



Canadian Artists and Producers
Professional Relations Tribunal

Tribunal canadien des relations
professionnelles artistes-producteurs

Ottawa, February 16, 2012

File: 1330-08-001

Decision No. 53

In the matter of a complaint pursuant to paragraph 32(a) of the Status of the Artist Act involving the Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Le regroupement des artistes en arts visuels du Québec (RAAV) against the National Gallery of Canada (NGC)

Decision of the Tribunal: The Tribunal allows the complaint and issues a declaration that the National Gallery of Canada breached its duty to bargain in good faith pursuant paragraph 32(a) of the Status of the Artist Act.

Place of Hearing: Ottawa, Ontario

Dates of Hearing: October 26 and 27, 2010
December 2 and 3, 2010
June 20 and 21, 2011
July 6 and 7, 2011
October 26, 2011

Quorum: Ms. Elaine Kierans, Acting Chairperson
Ms. Lyse Lemieux, Member
Ms. Marie-Josée Castonguay, Member

Appearances: Mr. David Yazbeck, Raven, Cameron, Ballantyne & Yazbeck, for the Canadian Artists' Representation/Le Front des artistes canadiens and Le regroupement des artistes en arts visuels du Québec
Mr. Guy P. Dancosse, Lapointe, Rosenstein, Marchand, Melançon for the National Gallery of Canada
Ms. Colette Matteau, Matteau Poirier avocats Inc. for the Intervenor, La Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) inc.

Canada

Reasons for Decision

1330-08-001: In the matter of a complaint filed pursuant to paragraph 32(a) of the *Status of the Artist Act* involving the Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Le regroupement des artistes en arts visuels du Québec (RAAV) against the National Gallery of Canada (NGC)

Introduction

[1] On April 22, 2008, The Canadian Artists' Representation/Le Front des artistes canadiens (hereinafter, CARFAC) and Le Regroupement des artistes en arts visuels du Québec (hereinafter, RAAV) jointly filed a complaint with the Canadian Artists and Producers Professional Relations Tribunal (hereinafter, the Tribunal) alleging that the National Gallery of Canada (hereinafter, the NGC) had failed to bargain in good faith in accordance with paragraph 32(a) of the *Status of the Artist Act* (hereinafter, the *Act*). CARFAC/RAAV submit that the NGC's refusal to discuss or bargain issues related to copyright has led the negotiations to an impasse.

[2] On May 15, 2008 the NGC provided a response to the complaint. The NGC denied CARFAC/RAAV's allegations and requested that the Tribunal dismiss the complaint.

[3] On June 6, 2008, CARFAC/RAAV replied to the NGC's response.

[4] On July 21, 2008, the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (hereinafter, SODRAC) filed a motion to intervene in the proceeding pursuant to subsection 19(3) of the *Act*.

[5] In accordance with the Tribunal's procedures, CARFAC/RAAV, as well as the NGC, were provided with an opportunity to make comments on SODRAC's application for leave to intervene. On August 15, 2008, CARFAC/RAAV replied to SODRAC's leave to intervene.

[6] SODRAC was then allowed the opportunity to reply, which they did on August 27, 2008.

[7] On September 5, 2008, after considering the written submissions, the Tribunal granted SODRAC a limited intervenor status in the proceeding.

Background

[8] CARFAC and RAAV are artists' associations, as defined under the Act, which were certified by the Tribunal to represent a sector composed of visual artists in Canada.

[9] On December 31, 1998 CARFAC was issued a Certification which was amended on December 9, 2003. The Certification Order states that "*The Canadian Artists and Producers Professional Relations Tribunal hereby grants to the Canadian Artists Representation/Le Front des artistes canadiens (CARFAC) certification to represent a sector composed of all independent professional visual and media artists in Canada who are authors of original artistic works of research or expression in the form of painting, sculpture, printmaking, engraving, drawing, installation, performance art, craft-based media, textile art, fine art film and video art, fine art photography or any other form of expression of the same type engaged by a producer subject to the Act, excluding:*

- a. *artists covered by the certification granted to the Conseil des métiers d'art du Québec by the Canadian Artists and Producers Professional Relations Tribunal on June 4, 1997 as amended June 26, 1998;*
- b. *artists covered by the certification granted to the Regroupement des artistes en arts visuels du Québec by the Canadian Artists and Producers Professional Relations Tribunal on April 15, 1997;*
- c. *artists covered by the certification granted to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996;*
- d. *artists covered by the certification granted to the Association des réalisateurs et réalisatrices du Québec by the Canadian Artists and Producers Professional Relations Tribunal on December 30, 1997; and*
- e. *artists covered by the certification granted to the Writers Guild of Canada by the Canadian Artists and Producers Professional Relations Tribunal on June 25, 1996; and*
- f. *artists who identify themselves as craftspeople rather than visual artists."*

[10] RAAV was issued a Certification on April 15, 1997. The Certification Order states that "*The Canadian Artists and Producers Professional Relations Tribunal hereby grants to Le Regroupement des artistes en arts visuels du Québec certification to represent a sector composed of all professional independent contractors in the field of visual arts in Québec who are authors of original artistic works, either in single copy or a limited number of copies, that are commissioned or distributed by a producer subject to the Act and expressed in the form of painting, sculpture, engraving,*

drawing, illustration, photography, textile art, installation, performance art, video art or any other similar form of expression, with the exception of:

- a. independent artists working in the fields of arts and crafts, film or audio-visual media;*
- b. commercial photographers and commercial illustrators within the scope of the certification issued to the Canadian Association of Photographers and Illustrators in Communications by the Canadian Artists and Producers Professional Relations Tribunal on April 26, 1996 and subject to the agreement between the Regroupement des artistes en arts visuels du Québec and Canadian Association of Photographers and Illustrators in Communications dated March 20, 1997;*
- c. artists within the scope of the certification issued to the Union des Artistes by the Canadian Artists and Producers Professional Relations Tribunal on August 29, 1996 and subject to the agreement between the Regroupement des artistes en arts visuels du Québec and the Union des Artistes dated March 20, 1997;*
- d. artists who practice the art of set design or costume design for theatrical purposes.”*

[11] The NGC is one of Canada’s premier art institutions, which has the mandate to develop, maintain, and make known, throughout Canada and internationally, a collection of works of art, both historic and contemporary, with special, but not exclusive, reference to Canada, and to further knowledge, understanding, and enjoyment of art in general among all Canadians. The NGC was created in 1860 and became a federal crown agency in 1990 when the Museums Act was proclaimed.

[12] On October 25, 2010, the parties filed an Agreed Statement of Facts with the Tribunal which is attached¹ to this decision. For the purpose of easy reference, the pertinent facts are summarized as follows:

- January 7, 2002, RAAV served the NGC with a notice to bargain.
- April 23, 2003, CARFAC served the NGC with a notice to bargain.
- September 4, 2003, CARFAC/RAAV informed the NGC that they will negotiate jointly.
- December 1, 2003, CARFAC/RAAV met with the NGC to begin negotiations.
- December 9, 2003, the Tribunal rendered a decision amending CARFAC’s certification by expanding its bargaining scope from visual and media artists “commissioned” by a producer subject to the Act, to visual and media artists

¹ See Appendix for the Agreed Statement of Facts.

“engaged” by a producer subject to the Act (The NGC participated as an intervenor in this case).

