

SELF-EMPLOYED WORKERS AND COLLECTIVE BARGAINING

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Do self-employed workers in Canada have collective bargaining rights? Yes—some do! This may be a surprise to many readers. Since 1987, self-employed artists in Quebec have the legal right to collective bargaining.¹ Similarly, since the federal Status of the Artist Act was proclaimed in 1995, self-employed artists engaged by certain producers in the federal jurisdiction have a legal framework for collective bargaining. This article describes how the collective bargaining regime put in place by the federal Status of the Artist Act works, how this unique regime came into being and what has happened in collective bargaining under this regime since its introduction.

Labour Relations and the *Status of the Artist Act*

The *Status of the Artist Act* grants collective bargaining rights to the following categories of artists:

- authors within the meaning of the *Copyright Act* (such as writers, photographers and music composers);
- performers (such as actors, musicians and singers);
- directors; and
- other professionals who contribute to the creation of a production.²

The *Act* entitles these artists to form associations to represent them in their dealings with the following producers in the federal jurisdiction:

- broadcasting undertakings under the jurisdiction of the Canadian Radio-television and Telecommunications Commission;
- federal government departments; and
- most federal agencies and crown corporations (such as the National Film Board and national museums).

The Canadian Artists and Producers Professional Relations Tribunal is an independent adjudicative agency, established by the *Status of the Artist Act*, to administer the professional relations provisions of the *Act*. In this context, professional relations really means labour relations. Essentially, the Tribunal has the following tasks:

- to define the sectors of cultural activity that are suitable for collective bargaining;
- to certify associations to represent independent entrepreneurs working in these sectors;
- to hear and decide complaints of unfair practices filed by artists, artists' associations and producers; and
- to prescribe appropriate remedies for contraventions of the *Act*.

Certification of an artists' association by the Tribunal gives that association the exclusive right to negotiate with producers in the defined sector for the purpose of entering into scale agreements. A scale agreement is

¹ *Loi sur le Statut professionnel et les conditions d'engagement des artistes de la scène, du disque et du cinéma* (L.R.Q. c.S-32.1).

² The *Act* provides for additional categories of professional artists to be prescribed by regulation.

slightly different from the usual collective bargaining agreement in that it specifies the **minimum** terms and conditions to which a producer must adhere when engaging or commissioning work from a self-employed professional artist in a particular sector. This means that negotiations for a contract of engagement between a producer and an individual artist start at the minimum terms and conditions set by the scale agreement, and an artist may negotiate any terms above these minimums.

In general, the collective bargaining provisions of the *Status of the Artist Act* are fashioned after those in the *Canada Labour Code*. There are provisions regarding a certification procedure, notice to bargain, compulsory dues check-off, pressure tactics, appointment of a mediator by the Minister of Labour, revocation of certification, successor rights and obligations, unfair labour practices, and offences and penalties, etc.

There are some notable differences with the *Canada Labour Code*. For example, there is no provision for conciliation under the *Status of the Artist Act*. In the latter, pressure tactics by artists or producers may begin 30 days after expiry of a scale agreement or, in the case of a new certification, six months after certification. Another significant difference lies in the determination of the representativeness of an applicant for certification. The test that the Tribunal must apply in this matter is whether the applicant artists' association is the "most representative" of artists working in the sector. The Tribunal has complete latitude as to how it will make this determination, subject to a statutory condition that it must hear the views of artists and artists' associations affected by the application who wish to be heard. On the other hand, the Canada Industrial Relations Board (CIRB), in determining representativeness, must satisfy itself that a majority of the employees in a bargaining unit wish to have the applicant trade union represent them.

