ALL NOT QUIET ON THE STATUS FRONT

Ottawa, October 2, 2002 - There is much movement around issues relating to artists employment status, and as two particular issues are moving into the public eye, CCA members will require the following update

Notable happenings this year include:

- Passage of enabling legislation for an artists' equity act in the Province of Saskatchewan
- Review of the federal Status of the Artist Act as required by the legislation.
- A move within the Canada Customs and Revenue Agency (CCRA) to re-examine the self-employment status of many of Canada's artists

To begin with the last bullet, CCRA is not going on a witch hunt but has responded to claims for Employment Insurance by individual artists (mainly musicians) which automatically sets off an audit process. There was also a request from the arts community for clarity about the position of artists who work for performing arts companies.

In 1999,the Royal Winnipeg Ballet requested a determination from the EI eligibility section of CCRA concerning the status of the dancers they engaged. CCRA agreed to the request and examined the situations of three dancers in the company (who volunteered to participate as examples of the different circumstances of the corps de ballet, soloists and principal dancers. CCRA has now provided its assessment - and has ruled that all three are in fact employees of the company, rather than independent contractors. Extrapolating from this ruling would lead to the conclusion that the other dancers are also employees, and the same might apply to other dance companies. The main reason for this decision, as outlined in the CCRA ruling, is that the RWB exercised control over the dancers and their work by:

- Determining which ballets were performed, and establishing the schedules for rehearsals and performances
- Determining which roles would be performed by whom
- Providing access to coverage for the dancers through various benefit plans

A further reason given was that the dancers cannot accept other engagements without the written consent of the company. Canadian Actors' Equity Association (which represents the RWB dancers) is contemplating an appeal of the decision on behalf of its members.

This clash between the cultural community and CCRA has been brewing for some time. The Canadian Conference of the Arts has brought together a working group of representatives of these organizations, and has been convening discussions among officials from CCRA and DCH, and leaders of arts organizations representing both performing arts companies and labour groups. There is no unified position on the issue and, in fact, many organizations have internal conflicts as some of their members value independent status while others would prefer to be employees. One thing is clear, there is a spectrum of relationships between artists and companies ranging from symphony musicians and dancers employed by large companies who are frequently in employee relationships, right across to actors hired on short term contracts for specific roles.

Earlier this year the CCA commissioned an examination by the firm of Sack, Goldblatt and Mitchell into the case law surrounding the tests of control. One of the conclusions reached is that "the discussion of how the CCRA applies those criteria to the arts community ... is much more contentious .... [T]he significance of any one of these factors, such as the existence of a collective agreement, for example, depends on the context in which it appears, and the presence or absence of other factors.... Different constituencies served by the Canadian Conference of the Arts, may present very different contexts which may necessitate different legal conclusions from one sector to another. For example, the context and practices of a small modern dance company may be very different from a large symphony or a rock music tour, or the provision of

graphic arts services. Each sector may need to be examined individually to determine the similarities and differences."
It comes as no surprise to learn that the four tests of control used by CCRA to determine employment status do not work well in the context of the cultural sector. To quote from a CCRA document: "... even if the employee provides her own musical instrument, clothing, make-up and other items, these elements alone are not decisive in order to assert that the employee is self-employed". Collective agreements are seen by CCRA as an indicator of an employer/employee relationship, and duration of a contract is not necessarily seen as a determinant. However, the federal Status of the Artist Act establishes that artists' organizations can be certified to bargain on their behalf even though they are independent contractors.
Nearly all arts organizations have Boards of Directors whose members could be held personally responsible for EI and CPP liabilities should the organizations have to change their relationship with the artists and not have sufficient funds to cover back contributions. However, CCRA only seems to resort to such extreme measures in circumstances where fraud or serious negligence are found, rather than in instances where a board and management honestly believed they were contracting artists appropriately.
So where do things stand?

- CCA continues its dialogue with the arts organizations, CCRA , DCH and HRDC in order to find some solution.
- The working group convened by the CCA is looking into possible models of self- employment in other sectors of the economy (ie: taxi drivers and hairdressers are considered to be employees for the purposes of EI and CPP but independent contractors for the purposes of income tax).
- Performing arts groups across the country are conducting internal audits to determine whether they could be viewed as employers or not. Other groups of people which have traditionally been deemed to be self-employed are being examined: designers (costume and lighting); stage managers and assistants; props, make-up
  and wig specialists; accompanists; etc.
- Some large companies whose boards know that they will be liable for the employer's share of EI and CPP deductions should CCRA rule that they are in an employer- employee relationship with the artists, are moving towards "voluntary compliance" (to use CCRA terminology).
- At DCH, Arts Policy officials together with a steering committee from the Canada Council and the CCA, have commissioned a study by Ernst and Young into the economic impact should a large number of arts organizations be deemed employers. The survey is still in the field - anticipated completion date is mid-October.
- The evaluative review of the Status of the Artist Act by Prairie Research Associates has been delivered to the Arts Policy unit and must now work its way through government to cabinet. Officials at DCH are responsible for co-ordinating the release of the review and its recommendations. The proper procedure for
  this is being discussed.
- Equity is proceeding with its challenge of the CCRA ruling on the Royal Winnipeg Ballet.
- Senator Tommy Banks is calling a group of arts labour organization to a meeting to discuss possible political action on the issue of self-employed status.

The above list sets out the several inter-related issues and the work that's going ahead, but the solutions are not obvious yet. At the 2000 Chalmers conference, Arthur Drache, the lawyer with the longest memory of these issues, proposed a simple system whereby artists could either opt into an employee benefit plan, or opt for independent status (see Bulletin 44/00, dated December 1, 2000). Although there are reasons why arts companies, labour organizations, and tax collectors find this idea problematic, it would be a neat and elegant solution. CCA will keep its members informed on all fronts as things progress.

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