COLLECTIVE BARGAINING RIGHTS FOR ASSOCIATIONS AND UNIONS OF PROFESSIONAL ARTISTS IN SASKATCHEWAN

A Report Prepared for Saskatchewan's
Minister's Advisory Committee on the Status of the Artist
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Garry Neil,
Neil Craig Associates

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1.0 EXECUTIVE SUMMARY

- The Saskatchewan Minister's Advisory Committee on the Status of the Artist is considering ways to extend collective bargaining rights to artists' associations and unions. This Report looks at alternative models and analyzes how each model would address issues of importance to Saskatchewan artists.

- The income of Canadian artists is lower than average, a high proportion of artists are self-employed and their incomes can fluctuate dramatically from year to year. Extending collective bargaining rights is one way to address income and other working conditions issues.

- Most artists are self-employed. Maintaining status as an independent contractor is very important as it permits the artist to deduct legitimate business expenses against earned income and secures their copyright.

- Organizations representing artists in performing arts, music and sound recording, and film and television, have had some success negotiating voluntary collective agreements. These generally exist outside traditional labour laws as a consequence of the self-employed status. Organizations representing artists working in other fields have been generally unable to negotiate collective agreements.

- Organizations representing creative artists (e.g., authors, visual artists and craftpersons) have had the greatest challenges negotiating agreements, primarily because these artists tend to work on their own and can create works before they have any contract. Interpretive artists are more likely to work in ensembles and are contracted to bring to life an artistic work created by another.

- In looking at the various models, the following issues of importance to Saskatchewan artists are examined:

    1. To what extent will the bargaining rights make a difference?
    2. What are the implications of bargaining rights for the self-employed status of professional artists?
    3. What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?
    4. Is it possible to find a bargaining model that will achieve a broad acceptance in the artistic community?
    5. How will the model affect engagers of artists, who often find themselves in a precarious economic situation?
    6. How will the bargaining model influence the generally collegial relationships that exist in the sector?
    7. What is the cost of the bargaining model?
    8. To what extent will the model improve support for individual contracts?
    9. What might be the unintended impact of bargaining rights on individual artists?

Federal *Status of the Artist Act*

- The Canadian Artists and Producers Professional Relations Tribunal administers Part II of the federal *Status of the Artist Act*. This establishes a framework to regulate the relationships between artists associations and producers operating in federal jurisdiction.

- The consequences of the Tribunal's operation have been the following:

1. Twenty associations have been certified as exclusive bargaining agents:
   - for the associations that already had voluntary agreements, recognition has provided a legal foundation for bargaining with engagers in federal jurisdiction and has provided them with a legal exemption from action under competition laws;
   - for the associations that had been unable to negotiate voluntary agreements, certification has brought little progress in the first 10 years of operation of the Tribunal.
2. The federal legislation is limited to "independent contractors."
3. National agreements negotiated under its terms are fully protected, but the scope of the legislation is national and narrow.
4. The law was generally welcomed by the community when it was introduced, although there is no evidence about whether all organizations supported all elements of the Act.
5. The Act has been neutral on private sector engagers since the few of them operating in federal jurisdiction were generally parties to voluntary agreements prior to the legislation.
6. The nature of the relationship with engagers has generally not changed.
7. The budget of the Tribunal in 2005/06 is more than $2.2 million.
8. The Act has had no impact on individual contracts, except by providing exemption from potential competition action.
9. There does not appear to have been any unintended consequences of the Act on individual artists.

Québec Artists' Acts

- The *Commission de reconnaissance des associations d'artistes et des associations de producteurs* administers two Acts. The first covers artists working in performing arts, music and sound recording, and film and television. The second covers artists working in visual arts, crafts and literature.

- Both Acts seek to encourage collective bargaining and establish a process for certifying artists' associations. The first one includes a provision for first contract negotiations, including a requirement for arbitration if the parties cannot reach agreement. The second one has provisions concerning the nature of individual contracts entered into between the artists and their engagers and promoters.