- February 12, 2004, the NGC informed CARFAC/RAAV that it was seeking a legal opinion on the Act and its implications for the NGC, as well as looking into forming a Federal Producers’ Association with other museums in Canada.
- November 5, 2004, the NGC informed CARFAC/RAAV that they had met with other museums and that no formal agreement among the producers had yet been reached. The NGC agreed, in the meantime, to carry on negotiations with CARFAC/RAAV.
- The two parties met on the following dates:
 - January 7, 2005;
 - February 23, 24, 2005;
 - March 17, 18, 2005;
 - April 21, 22, 2005;
 - October 27, 28, 2005;
 - December 15, 16, 2005;
 - March 13, 14, 2006;
 - October 26, 27, 2006; and
 - October 29, 30, 31, 2007.
- After having met on October 27 and 28, 2005, the parties signed a Collective Bargaining Protocol.
- March 13 and 14, 2006, the parties met and discussed reproduction rights and licences for reproduction rights.
- August 6, 2006, CARFAC/RAAV sent comments to the NGC on a draft scale agreement and exhibition contract.
- October 26, 2006, the NGC agreed to discuss a “bundle proposal” for reproduction, without prejudice to rights to any eventual decision regarding this issue. The NGC raised CAPPRT Decisions 050 and 051 for discussion in relation to the relationship between CARFAC/RAAV and art collectives.
- October 26 and 27, 2006 the parties met, and the NGC discussed reproduction and internet use of artists’ works, along with other issues.
- December 11, 2006, the NGC informed CARFAC/RAAV that they were seeking legal advice.
- May 23, 2007, the NGC informed CARFAC/RAAV that Guy Dancosse then of Gowling Lafleur Henderson LLP (hereinafter, Gowlings), Karen Colby-Stothart and Marie-Claude Rousseau had taken over from Daniel Amadei (who had left the NGC) in the negotiation process.
- July 9, 2007, Florence Lucas of Gowlings sent a legal opinion letter (hereinafter, the Legal Opinion) to Marie-Claude Rousseau and Karen Colby-Stothart.
- Later in July 2007 the Legal Opinion was sent to CARFAC/RAAV.
- October 29-31, 2007 the parties met again. During the meetings, the NGC invited Gilles Daigle of Gowlings to explain the Legal Opinion.
- October 30, 2007, the NGC provided a revised scale agreement to CARFAC/RAAV.

- October 31, 2007, CARFAC/RAAV responded to the revised scale agreement by reading out a prepared written statement which explained that CARFAC/RAAV considered the parties to be “at an impasse”.
- October 31, 2007, the NGC’s position was communicated at the bargaining table by Guy Dancosse and was recorded in a written statement which was given to CARFAC/RAAV’s bargaining committee at the table.
- January 29, 2008, the NGC proposed discussing a non-binding CAMDO-type agreement with CARFAC/RAAV. The NGC also stated “we can discuss binding exhibition rights fee schedules for temporary exhibition only for the artists you specifically represent in compliance with the *Copyright Legislation*”. The NGC went on to state, “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”.
- March 31, 2008, CARFAC/RAAV filed with the Tribunal a complaint alleging failure to bargain in good faith in accordance with subsection 32(a) of the *Act*.

Positions of the Parties

Overview of CARFAC/RAAV’s Position

[13] CARFAC/RAAV submit that the NGC failed to comply with its duty to bargain in good faith, in accordance with paragraph 32(a) of the *Act*, as the NGC drastically changed the terms of negotiations four years after the start of the negotiations.

[14] CARFAC/RAAV submit that the NGC failed to comply with its duty to bargain in good faith by failing to participate in rational and informed discussion and by engaging in impasse bargaining.

[15] CARFAC/RAAV submit that, at the start of the negotiations, the NGC was aware of any potential conflicts between the *Copyright Act* and the *Act* by virtue of the Tribunal’s decision CAPPRT Decision 047, which the NGC participated in as an intervenor.

[16] CARFAC/RAAV submit that from December 2003 to October 2007 the parties met on numerous occasions and during that time various draft scale agreements and model contracts were developed and proposed. These draft scale agreements included references to compensation for the use of artistic works.

[17] CARFAC/RAAV submit that the NGC changed its position on the issue of copyright fees, when Daniel Amadei, who was the NGC’s chief negotiator, was replaced.

[18] CARFAC/RAAV submit that a change in negotiating personnel should not constitute a change in negotiating policy.

[19] CARFAC/RAAV submit that the NGC is negotiating in bad faith by drastically changing the terms of negotiations four years after negotiations have started.

[20] CARFAC/RAAV submit that, in the visual arts sector, the question of the inclusion of minimum fees for the use of artistic works is the most important issue to negotiate in a scale agreement.

[21] CARFAC/RAAV submit that compensation, which is addressed through their proposal on minimum copyright fees, is a central component of their bargaining strategy, as this would be analogous to wages in any other sectors.

[22] CARFAC/RAAV submit that minimum rates for the use of artistic works are a proper subject matter for negotiations under the Act, and that the issue of bargaining copyright in scale agreements is settled in law.

[23] CARFAC/RAAV called two witnesses to testify at the hearing: Karl Beveridge and Gerald Beaulieu.

[24] Karl Beveridge represents CARFAC as co-chair of the bargaining committee along with Pierre Tessier who represents RAAV. Mr. Beveridge testified as to his involvement in the negotiations with the NGC. He was involved from the onset.

[25] Gerald Beaulieu is currently the National President of CARFAC. Mr. Beaulieu testified as to his involvement in the negotiations beginning in the fall of 2006.

[26] CARFAC/RAAV seek the following remedies from the Tribunal:

- (a) A declaration that the NGC has engaged in bad faith bargaining, in violation of section 32 of the Act;
- (b) An order that the NGC bargain in good faith and make all efforts to enter into a scale agreement, consistent with the reasons and directions of this Tribunal, including the scope to which the parties may bargain copyrights issues in scale agreement pursuant to the Act;
- (c) That the Tribunal's reasons include a ruling on the perceived conflict or overlap between the Act and the Copyright Act in respect of negotiating copyright matters within a scale agreement;
- (d) An order to commence bargaining within 60 days of the Tribunal's decision, with a schedule for the next six months of bargaining to be filed with the Tribunal within 30 days of its decision;
- (e) An order that bargaining proceed on a regular basis;
- (f) An order that the parties report to the Tribunal the status of their bargaining on a monthly basis;
- (g) An order that the Tribunal retains jurisdiction over this matter and allowing the parties to apply to the Tribunal on an urgent basis should any issue arise in bargaining which the Tribunal can address;

- (h) An order awarding them costs, pursuant to subsection 17(o) of the Act and consistent with the principles of awarding costs to *pro bono* counsel.

Overview of the NGC's Position

[27] The NGC submits that the Act creates no legal obligations for the parties to negotiate compensation for the use of copyrighted protected uses of artistic works. The NGC relies on a supporting legal opinion given by Florence Lucas from Gowlings dated July 9th, 2007.

[28] The NGC submits that CARFAC/RAAV rely on CAPPRT Decision 028 in support of their position that the NGC has a legal obligation to negotiate minimum copyright fees as part of a scale agreement.

[29] The NGC submits that no jurisdiction exists under the Act requiring the negotiation of scale agreement with respect to minimum royalties or any other compensation for the use of copyright works.

[30] The NGC submits that CARFAC/RAAV do not have the legal rights necessary to negotiate the terms and conditions relating to the use of copyrighted works as CARFAC/RAAV have not received an assignment or grant of interest in the copyright by the copyright owner or the owner's duly authorized agent.

[31] The NGC submits that even if CARFAC/RAAV had the necessary rights and conditions relating to the use of copyrighted works, they should have recourse to the provisions of the Copyright Act instead of the Act.

[32] The NGC submits that the refusal of a party to include a particular subject matter within the scope of negotiations does not constitute bad faith.

[33] The NGC submits that the Tribunal does not have the jurisdiction to determine what will be the content of a scale agreement. The scale agreement's subject matter may only be determined freely by the parties through negotiations. The NGC further submits that the Tribunal has expressed this principle in CAPPRT Decision 028 at paragraph 58:

Indeed, the Act contains no express limitation on an artists' association's right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[34] The NGC submits that CAPPRT Decision 028 is not a precedent for the proposition that the Act requires parties to negotiate terms and conditions applicable to protected uses of copyrighted works, as it would result in conflicts between the interpretation and application of the Act and the Copyright Act.