There are also some differences between the operation of the Tribunal and that of traditional labour boards. For example, the nature of the hearings conducted by the Tribunal in certification matters is somewhat different. At the time of receipt of an application for certification by the Tribunal, the parties involved may still be largely undetermined since more than one or perhaps many producers may be in the desired sector. In this context, the Tribunal's proceedings are more like a public inquiry – they are investigative. The Tribunal must decide what evidence it wants to hear

and ensure that this evidence is sought out and made available to everyone whose interests may be affected by an eventual decision. It may well be that at some point, after all of the affected parties have been identified, the proceedings will take on an adversarial nature, but this is not the model which applies at the outset of the process. On the other hand, because certifications under the provincial and federal labour codes usually involve one employer and one or more applicants for certification, the proceedings are generally treated as adversarial. Each party presents evidence and arguments in favour of its position. In this model, it is not the normal function of the decision-maker to seek out evidence on its own initiative.

Historical Background of the *Status of the Artist Act*

A number of key reports and events on both the domestic and international levels, dealing with the lack of sufficient recognition of artists and their poor living and working conditions, led to the passing of this legislation in Canada. In 1980, delegates at the UNESCO General Conference in Belgrade adopted the *Recommendation on the Status of the Artist* which included a recommendation that countries implement the right to collective bargaining for artists. Following Canada's signature of this recommendation, a number of studies were undertaken by government and private sector groups in an effort to find a means to enhance the socio-economic status of professional artists in Canada. Associations representing a number of artistic disciplines made representations to federal and provincial governments. A task force report prepared by Paul Siren and Gratien G  linas in 1986 addressed the precarious economic situation of Canadian artists and recommended that independent artists be given access to collective bargaining rights such as those that existed for individuals in an employer-employee relationship.

Through voluntary recognition arrangements, artists' associations such as the Union des Artistes, the Alliance of Canadian Cinema, Television and Radio Artists, Canadian Actors' Equity Association and the American Federation of Musicians of the United States and Canada had been successful in negotiating scale agreements with some producers that established basic protections for their freelance members. However, without a statutory basis for these voluntary arrangements, artists' associations had no legal ability to require producers to bargain in good faith.

In 1987, Quebec enacted legislation that created the "Commission de reconnaissance des associations d'artistes"³ and established a regime for legal recognition of artists' associations. In 1989, a unanimous report of the House of Commons Standing Committee on Communications and Culture recommended the enactment of federal legislation recognizing the status of the artist. These events led to the development and passage by Parliament of the *Status of the Artist Act*, which received Royal Assent in June 1992 and was brought fully into force in May 1995.

Canada is currently the only country in the world which has legislation granting collective bargaining rights to freelance artists.

Creation of the Canadian Artists and Producers Professional Relations Tribunal

During the drafting of the Status of the Artist Bill, it had to be decided if the administrator of the new regime would be the Canada Industrial Relations Board (CIRB), which was responsible for administering the *Canada Labour Code* at the time, or whether it would be a new board, either autonomous from the CIRB or subordinate to the CIRB. It was decided for very specific reasons that there would be a new Tribunal, autonomous from the CIRB.

This issue was intensely discussed in the hearings of the Standing Committee on Communications and Culture on the Bill. In introducing the Bill for Second Reading, the Honourable Bernard Valcourt stated it thus: "The Bill provides for the creation of a tribunal parallel in structure to the Canada Labour Relations Board which is designed to be sensitive to the specific needs of Canadian artists." During the hearings, government officials from the Communications and Labour departments, artists and also one of the producers spoke in favour of the creation of a separate board. It was pointed out that the new board would be dealing with self-employed workers who work for several engagers and who have different characteristics from employees working for one employer. Also, labour relations in the artistic community have some differences from those in the economy's industrial sectors. In the former, labour relations were described as being less adversarial, in part due to the fact that

producers and artists alike are involved in the creative process and to some extent they can change hats. For example, a producer may become a performer at some time and a writer at another time.

Composition of the Tribunal

The Tribunal is composed of a Chairperson, a Vice-Chairperson and from two to four full-time or part-time members. They are appointed by the Governor in Council, on the recommendation of the Minister of Labour in consultation with the Minister of Canadian Heritage. Currently the Tribunal has a Chairperson, Vice-Chairperson and three other members, all part-time. Since the Tribunal's inception, its members have generally come from the cultural community with some having experience as government executives in cultural affairs. The Tribunal is a federal government agency which reports to Parliament through the Minister of Labour. The staff of the Tribunal is very small, numbering about ten, headed by an Executive Director. The Tribunal contracts-out for most of its corporate services, often with other federal government departments.