- The consequences of the *Commission*'s operation have been the following:

1. Fifteen associations have been certified as exclusive bargaining agents. The Acts have had a greater impact on the sector than the federal Act since the bulk of artistic activity takes place in provincial jurisdiction. Associations with existing agreement have been able to bring non-union productions under the agreements. There is a greater use of individual contracts in the visual arts, crafts and publishing, but collective agreements in these sectors generally do not exist.
2. The Act governing performing arts et al, confirms the self-employed status of artists represented by the certified associations. Since Québec has greater control of its income tax system than other provinces, this has secured that status, although there has not yet been a definitive case under the Act.
3. The Acts provide that collective agreements must be ratified by members covered by them, and associations have generally chosen to ratify national agreements on a provincial basis. A process to remove certification can be launched only by 25 percent of the artists in the sector.
4. The *Commission*'s decisions respecting the historic and linguistic divisions between artists' associations alleviated earlier concerns.
5. There is anecdotal evidence that a few producers in the audiovisual field have moved production outside the province.
6. The nature of the relationships with engagers has generally not changed.
7. The budget of the *Commission* is roughly $ 670,000.
8. Individual contracts in visual arts, crafts and publishing are now more common, although there is anecdotal evidence that they are not yet universal. Confirming bargaining rights may have reduced the threat of action under competition laws.
9. All artists in a sector are bound by any collective agreement, however, artists are not obligated to become members of the certified association and remain free to negotiate beyond the minimum standards.

Saskatchewan Labour Relations Board

- The Saskatchewan Labour Relations Board administers the province's labour laws. For purposes of analysis, two hypothetical models of extending bargaining rights through the SLRB were examined:
    - Model A – would provide a process, rights and obligations for artists and their associations in all cultural sectors equivalent to other workers and their unions, including mandatory bargaining;
    - Model B – is similar to Québec and would provide for mandatory bargaining in the performing arts, music and sound recording, as well as film and television. There would no statutory requirement to conclude an agreement in other cultural sectors.

- The consequences of these hypothetical Models would be the following:

1. a) Model A would make a significant difference. Associations would be able to obtain certification as the exclusive bargaining agent for a defined sector. Associations with existing agreements would be able to extend their jurisdiction to all engagers operating in the province. Associations in sectors which have been unable to conclude collective agreements would be able to compel their

engagers/promoters to negotiate with them and would be able to seek the assistance of the Board to conclude agreements.
b) Model B would have an equivalent impact on associations that currently have voluntary agreements. For other associations, the impact would be far less significant, since the engagers/promoters would not be required to conclude an agreement.

2. While extending bargaining rights in this way may have a negative impact on the self-employed status, it may be possible to ameliorate this challenge with appropriate language in the enabling legislation.
3. Assuming that the enabling legislation protects nationally negotiated agreements in a manner similar to the construction industry act, the risk to them would be minimal. Providing provincial certification creates the possibility that a provincial organization may apply for recognition in a field where a national organization has operated historically, although this did not generally occur in Québec.
4. It appears there is not yet a consensus in Saskatchewan around any model for extending bargaining rights.
5. a) By extending the reach of artists' associations and requiring collective agreements in areas where they do not yet exist, Model A is likely to bring additional costs to some engagers/promoters in all sectors. In those areas where voluntary agreements already exist, this may not be a significant factor. For engagers/promoters in publishing, this is likely to be far more significant.
   b) The overall impact of Model B will not be as significant. The effect would be the same as Model A in those areas where voluntary agreements already exist. However, since agreements would not be mandatory in visual arts, crafts and publishing, the impact will be reduced.
6. To the extent the extension of collective bargaining rights involves the intervention of the SLRB, there may be an initial legitimate concern about how the more adversarial model of traditional labour relations might impact on the sector. This concern would ease over time with training and hiring experts from the sector.
7. The SLRB is likely to need additional members and staff to take on the new responsibilities.
8. The models would have no impact on individual contracts, except they may reduce the threat of action under competition laws and would provide security for union activities.
9. It is assumed that enabling legislation would provide that all artists in a sector are bound by any collective agreement, however, they would not be obligated to become members of the certified association and would remain free to negotiate beyond the minimum standards.