[35] The NGC requests that the Tribunal confirm that the NGC is not required to negotiate copyright fees or any other terms and conditions relating to copyright protected works in the scale agreement that is being negotiated with CARFAC/RAAV.

[36] The NGC called four witnesses to testify at the hearing: Gilles Daigle, Legal Counsel with Gowlings; Karen Colby-Stothart, Deputy Director, Exhibition and Installations at the NGC; Marie-Claude Rousseau, Chief Collections Management at the NGC; and Amal Tadros an administrative assistant who worked in various departments at the NGC.

[37] Gilles Daigle testified regarding the presentation he made at a meeting on October 30, 2007 and regarding the Legal Opinion.

[38] Karen Colby-Stothart testified regarding the NGC's operations and her involvement in the negotiations since joining the NGC's bargaining committee in May of 2007.

[39] Marie-Claude Rousseau testified as to her involvement in the negotiations. In April 2004, she was senior project manager, working directly for Daniel Amadei who was the spokesperson for the NGC bargaining committee. She testified that she coordinated the meetings, the preparation of documentation for the meetings and the general support for the negotiations.

[40] Amal Tadros testified regarding notes she took during bargaining meetings held on October 26 and 27, 2006 when she was Daniel Amadei's administrative assistant.

Overview of SODRAC's Position

[41] SODRAC submits that some of the artists which CARFAC/RAAV are representing have assigned their copyrights to SODRAC, and that SODRAC and CARFAC/RAAV have diverging opinions on how CAPPRT Decision 028 should be applied.

[42] SODRAC submits that CARFAC/RAAV cannot, for artists who are members of SODRAC, allow or prohibit in a scale agreement with the NGC the rights of exploitation of the artistic works that are contained in the Copyright Act.

[43] SODRAC submits that CARFAC/RAAV cannot determine minimum fees, for artists who have assigned their rights to SODRAC, in a scale agreement with the NGC in exchange for the licensing of the artistic works, which can only be done by them.

[44] SODRAC submits that the minimum fee in exchange for the use of artistic works cannot include or affect the royalty paid in a licensing agreement negotiated by a copyright collective.

Issues

[45] This matter raises the following issues:

- a. Whether the Tribunal should dismiss the complaint as statute barred since the complaint was not filed within the six month delay required by subsection 53(2) of the Act and whether the complaint is on its face ill-founded and should be dismissed pursuant to paragraph 53(3)(a) of the Act;
- b. Whether copyright issues are proper subject matter for collective bargaining and inclusion in a scale agreement under the Act; and
- c. Whether the NGC breached its duty to bargain in good faith pursuant to section 32 of the Act.

ISSUE: Whether the complaint was filed within the six-month delay required by subsection 53(2) of the Act and whether it should be dismissed pursuant to paragraph 53(3)(a) of the Act

Overview of the NGC's Position

[46] The NGC requests that the Tribunal dismiss the complaint as statute-barred since the complaint was not filed within the six-month delay required by subsection 53(2) of the Act. The NGC also requests the Tribunal to exercise its jurisdiction under paragraph 53(3) (a) of the Act to dismiss the complaint without further representations since said complaint "*is moot, or is frivolous, vexatious or in bad faith*".

[47] The NGC raised these issues for the first time in its closing arguments filed with the Tribunal on August 9, 2011.

[48] The NGC submits that in October 2006, they informed CARFAC/RAAV that "today we are agreeing to discuss an eventual minimum fee schedule for reproduction but without prejudice to our right [*sic*] any eventual inclusion or not of reproduction or part or reproduction in the Collective Agreement". (Exhibit 25)

[49] The NGC submits that several months before October 2007, the NGC provided a copy of the Legal Opinion to CARFAC/RAAV which clearly expressed that the Act and the Copyright Act were incompatible and that copyrights should not be included in a scale agreement.

[50] The NGC submits that, if the Tribunal concludes that the NGC acted in bad faith by changing its position as suggested by CARFAC/RAAV, which the NGC denies, the Tribunal has no other alternative than to declare the complaint statute-barred, as the NGC's statement in October 2006 would have constituted the change of position argued by CARFAC/RAAV, so this point should be the starting point of the delay.

[51] The NGC also submits that the record shows that the NGC negotiated in good faith at all times and that CARFAC/RAAV's complaint is, on its face, ill-founded and that the Tribunal should therefore exercise its jurisdiction under paragraph 53(3)(a) of the *Act* to dismiss the complaint.

Overview of CARFAC/RAAV's Position

[52] CARFAC/RAAV submit that the NGC raised this timeliness issue for the first time in its closing submissions. This allegation should have properly been raised at the outset of the hearing.

[53] CARFAC/RAAV submit that it is not open to the NGC to raise the timeliness issue after the close of proceedings and it is prejudicial to CARFAC/RAAV to be raised at this time, without an opportunity to tender evidence that would establish precisely when the time limit started to run to file a complaint.

[54] CARFAC/RAAV submit that it is not open for the NGC to rely upon a timeliness defence during the closing arguments and that in any case the NGC's firm position was not presented until October 2007 when a completely revised agreement was presented.

[55] CARFAC/RAAV submit that they fully expected the October 2007 meeting to involve bargaining. When they arrived, the NGC made it clear that it was not prepared to bargain the inclusion of copyright protected uses of artistic works in a scale agreement based on the Legal Opinion.

[56] CARFAC/RAAV submit that it was at the October 2007 meetings, and after Gilles Daigle was invited to explain the Legal Opinion, that the NGC finally presented its firm position that the Legal Opinion was the final word on the matter.

[57] CARFAC/RAAV submit that, for the above mentioned reasons, it was appropriate to file the complaint after the NGC presented its position on October 31, 2007 indicating that the NGC would not negotiate the inclusion of copyright protected uses of artistic works in a scale agreement.

[58] CARFAC/RAAV submit that the record adequately demonstrated that their complaint is not "ill-founded".

Analysis

[59] Section 53 of the Act provides as follows:

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

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

(b) a person has failed to comply with section 52.

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

(3) The Tribunal shall hear a complaint made under subsection (1), unless the Tribunal is of the opinion that the complaint

(a) is moot, or is frivolous, vexatious or in bad faith; or

(b) is not within the Tribunal's jurisdiction, or could be referred by the complainant to an arbitrator or arbitration board, pursuant to a scale agreement.

[60] The Act requires a complaint to be filed within six months of the date on which a complainant knew or, in the opinion of the Tribunal, ought to have known of the action or circumstances giving rise to it.

[61] CARFAC/RAAV filed the complaint with the Tribunal on March 31, 2008, after the NGC provided them with a revised scale agreement on October 30, 2007.

[62] In order to determine whether CARFAC/RAAV complied with the timeline provided in the Act, the Tribunal considered previous decisions from the Canada Labour Relations Board [now the Canada Industrial Relations Board] (hereinafter, the Board) that set out an interpretation of a similar provision of the Canada Labour Code that has generally been followed since then.

[63] In *Amalgamated Transit Union, Local 1374 v. Brewster Transport Company Ltd. (1986)*, 66 di 1 at pages 30-31, the Board stated that:

Since a complaint alleging failure to bargain in good faith deals with a course a conduct, the 90 day limit for a complaint starts to run only at the end of the course of the conduct.

[64] In *Iberia Airlines of Spain* (1990), 80 di 165 at page 7, the Board affirmed that:

The nature of the duty to bargain in good faith determines the method of calculating time limit for filing a complaint with the Board. Thus, since the duty to bargain in good faith is a continuous duty, that is, it is uninterrupted from the time the notice to bargain is given to the party, it follows that the party alleging that this duty has been violated may file a complaint at any time during the period of the collective bargaining process.

[65] The Tribunal has reviewed this jurisprudence in a previous decision. In CAPPRT Decision 040, at paragraphs 49 and 50 the Tribunal stated:

[49] On the one hand, it is clear that a party may file a complaint alleging a failure to bargain in good faith at any time in the bargaining process if it believes that the circumstances so justify. It is not necessary to wait until the parties have reached an impasse. On the other hand, a party alleging bad faith on the part of the other party may also file a complaint, even after the conduct complained of has ceased.