Collective Bargaining Activity under the Status of the Artist Act

Since its first decision in January 1996, the Canadian Artists and Producers Professional Relations Tribunal has defined 20 cultural sectors and has certified artists' associations to represent these sectors. In most of the cases, artists' associations other than the applicant served notice of interest in intervening, mainly due to potential conflicts in jurisdiction. In most of these cases, the artists' associations themselves, encouraged by the Tribunal, reached agreements on jurisdiction before the hearing took place. Oral hearings were held in all certification cases except one. In addition, a representation vote was held in one case.

Seven associations which have received certification had already negotiated scale agreements on a voluntary basis before the status of the artist legislation was passed and they have negotiated renewals of some of these agreements. As well, three associations have negotiated first agreements, all with producers in the broadcasting sector.

³ "La Commission de reconnaissance des associations d'artistes et des associations de producteurs" (as it is now called) is the body responsible for administering Quebec's status of the artist legislation.

As in other jurisdictions, negotiations for a first scale agreement are taking time. Notices to bargain have been served by eight artists' associations for first agreements with various producers including the specialty television channels and federal government institutions.

Impact of the *Status of the Artist Act* (collective bargaining regime)

Labour relations and collective bargaining involving self-employed workers differ from what they are traditionally because of the nature of the work itself. In the case of the status of the artist regime described here, each time an artist is engaged by a producer, a new contract is negotiated between the two parties for that particular production. Furthermore, not only can artists work for various producers, they may also do different kinds of work and therefore belong to more than one artists' association. For example, a musician may also be a songwriter and a singer, and therefore belong to two or three different associations.

Although scale agreements may deal with some of the same issues as are found in collective agreements between employees and employers, such as hours of work with respect to actors, some issues are quite different. For example, a major issue for many artists engaged by broadcasters is the remuneration they will receive from the future sale of television and radio programs they are associated with, either as writers, musicians or actors.

The *Status of the Artist Act* was passed to give recognition to artists and to grant them a means to improve their economic situation. As soon as the Tribunal became fully operational, many artists' associations submitted applications for certification. The Tribunal is required by law to "proceed as informally and expeditiously as the circumstances and considerations of fairness permit." To comply with this requirement, the

Tribunal designed its procedures to be straightforward and usable by laypersons. The applications have been dealt with in a timely manner, with certifications granted on average within eight months of receipt of the completed application. At present, an estimated 50 to 75 per cent of the legislated jurisdiction is represented by certified artists' associations.

As explained in its Departmental Performance Report for 1997-1998⁴, the Tribunal will start to use surveys and other means in the near future to gather feedback from the artists' associations and producers on the extent to which they are satisfied with the collective bargaining regime and the Tribunal's administration. The *Act* requires that a formal evaluation of the labour relations provisions be carried out by the Minister of Canadian Heritage in the seventh year following proclamation.

Apart from the legal requirements to assess the effectiveness of this labour relations regime, there is growing interest in the operation of this unique regime on the part of policy makers, academics and others. The number of self-employed workers has been growing rapidly, particularly during the 1990s when self-employment accounted for three-quarters of the growth in total employment. For many of these workers, there has been a deterioration in job security, working conditions and financial stability. In its report to the federal Labour Minister in 1996, the Advisory Committee on the Changing Workplace recommended looking at sector-based models, such as the status of the artist regime, to those in search of new modes of representation for workers in the changing economy. In 1998, the federal Minister of Labour at the time, the Honourable Lawrence MacAulay, made mention of this labour relations regime in his presentation to the Inter-American Conference of Ministers of Labour. In addressing the necessity to adopt new approaches in response to globalization and the changing workplace, he stated that the *Status of the Artist Act* is an innovative model that can be applied to independent workers.

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⁴ As for all government departments and agencies, the Tribunal is required to submit a Departmental Performance Report annually. The Report is accessible on the Tribunal's website or a copy can be obtained free of charge by contacting the Tribunal.