MACSA Fair Compensation Model

- The Ministerial Advisory Committee on the Status of the Artist has proposed a Fair Compensation Model. Through amendments to the *Status of the Artist Act* this model would i) establish a legal authority to intervene and provide dispute settlement in support of voluntary collective bargaining, and ii) provide that the authority could establish minimum industry standards that would be mandatory on the government, its agencies and those receiving government grants. The authority would also provide dispute settlement services for individual contracts.

- The consequences of the Fair Compensation Model would be the following:

1. The ability of the Model to have an impact on bargaining in the sector would depend on the extent to which the authority's industry standards would be mandatory on all engagers receiving public funds. Most engagers in the cultural sector receive such funding. If they are covered by the standards, they would be encouraged to bargain to reach an agreement since they could exercise more control over the terms than over the authority's process. Questions about the "representativeness" of an artists' association claiming jurisdiction may be difficult to determine without a certification process.
2. This model carries the lowest risk to the self-employed status since it would be unique to artists.
3. Without a certification process and a process through which bargaining rights could be lost, there is risk that any group of artists could form an association and seek to bargain at any time. It is assumed that the authority would respect established national standards in making its decisions.
4. It appears there is not yet a consensus in Saskatchewan around any model for extending bargaining rights.
5. There would be additional costs to engagers who receive public funds but who do yet have collective agreements covering the artists they engage.
6. The model is attempting to respect the historic organizing and bargaining models.
7. It is assumed the authority would need appropriate members and staff to carry out its work. Adding appropriate resources to an existing body is likely to keep the costs lower than creating an independent agency.
8. Protection for job action in support of voluntary agreements would be provided. The dispute settlement for individual contracts would presumably be cheaper and more efficient than existing court procedures.
9. Without a certification process, there may be concerns about the lack of a mandatory requirement on artists' association to provide fair and non-discriminatory representation. Beyond that, there would appear to be little effect on any individual artist, since normal patterns of contracting are preserved.

2.0 BACKGROUND

2.1 Status of the Artist

The concept of the Status of the Artist was introduced in the 1970s during a process undertaken by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to research and discuss the situation of the world's artists. The 1980 *Recommendation on the Status of the Artist* concluded that process. In it, UNESCO recommends that governments enact legislation and implement policy measures to acknowledge the fundamental role which artists play in our societies, to encourage artistic expression by responding to the unique manner in which artists work and to improve the economic, social and political status of professional artists.

In addition to important issues around the right of artists to be compensated fairly for their work and to enjoy social benefits equivalent to other workers in the society, an important element of the discussion was ensuring that artists have the right to organize collectively to defend their common interests and to form trade unions and professional associations to help regulate their remuneration and working conditions.

> Member States should ensure, through appropriate legislative means when necessary, that artists have the freedom and the right to establish trade unions and professional organizations of their choosing and to become members of such organizations, if they so wish, and should make it possible for organizations representing artists to participate in the formulation of cultural policies and employment policies, including the professional training of artists, and in the determination of artists conditions of work.[1]

Canada responded to the UNESCO *Recommendation* by creating the Siren-Gélinas Task Force on the Status of the Artist which reported in August 1986. Among its 37 recommendations was a call for legislation to recognize organizations representing self-employed professional artists as collective bargaining agents. While the Task Force was carrying out its work, there were several issues before the federal competition authorities concerning collective bargaining agreements entered into by associations of artists. This gave impetus to the Task Force recommendation and a companion call for a moratorium on the investigation of artists' unions and guilds under the *Combines Investigation Act* until the necessary bargaining legislation had been adopted.

The work of the Task Force was continued by the first Advisory Committee on the Status of the Artist appointed in 1987 by the Minister of Communications (now Canadian Heritage). The following year, the Committee developed draft legislation, known as the *Canadian Artists' Code*.