[50] The duty to bargain in good faith is a duty that is ongoing and a breach of this duty usually relates to general behaviour and not necessarily to any event in particular. Consequently, the approach taken in the case of *Brewster Transport, supra*, in calculating the time limit seems to us to be appropriate. The period of six months will accordingly start to run from the point when the alleged conduct ceased.

Conclusion

[66] Based on the foregoing, the Tribunal rejects the NGC's request to dismiss the complaint as failing to meet the timeliness requirements under section 53(2) of the Act. The Tribunal further finds that upon a review of the evidence, the complaint, dated March 31, 2008, was properly filed within the six-month time limit as required in subsection 53(2) of the Act.

[67] The Tribunal further rejects the NGC's request to dismiss the complaint as moot, frivolous and vexatious under section 53(3) of the Act. The evidence presented clearly shows a substantive basis for the complaint.

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

Overview of CARFAC/RAAV's Position

[68] CARFAC/RAAV submit that the issue of bargaining copyright in a scale agreement is settled law and there is no conflict between the Act and the Copyright Act.

[69] CARFAC/RAAV submit that artists associations certified under the Act are democratic organizations. The members ultimately decide whether to mandate their association to bargain on any matters related to the copyright; the choice is theirs.

[70] CARFAC/RAAV also submit that where the members decide that artists' association include their copyright in pre-existing works in a scale agreement, the Tribunal has already explained in CAPPRT Decision 028 at paragraph 64 that:

This collective bargaining activity does not make the artists' association the agent of the artists for the purpose of granting licences or assignments of copyright for those works, but merely seeks to establish the minimum terms and conditions that would apply when an artist decides to licence or assign a particular copyright to a producer who is a party to the scale agreement.

[71] CARFAC/RAAV submit that compensation, which is addressed through their proposal on minimum copyright fees, is a central component of their bargaining strategy, as this would be analogous to wages in any other sectors.

[72] During his testimony, Mr. Beveridge explained that the "CARFAC fee Schedule" that is informally being used in the sector goes back to 1968. CARFAC has always recommended minimum amounts that artists should be paid, recognizing always that an artist could negotiate a higher rate. The schedule has become a sector standard.

[73] Mr. Beveridge further explained that there are two reasons why it was important for CARFAC/RAAV that minimum fees be included in a scale agreement. Firstly the income an artist receives from the temporary exhibition fee and also reproduction fees can form a significant amount of the artist's income. Secondly, CARFAC is identified with fees through its "CARFAC fee Schedule". This fee schedule is a central part of who CARFAC is and what it does. Setting fee schedules is seen as CARFAC's mandate; because they are mandated by their members to negotiate those fees and because the members ratify the fee schedule each year at the annual general meeting, fees are a central part of who CARFAC is and what it does.

Overview of the NGC's Position

[74] The NGC submits that the minimum fee to be paid for exhibition and reproduction of the works for which copyright is owned or administered by parties other than CARFAC/RAAV are not proper subject matter for negotiations between the parties in a scale agreement.

[75] The NGC submits that CARFAC/RAAV do not possess the rights required to negotiate copyright fees. No assignment or grant of an interest in copyright is valid unless it is in writing and signed by the copyright owner or a duly authorized agent.

[76] The NGC submits that by negotiating minimum fees, CARFAC/RAAV are illegally interfering with private property belonging to third parties.

[77] The NGC submits that the Copyright Board is the proper forum to debate copyright fees pursuant to its exclusive jurisdiction under the Copyright Act to set royalties for compensation for uses of copyright works.

[78] The NGC submits that copyrights are private property and ownership of property grants the owner the exclusive right to sell the property in question for as high or as low as he/she likes. He/she may even donate the property.

[79] The NGC submits that under the Act, they have no legal obligation to include copyright fees in the scale agreement; and the NGC was free to accept or reject CARFAC/RAAV's demands to include copyright matters in a scale agreement.

Overview of SODRAC's Position

[80] SODRAC submits that the Tribunal's decisions regarding the interaction between the Act and the Copyright Act have all been rendered at the certification stage. The Tribunal has never addressed this issue at the stage where parties are negotiating a scale agreement.

[81] SODRAC submits that the Tribunal has always recognized that there was a possibility for a conflict between the two Acts, but that the conflict would only materialize when negotiating a scale agreement. Thus, it was premature to make any such rulings at the accreditation stage. SODRAC refers to CAPPRT Decision 001:

[22] In the Tribunal's view, there is no necessary conflict between the provisions of the Status of the Artist Act and those of the Copyright Act. However, the Tribunal recognizes that in the context of the collective bargaining which will eventually take place between the certified artists' association and producers subject to the Status of the Artist Act, there is a potential for conflict between the terms contained in the scale agreements and the royalty rates set by the copyright collective. If such conflict should materialize, SODRAC's interests could be affected.

[23] However, this potential conflict has not yet materialized. In the context of the proceeding which is before it, namely UNEQ's application for certification, the Tribunal therefore intends to deal only with questions that are related to the application. The Tribunal thus declines to make the determinations sought by SODRAC at this time.

[82] SODRAC submits that the Tribunal also addressed this issue in CAPPRT Decision 005:

[40] The Tribunal is not convinced that it is appropriate, at this time, to define or limit the exclusive authority resulting from the determination of a sector under the Status of the Artist Act. As we stated in interim decision #001 dated December 8, 1995, "there is no necessary conflict between the provisions of the Status of the Artist Act and those of the Copyright Act." We are certain that if an artists' association were to try, without the necessary authorization, to appropriate the exclusive rights held by a body

mandated by the Copyright Board, that transgression would be brought to the Tribunal's attention by way of a complaint.

[83] SODRAC submits that it is clear from the above-mentioned statement in CAPPRT Decision 005, that certification does not confer the necessary authorization required pursuant to the Copyright Act.

[84] SODRAC submits that the Tribunal reiterated these comments in CAPPRT Decision 028, by expressly stating that the authorization to manage copyright was not granted by certification, but must emanate from the artist in accordance with the Copyright Act.

[56] However, the Tribunal also agrees with PCH and PWGSC's contention that Parliament's intention in passing the Status of the Artist Act was not to replace or modify the Copyright Act, and with their proposition that artists alone should have the right to decide how their works should be used or exploited. There is no doubt that the regime established by the Copyright Act continues to be the only practical avenue available to artists to protect their copyrights internationally and with respect to users not subject to the Status of the Artist Act.

[...]

[64] In certain sectors, the members of an artists' association may decide that it is appropriate for their association to seek to include matters related to their copyright in pre-existing works in a scale agreement. This collective bargaining activity does not make the artists' association the agent of the artist for the purpose of granting licenses or assignments of copyright for those works, but merely seeks to establish the minimum terms and conditions that would apply when an artist decides to license or assign a particular copyright to a producer who is a party to the scale agreement. In the example given above, if the artist has already assigned his or her copyrights to a collective society for administration, then the artist would instruct the producer to deal with that organization; otherwise the artist can enter into individual negotiation with the producer, with the terms of the scale agreement setting the floor for the negotiations.

[85] SODRAC submits the Tribunal's jurisprudence, has not recognized the right for an artists association to negotiate binding minimum fees for the use of artists' works. Rather, the Tribunal determined that the certification in itself did not confer the authorization to negotiate those fees, but that it opened the door to do so, while respecting the Copyright Act, and notably its provision relating to collective administration of copyright.

[86] SODRAC submits that if the Tribunal gives directives regarding the subject of negotiations between the NGC and CARFAC/RAAV, the Tribunal should specifically state that this subject excludes the collective management of copyright for the works of members of SODRAC, pursuant to the Copyright Act.

