally (as opposed to accepting replacements provided by the individuals), prohibits engagements with other employers during the term of the engagement (expressly or by implication), provides benefit plans, sick leave or long-term disability plans, and provides for vacation, etc., the more likely it is ... that they will be found to be employers of employees, notwithstanding any agreement to the contrary between the organizations and the individuals who are rendering the services, and notwithstanding the fact that the services are rendered through the medium of a corporation owned by the individual."

The summary goes on to outline a few ways performing arts companies could proceed:

•Continue with the status quo and await the outcome of the Royal Winnipeg Ballet appeal (which runs the risk of accumulating increasing liability should they ultimately be determined to be employers of employees).

•Approach CCRA for "voluntary compliance" in the hope that CCRA will be more lenient in accessing the liabilities.
•Restructure their relationships with artists so that they are clearly engager/ independent contractor relationships (which runs the risk of sacrificing a considerable degree of control over the provision of services).

Regardless of which route performing arts companies take, and there may be other options available, CCA hopes all will join in the effort to lobby for change, either at the legislative or regulatory levels, in how CCRA views artists. We are hopeful that a consensus on direction with the various stakeholders will be reached in the near future, and we will keep our members informed.

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