The government responded to these developments by developing legislation which was tabled in the House of Commons in 1990. In June 1992, the federal *Status of the Artist Act* was proclaimed into law.

[1] UNESCO Recommendation on the Status of the Artist, available at www.unesco.org/culture

Part I outlines a number of principles concerning the important contribution artists make to society and the need for society to "(confer) on artists a status that reflects their primary role in developing and enhancing Canada's artistic and cultural life, and in sustaining Canada's quality of life."

Part II, the operative provisions, creates a framework to regulate the relationship between associations, guilds and unions representing self-employed professional artists and producers operating in federal jurisdiction and establishes the Canadian Artists and Producers Professional Relations Tribunal (Tribunal) to oversee the system. It provides a process for the recognition of artists' associations and regulations which encourage collective bargaining and the conclusion of agreements to cover the engagement of professional artists. It applies to the departments, agencies and institutions of the federal government and to employers or engagers operating in federally-regulated industries, such as telecommunications, banking, airlines and broadcasting.

Five years before the federal legislation was proclaimed, the Government of Québec had enacted Canada's first legislation in this field, *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*. In 1988, the province enacted *An Act Respecting the Professional Status of Artists in the Visual Arts and Crafts and Literature and their Contracts with Promoters*. The primary purpose of both statutes is to recognize the unions, guilds and professional associations representing artists and to regulate or encourage collective bargaining between them and the producers, promoters and employers who engage artists in work that takes place under provincial jurisdiction. The *Commission de reconnaissance des associations d'artistes et des associations de producteurs (Commission)* was established for the purpose of administering the Acts.

As a consequence of the discussions around the UNESCO *Recommendation*, the federal Task Force and the Advisory Committee, other provinces began to consider the issue of the status of the artist. British Columbia, Ontario and Saskatchewan all launched processes to review these issues in the early 1990s.

2.2 Status of the Artist in Saskatchewan

In Saskatchewan, the work was taken on by a government-appointed Advisory Committee on the Status of the Artist. In May 1993, the Committee tabled its Report which contained 115 recommendations covering the full spectrum of issues. The Committee recommended that a new Saskatchewan Artists Code should contain "a mechanism for recognition of collective cultural organizations and producer/presenter organizations for the purpose of collective bargaining."

The work in Saskatchewan was taken up again in 2001. In June 2002, framework legislation introduced by the Minister of Culture, Youth and Recreation was adopted. The *Status of the Artist Act* identified equity for artists within the workforce as a key issue and launched a process to implement practical measures to improve the situation for professional artists. The Saskatchewan Act is broad in its scope and touches on most of the issues addressed in the UNESCO *Recommendation*, including the important contribution artists make to society; the right of artists to freedom of speech, freedom to create and freedom to form associations; the right and need for artists to earn a living from their art; and the need for appropriate education and training.

In September 2002, the Minister appointed a new Ministerial Advisory Committee on the Status of the Artist (MACSA) to study the issues and prepare recommendations for consideration by the government. The Committee's Report was tabled with the Minister in October 2003 and released at the November 2004 conference on the status of the artist convened by the Canadian Conference of the Arts in Regina.

MACSA considered "the establishment of mechanisms that would ensure appropriate and fair compensation for artistic work and services" to be "the most effective approach to improving the status of Saskatchewan artists." Three of its 17 recommendations concern these issues. The Report's first recommendation is this:

> That the Saskatchewan Government amend the *Status of the Artist Act* to establish legal authority to intervene and provide dispute resolution in support of voluntary collective bargaining between artists and engagers. These powers would include the ability to hold hearings designed to recommend minimum industry standards within the arts sector.

The other recommendations are for statutory protection for "job action by artist associations in support of voluntary collective bargaining," and enforcement support from the Department of Labour for self-employed artists who may be involved in a contractual dispute with an engager.

2.3 Objectives of this Report

The purpose of the present Report is to analyze various labour relations models to determine how issues of importance to artists can be addressed in a collective bargaining system in Saskatchewan.