Analysis

[87] The Tribunal stated in CAPPRT Decision 028 that Parliament's intention in passing the Act was not to replace or modify the Copyright Act. There is no issue that artists alone should have the right to decide how their works should be used or exploited. There is no doubt that the regime established by the Copyright Act continues to be a practical avenue available to artists to protect their copyrights internationally and with respect to users not subject to the Act.

[88] The relationship between the Copyright Act and the Act has been the subject of close interest since the Act's coming into force in 1995. The Tribunal has had opportunities to consider and comment on the interrelations of these two statutes in previous decisions. The relationship has been viewed by the Tribunal as a complementary one. In CAPPRT Decision 028, the Tribunal stated as follows:

[57] In the Tribunal's view, the Status of the Artist Act was intended to complement and supplement the regime provided in the Copyright Act. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work, thereby enhancing and promoting artists' freedom of choice as to how they will exploit the fruits of their creative talents.

[58] The statute must be given an interpretation that will fulfill Parliament's intention of improving the socio-economic status of artists in Canada. The Act mandates certified artists' associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the Act. Parliament did not expressly exclude matters related to copyright from the ambit of collective bargaining. Indeed, the Act contains no express limitation on an artists' association's right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[59] Copyright is often referred to as a "bundle of rights". It involves an interest in a particular type of property (the work itself); for example, one person may own a work of art while another person owns the copyright to that work. Copyright embodies both a moral and an economic interest; indeed copyright is the fundamental socio-economic right of creators of artistic, dramatic, literary and musical works. Therefore, with the greatest of respect for our colleague at the Copyright Board, the Tribunal is of the view that copyright is not merely a good.

[60] Historically, self-employed artists have had two options when dealing with their copyrights: self-management or collective administration through a copyright collective within the regime established by the Copyright Act. Artists who decide to manage their own rights maintain complete control:

they decide who will be permitted to use their works and the fee for such use. To take advantage of the Copyright Act regime, artists assign their copyright to a collective society, thereby ceding control over the use of their work and the ability to negotiate individual fees. The collective society manages the copyright on behalf of the artist, sets the tariff for the use of works in its repertoire and collects and remits payment to the artist.

[61] The advent of the Status of the Artist Act provides a third option for certain artists. The Act enables certified artists' associations to negotiate with producers in the federal jurisdiction for the purpose of entering into scale agreements that establish the minimum terms and conditions that will apply to the provision of artists' services and other related matters. 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. To enforce the right to payment under the scale agreement, the artist has recourse to the dispute resolution procedure provided in the agreement and the resources of the certified artists' association.

[63] Artists' associations are democratic organizations. Before an artists' association can be certified to represent a particular artistic sector, section 23(1) of the Act obliges the Tribunal to assure itself that the association has adopted bylaws that, *inter alia*, give regular members the right to take part and vote in meetings and to participate in a ratification vote on any scale agreement that affects them. It is the members of an association who decide on the subjects that they wish their association to bargain on their behalf. In sectors where copyright collectives are functioning effectively, the members may very well decide not to mandate their association to bargain on any matters related to copyright; the choice is theirs.

[64] In certain sectors, the members of an artists' association may decide that it is appropriate for their association to seek to include matters related to their copyright in pre-existing works in a scale agreement. This collective bargaining activity does not make the artists' association the agent of the artist for the purpose of granting licenses or assignments of copyright for those works, but merely seeks to establish the minimum terms and conditions that would apply when an artist decides to licence or assign a particular copyright

to a producer who is a party to the scale agreement. In the example given above, if the artist has already assigned his or her copyrights to a collective society for administration, then the artist would instruct the producer to deal with that organization; otherwise the artist can enter into individual negotiation with the producer, with the terms of the scale agreement setting the floor for the negotiations.

[89] In CAPPRT Decision 047, the Tribunal reiterated the position expressed in CAPPRT Decision 028 stating it saw no reason to alter that position.

[90] Parliament passed the Act in 1992 as part of a commitment to recognize and stimulate the contribution of the arts to the cultural, social, economic and political enrichment of the country. The Act reflects the recognition that constructive professional relations in the arts and culture sector are an important element of a vibrant Canadian culture and heritage.

[91] Section 7 of the Act states that:

7. The purpose of this Part is to establish a framework to govern professional relations between artists and producers that guarantees their freedom of association, recognize the importance of their respective contributions to the cultural life of Canada and ensures the protection of their rights.

[92] Part II of the Act provides the framework for collective bargaining. It mandates the Tribunal to take into account the principles of labour law in the context of the cultural industries by providing a legislative framework for collective bargaining between artists and producers.

[93] In CAPPRT Decision 028 the Tribunal stated that under the Act's framework for collective bargaining, once a scale agreement is in place, 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 artists' association have agreed.

[94] The Tribunal further stated that an artist association does not carry on the business of collecting and distributing royalties or levies on behalf of the artist.

[95] Karl Beveridge testified that what CARFAC/RAAV were negotiating with the NGC was a collective agreement, outlining the general terms of the relationship between CARFAC/RAAV and the NGC, including such matters as dispute resolution, harassment policy, safety and minimum fees. Mr. Beveridge explained that the individual contracts that the parties were reviewing were appendices to the collective agreement. These contracts would have been the contracts that the artist would have actually signed, outlining the actual work that the artist would exhibit and the actual fees that the artist would receive.

[96] Karl Beveridge also testified that it is important to understand that the fees that CARFAC/RAAV was negotiating were only minimum fees. Artists in their contract

could negotiate any fees above that. The artist, his agent or his copyright collective would negotiate the economic terms of that individual contract so that the artist wasn't signing a collective agreement; they were signing a contract that specified the actual work and the terms and conditions of the specific use of the work and the actual rates that would be paid.

Conclusion

[97] Since its inception in 1995, the Tribunal has defined 26 sectors of artistic activity and certified 24 artists' associations to represent them. Once an artists' association is certified under the Act, the association has the exclusive right to bargain on behalf of the artists in the sector and to negotiate scale agreements with producers on behalf of the artists defined in its certification order. The exclusive right under the Act is to prevent overlap between sectors in order that only one artists' association will bargain on behalf of the artists included in a certification order. The Tribunal has an obligation to prevent overlap between certified sectors by excluding from the definition of new sectors those it has already defined.

[98] Certified artists' associations have concluded nearly 180 scale agreements with producers, including government producers and broadcasting undertakings, since they have been certified by the Tribunal.

[99] Many scale agreements negotiated under the Act contain matters related to copyright. It has become a standard in the cultural sector that these matters are included in scale agreements. 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. The Tribunal is of the view that it would indeed be inconsistent with the purpose of the Act if a scale agreement concluded under the Act that governs professional relations between artists and producers could not contain stipulations relating to copyright.

[100] The Tribunal found in CAPPRT Decision 028, and later confirmed its position in CAPPRT Decision 047, that the Act provides artists with a third option to obtain compensation for their works:

[64] In certain sectors, the members of an artists' association may decide that it is appropriate for their association to seek to include matters related to their copyright in pre-existing work in a scale agreement. This collective bargaining activity does not make the artists' association the agent of the artist for the purpose of granting licenses or assignments of copyright for those works, but merely seeks to establish the minimum terms and conditions that would apply when an artist decides to license or assign a particular copyright to a producer who is a party to the scale agreement. In the example given above, if the artist has already assigned his or her copyrights to a collective society for administration, then the artist would instruct the producer to deal with that organization; otherwise the artist can enter into individual negotiation with the producer, with the terms of the scale agreement setting the floor for the negotiations.

[101] Artists' associations and copyright collectives are two distinct entities. Artists associations and copyright collectives regularly enter into agreements on how those agreements will work within particular sectors. Where copyright collectives exist, memoranda of understanding have been entered into between copyright collectives and artists association to clarify their common understanding of their respective functions².

[102] In the context of legislative interpretation, there is a presumption of coherence between legislation. This principle has been expressed by Ruth Sullivan in her book entitled *Sullivan on the Construction of Statutes, Fifth edition, Lexis Nexis*, at page 223. It reads:

“It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. This presumption is the basis for analyzing legislative schemes, which is often the most persuasive form of analysis. .”

[103] The Tribunal reaffirms the principles expressed in CAPPRT Decision 028 and CAPPRT Decision 047 that the 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. The Tribunal finds that the right to use an existing work is a service that the artist who holds the copyright to that work may provide to a producer. The Tribunal further finds that representing artists' interest in this fundamental socio-economic right is an appropriate activity for a certified artists' association to bargain.

[104] The Tribunal finds that an artist association may negotiate and conclude a scale agreement which contains minimum fees for the use of artistic works, as long as the artist association does not bind a copyright collective or encroach on the rights conferred by an artist to a copyright collective, such as SODRAC, and exercised pursuant to the Copyright Act.

[105] It is not up to the Tribunal to determine the specific proposals or content of what the parties may bargain.

² Such as the Memoranda of Understanding agreed to between the Writers' Union of Canada and CANCOPY; the Memo of Understanding between the Writers Guild of Canada and CANCOPY; the Agreement between the American Federation of Musicians of the United States and Canada (AFM) now the Canadian Federation of Musicians / Fédération Canadienne des musiciens et des musiciennes and the Society of Composers, Authors and Music Publishers of Canada (SOCAN) copies of which are available from the Tribunal.

[106] The Tribunal finds that artists should have the choice as to how they will deal with the rights to their works, be it through agents, copyright collectives, scale agreements or a combination of these mechanisms.

ISSUE: *Whether the NGC breached its duty to bargain in good faith pursuant to section 32 of the Act*

Overview of CARFAC/RAAV's Position

[107] CARFAC/RAAV submit that the NGC has violated the duty to bargain in good faith pursuant to section 32 of the Act by engaging in an inappropriate change of position in 2007 such that the NGC was not required to negotiate minimum fee provisions; by failing to participate in rational and informed discussion of the inclusion of minimum fees for artists' works after October 2007; and by engaging in impasse bargaining.

[108] CARFAC/RAAV submit that the NGC took the position in October 2007, supported only by the Legal Opinion that it was not required to negotiate copyright. After October 2007 there was no indication that the NGC was prepared to alter their position. The NGC never bothered to discuss whether the Legal Opinion was correct or whether there were any other ways to address the concerns they had. The NGC presented the Legal Opinion as a *fait accomplis* and refused to bargain further on the issue. The NGC further reiterated its position in a letter dated January 29, 2008 in which they stated that "their hands were tied" on the matter of negotiating copyrights. (*Agreed Statement of Facts, Appendix 44*).

[109] CARFAC/RAAV submit that while the NGC is free to table whatever proposals during bargaining the NGC sees fit, the NGC may not push a proposal to impasse. CARFAC/RAAV rely on the commonly held principle of labour tribunals that, "[i]mpasse in this sense means that a party remains insistent on its position without a realistic possibility of change, which forces the other side into industrial conflict because of the insistence on that position."³ According to CARFAC/RAAV, in this regard it would also be bad faith for a party, after bargaining to impasse, to make a unilateral change in its position that would not have been reasonably comprehended within its pre-impasse proposals. CARFAC/RAAV submit this is what the NGC did.

³ United Steelworkers of America, Local 5917 v. Wheat City Metals, A Division of Jamel Metals inc., 2005 CanLII 63019 at paras. 48-59, 52, affirmed 2005 SKQB 364

Overview of the NGC's Position

[110] The NGC submits that the parties were not at an impasse and that the NGC did not change its position.

[111] The NGC submits that the complaint is premature since open items still remained to be discussed and the NGC was still requesting that CARFAC/RAAV return to the bargaining table.

[112] The NGC submits that at no time did the NGC commit to including copyrights in the scale agreement. As such, the NGC argues, even if the NGC had changed its position, which it denies, such conduct should not constitute bad faith.

[113] The NGC submits that it strongly wished, at all times, to conclude a scale agreement. The NGC did not refuse to meet with CARFAC/RAAV or discuss any proposal, including proposals related to copyright issues. However, the NGC submits, that some of CARFAC/RAAV's demands could cause financial, administrative and legal difficulties to the NGC.

[114] The NGC submits that the NGC was willing to carry on discussions, to explore and find an alternative solution acceptable to both parties. According to the NGC, its refusal to discuss was in fact a mere position in the evolving process.

Analysis

[115] The relevant provision of the *Act* is found at section 32:

32. Where a notice to begin bargaining has been issued under section 31,

(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,

(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

(b) the producer shall not alter, without the consent of the artists' association, any term or condition of engagement, including the rates of remuneration, or any right or privilege of an artist or the association, that is contained in the scale agreement, until such time as pressure tactics are permitted under section 46.

[116] The purpose of section 32 of the *Act* is to protect the balance of power during the bargaining by ensuring that one party does not take advantage of the other by means of tactics that contravene acceptable standards in collective bargaining. As described by George W. Adams, former Justice of the Ontario Court (General Division) and former chairman of the Ontario Labour Relations Board in his book entitled *Canadian Labour Law, 2d ed.* (Aurora: Canada Law Book Inc. 1995) at pages 10-92 and 10-93:

The purpose of collective bargaining legislation is to bring the parties to the bargaining table where they will present their proposals, articulate supporting arguments and search for common ground which can serve as the basis for a collective agreement. The duty to bargain, no matter how phrased, has been elaborated over time by labour boards to prohibit certain specific conduct, *i.e.*, misrepresentations, and at times to censure a party's entire bargaining stance where 'having regard to all the circumstances', a labour board concludes that the real object of that party is to avoid a collective agreement. Nevertheless, the underlying philosophy of the duty also embraces a 'freedom of contract', that the parties are best able to determine the content of their agreement, and, failing agreement, each has recourse to economic sanctions.

[117] George W. Adams also discusses the effect of a change of position on the duty to bargain in good faith at page 10.1540:

In certain circumstances, a sudden unexplained change of position may constitute a violation of the bargaining duty. Whether the action amounts to bad faith will hinge upon whether it is perceived by a labour board to be designed to avoid reaching a collective agreement. In general, there is no presumption that reneging on an offer or tabling new demands is bad faith. Each situation depends on the particular state of relations between the parties at the time the change of position occurs. [...] Labour boards have taken notice of the reality that bargaining takes place against a "fluid backdrop of events" and that a change in circumstances may necessitate a change in position.

[118] Both parties have cited several cases from labour boards in regards to the duty to bargain in good faith, which the Tribunal has referenced as well as its own jurisprudence. In *Public Service Alliance of Canada v. Senate of Canada, 2008 PSLRB 100*, the Public Service Labour Relations Board summarized the duty to bargain in good faith as follows:

34. The underlying principle of the duty to bargain in good faith is to foster a sound and effective collective bargaining process. The duty to bargain in good faith has been defined with respect to the manner in which the parties conduct themselves within the bargaining process. The parties must enter into serious, open and rational discussions with the real intent of entering into a collective agreement. That obligation implies that the parties act in a manner that is conducive to a full exchange of positions.

35. In *CKLW Radio Broadcasting Limited*, the Canada Labour Relations Board referred to the following excerpt from *Canadian Industries Limited*, [1976] O.L.R.B. Rep. 199, which offers a useful description of the duty to bargain in good faith:

...the Board made it clear that satisfaction of the duty to bargain in good faith depends on the manner in which negotiations are conducted, and not upon the content of the proposals brought at the bargaining table...

...

The conduct of the negotiation is not only judged in terms of mutual recognition but also in terms of quality of discussions. This latter factor is somewhat broader in its application, extending to those situations where there may be present the same objective of entering into collective agreement, but where there is absent any willingness to discuss how that common objective might be reached.