3.0 A BRIEF AND SELECTED HISTORY OF COLLECTIVE BARGAINING AND CANADA'S CULTURAL SECTOR

The first labour laws in Canada were enacted in the later part of the 19th Century and dealt primarily with the right of workers to organize free from the restraints imposed by competition laws. Previously, attempts to organize could bring charges of criminal conspiracy or of being a "combination in restraint of trade." Since 1925, a court decision confirmed that legislative jurisdiction over industrial relations rested largely with the provinces. During World War II, in order to establish a stable workplace, the federal government enacted the law that became the model for labour relations legislation in all Canadian jurisdictions.

In 1944, Saskatchewan enacted *The Trade Union Act* and established the Saskatchewan Labour Relations Board (SLRB), an independent, quasi-judicial tribunal, to adjudicate disputes that arise under the *Act*.

Current labour laws in all Canadian jurisdictions typically provide:

- recognition of the fundamental right of workers to organize;
- rules and regulations governing how unions can become certified to represent a group of workers and how they can lose bargaining rights;
- obligations on the employers and the certified union to bargain "in good faith" to reach a settlement;
- requirements for certain minimum standards for collective bargaining agreements.

In return for the legal status of the bargaining regime and mandatory rules on grievances and arbitration to ensure disagreements between workers and the employer can be resolved, unions cannot strike or otherwise disrupt the workplace during the life of the agreement and the employer may not lock-out the workers.

Initially, labour laws applied only to employees. They were intended to regulate the relationships at a physical workplace, where you would find a stable group of employees working for a common employer. Thus, the rules and regulations of the labour codes were developed with an assumption of an ongoing attachment of the worker to the particular employer.

3.1 Early Organizing in the Cultural Sector

The earliest organization in Canada's cultural sector was the AFM, which became the American Federation of Musicians of the United States and Canada in 1900. Organizing efforts in the sector picked up pace in the early 1940s, when the first agreements were concluded. The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) and Union des artistes (UDA) trace their roots to the 1940s or earlier. Actors Equity Association, the U.S.-based union from which Canadian Actors Equity Association emerged in 1976, established in Canada in 1955.

From the early days, these organizations have succeeded to one degree or another in negotiating agreements with their engagers, strictly on a voluntary basis. To the extent that these associations have economic clout, it arises from Constitutional provisions common in the associations that member artists agree they will work only for engagers signed to a union collective agreement or bound by the terms of a work code implemented by the union. The Constitutions also typically provide that members will work only with others who are also working under the jurisdiction of the artists' association. The degree of economic clout is usually proportional to the degree to which professionals in a sector are members of the appropriate organization and adhere to these principles.

From the engagers' side, there was some willingness to enter into agreements because the organizations also operate as professional associations. In the early days, membership was offered only to those already established as professional artists and the Constitutions generally provide that members must adhere to basic professional standards. As an example, actors are required to be on time for rehearsals and performances, having learned their lines beforehand. If an actor fails to carry out the work in a professional manner, their union may take disciplinary action under Constitutional provisions. Thus, engagers had some assurance that artists they were hiring were qualified for the job.

Another element that has encouraged voluntary collective bargaining in the sector is the unique nature of the work of artists. While there may be some generally acknowledged and easily understood value of different forms of traditional human labour, it is difficult to quantify the economic value of the work of an artist. There may be little relationship between the physical labour the artist has put into the painting and the price that work will bring in the open market. How do you assign an economic value to the work of a singer participating in a studio session? For some engagers who bring together a group of artists to create a work, this has meant that they have been more willing to negotiate collectively, since this provides a minimum standard that will be understood by all. An example of this affect can be found in the advertising industry where the establishment of minimum standards creates a level playing field between producers competing for the same assignments; each will know the basis on which the others will be preparing their bids when they consider hiring talent to appear in a television commercial.