37. The Board must be circumspect in its assessment of a bad faith bargaining complaint. The Board is not an instrument to be used to resolve bargaining impasses or modulate the balance of power that may exist between parties. The Board must be cautious not to unduly interfere in the bargaining process and not to undermine the parties' freedom to negotiate and develop their negotiation tactics. As a general principle, the Board must not assess the reasonableness of the positions taken by the parties. However, the Board must not hesitate to intervene when it determines that the behaviour of a party amounts to bad faith or prevents informed and rational discussions. Moreover, the Board must assess the content of the positions taken by one party when those positions are allegedly illegal, contrary to policy or otherwise disruptive to the bargaining process and the decision-making capability of other party.

[119] In *Royal Oak Mines Inc. v. Canada (Labour Relations Board)* [1996] 1 S.C.R., at paragraph XLV, the Supreme Court of Canada stated that 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, a labour board may find that the party is not making "every reasonable effort to enter into a collective agreement". According to the Court "... a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions ..."

[120] In *Royal Oak Mines* at paragraphs XLIII and XL I the Supreme Court of Canada also found that the concept of "reasonable effort" should be assessed on an objective standard by reference to industry standards. According to the Court, "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."

[121] In order for dialogue to be meaningful, the parties must be willing to explain their positions. Since the purpose of the duty to bargain in good faith under the *Act* is to encourage the successful negotiation of a scale agreement, the Tribunal will focus on examining the manner in which the negotiations were conducted.

[122] Matters related to the use of copyrighted works were on the agenda for discussion from the very beginning. On February 3, 2005, Daniel Amadei proposed the following list of items to be discussed at the next meeting:

1. Contracts (Exhibition, Installation and Performance)
2. Reproduction fees
3. Permanent Collection
4. Exhibition fees
5. Other fees

(Agreed Statement of Facts Appendix 23)

[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. *(Agreed Statement of Facts paras. 51, 52 and 53, Appendices 33, 34 and 35).*

[124] There is evidence showing that from the beginning of the bargaining and negotiation process in 2003, the NGC had concerns regarding the inclusion of minimum fees in a negotiated scale agreement, as stated in a letter from June 26, 2003 regarding CARFAC's application to amend their certification order.

[125] Notwithstanding the NGC's concerns, the parties continued to meet on a regular basis until 2007 in an attempt to reach a scale agreement between the NGC and CARFAC/RAAV. While the NGC was represented by Mr. Amadei, the topic of minimum fees was always part of the general process.

[126] Karl Beveridge testified that the parties' negotiating practice was intensive and involved meeting to review and revise previous drafts. He stated that the discussion was a continuous discussion around contracts, the collective agreement and then moving into 2006, the issues of actual fees and what a fee schedule might look like in a collective agreement. He also testified that throughout most of those discussions, the issue of copyright didn't come up.

[127] Marie-Claude Rousseau testified that since the beginning of the negotiations, there were discussions relating to the fees for the permanent, travelling, and temporary exhibits. She confirmed that the parties worked on the scale agreement and the various clauses and that in 2005 there was a working document containing the clauses which could be contained in a scale agreement.

[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.

[129] This negotiating practice was in line with the Collective Bargaining Protocol signed between the parties on October 27, 2005. (*Agreed Statement of Facts para. 46 Appendix 30*)

[130] On May 23, 2007 the NGC informed CARFAC/RAAV of the departure of Daniel Amadei and that the NGC had retained Guy Dancosse, as its spokesperson. The NGC also informed CARFAC/RAAV that the negotiating team would also include Karen Colby-Stothart, and Marie-Claude Rousseau. (*Agreed Statement of Facts paragraph 56, Appendix 38*)

[131] On October 29-31, 2007 the parties met again. This was the first meeting involving the new bargaining committee. On October 29, 2007, the parties reviewed the October 20, 2007 draft version of the scale agreement that included minimum fees. (*Exhibit 15*)

[132] On October 30, 2007, the NGC invited Gilles Daigle from Gowlings to present the Legal Opinion that had been prepared by Florence Lucas. (*Agreed Statement of Facts paragraph 59*).

[133] Ms. Colby-Stothart testified that Gilles Daigle was at the meeting because the NGC recognized the complexity of the issue contained in the Legal Opinion. Ms. Colby-Stothart testified that “rather than simply taking that position based on it, or take a position in which this formed a portion of the our rationale, what we preferred to do was really sit down with both the parties and have a very good presentation, open forum discussion, really to present it as a shared situation.”⁴

[134] Mr. Daigle testified that he is a copyright specialist and that he had no mandate from the NGC to resolve the potential conflict between the parties. Mr. Daigle further testified that he was at the meeting to explain the Legal Opinion and that he had no mandate was not to deviate from the position that the NGC was taking respecting the issue of copyright.

[135] Karl Beveridge testified that according to CARFAC/RAAV when the NGC presented the Legal Opinion they were allowed to ask questions, but it was clear to them that the NGC was going to rely solely on that Legal Opinion to justify their position to refuse to include binding minimum fees for copyright in a scale agreement. Karl Beveridge further testified that no rational and informed discussion took place.

[136] On October 30, 2007, after Gilles Daigle’s presentation on the Legal Opinion the NGC provided a revised scale agreement to CARFAC/RAAV. (*Agreed Statement of Facts paragraph 60, Appendix 40*).

[137] On October 31, 2007, CARFAC/RAAV responded to the revised collective agreement by reading out a prepared written statement which explained that CARFAC/RAAV considered the parties to be “at an impasse”. (*Agreed Statement of facts paragraph 61, Appendix 41*)

[138] Karl Beveridge was asked to explain why he arrived at the conclusion that the parties were at an impasse and presented that position to the NGC. Mr. Beveridge testified that the act of taking out all references to copyright from the scale agreement was critically important because there had been no discussion about that prior to the October 30, 2007 revised version being put on the table. This was the first meeting held with the new negotiator for the NGC, Mr. Dancosse.

[139] Mr. Beveridge also stated that “I think it’s not only the content that basically – that the fees were taken out of the collective agreement, but I think it was partly the way it was done. In other words, this was the first meeting with the new negotiating team. We had a presentation made to us on one day in which an argument was made in support of not including copyright fees in the exhibition contract. We did ask questions

⁴ Transcript of June 20, 2011, p. 13.

of Mr. Daigle, but we didn't have a discussion about it in a bargaining sense. And then the next day, we sit down at the table and we're presented with a collective agreement that has deleted all references to that. We found that quite severe. And we realize in part because of the insistence on this point that it would not be included and the way it was done didn't leave a lot of room to move."⁵

[140] The NGC's evidence was that they were willing to keep on negotiating a collective agreement and that it is CARFAC/RAAV that walked away from the table. Ms. Colby-Stothart testified that they would negotiate the issue of minimum copyright fees but that they would not accept binding copyright fee schedules within the scale agreement under the *Status of the Artist Act*.

[141] The NGC proposed to discuss a non-binding Canadian Art Museum Directors Organization (CAMDO)-type agreement with CARFAC/RAAV, by letter dated January 29, 2008. The letter states in part that:

"We can discuss binding exhibition rights fee schedules for temporary exhibition only for the artists you specifically represent in compliance with the *Copyright Legislation*." [...] The NGC went on to state that: "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 you will recall that during our meeting of October 31, 2007 in Ottawa we gave you a copy of the final opinion given to us on this topic, and Gilles Daigle, a Gowlings' Copyright expert, explained the rationale behind our position and answered all your questions [...]: "All this to say that our hands are tied: we cannot envisage negotiating binding minimum exhibition rights fees in this collective bargaining process, under the *Status of the Artist Act*, unless this is done in full compliance with all mandatory Copyright Legislation requirements". (*Agreed Statement of Facts Appendix 44*)

[142] Ms. Colby-Stothart, when asked about the agreement reached between the complainant and CAMDO, testified that: "First of all, it's not directly applicable in any way. It's not being negotiated under the framework of the *Status of the Artist Act* because most parties don't fall within - - if it's not - - it doesn't compare. And secondly, it's a non-binding agreement on recommended minimums, so it doesn't have any legal teeth. But what is interesting about it, was it's an example of how the issue can be dealt with"⁶.

[143] When asked about the January 29, 2008 letter from the NGC in relation to their proposal to discuss a non-binding CAMDO type agreement that contained minimum fee schedules, Mr. Beaulieu testified that this would not be acceptable because CARFAC/RAAV had a mandate from its members to negotiate a scale agreement within the parameters of the *Act*.

⁵ Transcript of October 26, 2010, p. 110-111.

⁶ Transcript of June 20, 2011, p. 40.

Conclusion

[144] The evidence is clear that the parties had different views on how close they were to concluding a scale agreement and which clauses were agreed upon or not in the draft scale agreements.

[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 relating to copyright, including binding minimum fees in the scale agreement created a rigid stance resulting in the failure to conclude an agreement.

[149] The Tribunal finds that this rigid stance is illustrated not only by the manner in which the October 30, 2007 revised draft scale agreement was presented to CARFAC/RAAV but also by the NGC entirely relying on the Legal Opinion to justify their position and by Gilles Daigle's admission that he was just there to explain the Legal Opinion and not deviate from the NGC's position as set out in the Legal Opinion. This position was further confirmed in the January 29, 2008 letter from the NGC to CARFAC/RAAV.

[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.

COSTS

[153] Counsel for CARFAC/RAAV has requested costs. Counsel for CARFAC/RAAV is representing them *pro bono* and submit that there are two basic factors that would justify an award of costs against the NGC.

[154] The first is that bad faith bargaining is in and of itself egregious and unnecessary conduct and a serious violation of the Act. According to CARFAC/RAAV, the NGC by bargaining in bad faith has demonstrated its intent to prejudice CARFAC/RAAV financially and destroy their effectiveness as a bargaining agent. CARFAC/RAAV submitted that the reimbursement of legal fees is compensatory and reasonable given the serious violation of the Act. A cost award would ensure that the NGC does not continue to abuse the collective bargaining regime established under the Act.

[155] The second factor is that the NGC's actions have unreasonably delayed the proceedings. In particular, CARFAC/RAAV submit that the NGC failed to comply with the Tribunal's disclosure order of December 2, 2010 in a timely manner, which increased the amount of time counsel for CARFAC/RAAV had to spend on such an issue. In addition, the NGC should be responsible for costs associated with its requested adjournment of the hearing dates scheduled for February 2011.

[156] CARFAC/RAAV submit that the February 2011 adjournment, caused CARFAC/RAAV to incur travel expenses which they say are unfair for them to bear. CARFAC/RAAV submit that the hearing was adjourned to allow the NGC to call Ms. Lucas as a witness. However, the NGC then chose not to call her as a witness. CARFAC/RAAV submit that there is no issue that the delay was solely attributable to the NGC.

[157] The NGC submits that no extenuating factor or exceptional circumstances exists which would justify the Tribunal to order such a remedy as is asked by CARFAC/RAAV.

Analysis

[158] Paragraph 17 (o) of the Act gives the Tribunal express authority to award costs. However, the Act also provides, at paragraph 18(a), that the Tribunal must take into consideration the applicable principles of labour law.

[159] Historically, labour boards have been reluctant to award costs. This practice usually constitutes a punitive measure that, in addition, often creates the impression that some parties are winners and others are losers. Such an approach could be harmful to good labour relations and damage the future relationship between the various parties.

[160] The Tribunal's Procedures specifically contemplate the issue of costs relating to an adjournment.

If the reason for the adjournment could reasonably have been anticipated by the participant seeking the adjournment, and the adjournment will result in inconvenience or increased expense to any other participant to the proceeding, the Tribunal may order the participant seeking the adjournment to pay the costs of the adjournment.

[161] During the hearing, counsel for the NGC stated that if certain documents that were subject to the Tribunal's Production Order of December 2, 2010 existed and were produced he would insist on calling Florence Lucas at the earliest possible time to testify and answer questions.

[162] The Tribunal however finds that the NGC knew since at least January 28, 2011 that Ms. Lucas was unavailable but did not bring forth a request to adjourn the hearing until February 18, 2011, which was only 10 days prior to the scheduled hearing.

[163] On February 18, 2011 further to a conference call which was held with the parties and staff of the Tribunal Registry, counsel for the NGC requested an adjournment *sine die* of the hearing scheduled from February 28 to March 4, 2011 on the grounds that they would be seeking judicial review of the Tribunal's December 2, 2010 Production Order. It was then that the NGC informed that their witness Florence Lucas would not be available to attend the hearing scheduled for February 28 to March 3, 2011. Counsel for CARFAC/RAAV objected to the request for an adjournment *sine die* for a number of reasons, and asked that if an adjournment was granted costs be made a condition of the adjournment given the short timeframe. On February 22, 2011 the Tribunal, due to the unavailability of Florence Lucas, granted the adjournment to June 20 and 21, 2011, and reserved its decision on the issue of costs.

Conclusion

[164] The Tribunal prefers to adopt the labour relations' practice to the effect that costs will only be awarded in exceptional circumstances.

[165] The Tribunal finds that exceptional circumstances do not exist. The Tribunal finds that legal costs are not appropriate in the circumstances respecting bad faith bargaining.

[166] With respect to costs associated with the adjournment of the hearing scheduled for February 2011, the Tribunal finds that despite e-mails from the Tribunal, as well as from CARFAC/RAAV requesting an update on the status of disclosure, the NGC did not inform the Tribunal or CARFAC/RAAV until February 17, 2011 that Florence Lucas was unavailable until June 2011 and that they would be seeking an adjournment. The request was made 10 days before the hearing, which was scheduled 3 months prior. The delay prejudiced CARFAC/RAAV. The Tribunal finds that the legal costs are reasonable and appropriate in these circumstances. An Order will be made with respect to them.

Decision

[167] The Tribunal has carefully considered all of the evidence and arguments that were put forward by the parties.

[168] The Tribunal finds that the NGC, by introducing at the bargaining meeting on October 30, 2007, a revised scale agreement removing all matters relating to the use of artistic works, without providing an advance copy to CARFAC/RAAV at that stage of the bargaining process and by remaining insistent on its position, created an impasse and this was the reason preventing the parties from reaching an agreement.

[169] For all of the foregoing reasons, the Tribunal allows the complaint and hereby issues a declaration that the NGC has violated section 32 of the Act by failing to bargain in good faith.

[170] The Tribunal finds that the relationship between the Act and the Copyright Act is a complementary one. The Tribunal reaffirms the principles expressed in CAPPRT Decision 028 and CAPPRT Decision 047 and finds that copyright matters are appropriate for collective bargaining under the Act while respecting the rights of copyright collectives such as SODRAC.

[171] The Tribunal orders the NGC, pursuant to section 54 of the Act, to cease and desist from further violations of the Act, and, in particular, orders the NGC to return and bargain in good faith.

[172] The Tribunal orders the parties to come up with bargaining a schedule to be filed with the Tribunal within 45 days and to commence bargaining within 60 days of this decision.

[173] The Tribunal also orders the parties to bargain on a regular basis and to report to the Tribunal the status of their bargaining on a monthly basis.

[174] The tribunal orders that the NGC shall pay to CARFAC/RAAV the fees and disbursements relating to the motion for the February 2011 adjournment.

[175] The Tribunal requests that counsel meet and agree on the costs awarded but with the ability to apply to the Tribunal for determination, should they be unable to do so.

[176] The Tribunal upon application can be spoken to respecting issues that may arise out of the implementation of this Order.

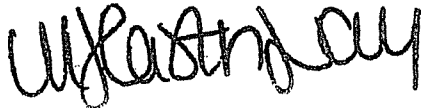
Ottawa, February 16, 2012



Elaine Kierans
Acting-Chairperson



Lyse Lemieux
Member



Marie-Josée Castonguay
Member

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APPENDIX

Agreed Statement of Facts