UDA had reached its first collective agreement in theatre in 1937. The first agreement between the CBC and the predecessor of ACTRA, covering performers working in radio, was concluded in 1942 in Toronto. Organizations emerged in other centres in Canada where radio stations existed and efforts were made in the 1950s to create the national associations that exist today. In the case of ACTRA, as the CBC established production centres across Canada, the union set up shop at the same time, often with the tacit concurrence of the CBC. The organization that would become the Directors Guild of Canada was formed in 1961 and by the middle of the 1960s all of the associations of artists working in film and television were firmly established. Performers in Saskatchewan organized an ACTRA Branch in 1967.

Union organizations in other cultural fields did not develop until the 1970s or later, primarily because the industries in which these artists work, from book and magazine publishing, to commercial galleries did not develop the level of professionalism needed as a foundation for such activities.

The Writers Union of Canada (TWUC) was established in 1973 and the Periodical Writers Association of Canada (PWAC) in 1976. Canadian Artists Representation/le Front des artistes canadiens (CARFAC) was founded in 1968 to represent visual artists.

3.2 Agreements Covering Artists

In many respects, the voluntary agreements entered into by the larger organizations of artists, such as ACTRA, DGC, CAEA and the AFM look much like union collective agreements. They provide basic standards such as rates of pay, hours of work and expenses, they regulate working conditions, and they provide for engager and artist contributions to pension and insurance programs organized by the artists' associations. The have a fixed term, provide a process to renegotiate the provisions and establish a grievance and arbitration system for settling disputes.

However, in other key respects they differ from traditional employee agreements. These unique provisions may include:

- the need for the particular circumstances of the engagement to be confirmed by a written contract between the artist and the producer;
- the right to negotiate a fee or compensation greater than the minimum in the agreement;
- the right to share in the economic returns generated by the production; and
- the appropriate on-screen credit to give to the writer, director or performer in an audiovisual work; or the credit to provide the artist in the publicity materials of theatre productions.

A key difference between traditional union agreements and voluntary agreements in the cultural sector is that the legal basis for the artists' agreements is contract law, rather than labour law.

Generally, an agreement entered into by a trade union is a legally binding instrument that can be enforced either by the employer or by the union. By virtue of the legal recognition as the bargaining agent, the union can become a legal party to the collective agreement and it has an obligation to administer the agreement on behalf of the individual members. Where the terms of the agreement have been breached, the aggrieved party can seek redress under its arbitration provisions and/or through a labour board. An arbitration award that is not respected can be filed in court and become a court order.

The legal situation has historically been much different in the cultural sector, although this has changed over time. Artists have created voluntary associations that are more in the nature of private clubs. When these associations negotiated agreements, they could not in the end be enforced in any court by the association acting in its own name. The engager groups that negotiated these agreements typically did not have the legal authority to act on behalf of their members in this way. As a consequence, artists' associations require individual producers to become signatory to the collective agreements to ensure their adherence to the provisions. In the 1980s, these factors came together in the decision of the associations representing the advertising industry to refuse to sign the terms of the agreement they had reached with ACTRA, since they were advised about a potential problem with competition law.

Legal enforceability of the agreements arises through the individual contracts that are entered into between artists and the engagers. These have an equivalent status to any other written contract between two parties. Generally, when an artist signs a contract to provide services to an engager, the collective agreement will provide that its terms must be incorporated by reference into the individual contract. Typically, this will be through a clause that states something to the effect that "this contract is subject to the terms and conditions of the agreement entered into between the artists association and the engager." Thus, the legal enforceability of the agreement arises from the right of the individual artists to enforce the terms under laws governing private contracts, rather than from the status of the collective agreement itself.

As a concrete example of how this plays out, in the 1980s there was a serious dispute between the CBC and ACTRA. The union asked performers to withdraw from a set and this led to the cancellation of the production. Legal advice received at the time concluded that:

- any legal action taken by "ACTRA" to enforce the collective agreement could be launched only with the consent and in the name of the individual artists contracted to that production;
- any legal action against "ACTRA" would be either a series of individual (breach of contract) actions against the artists contracted on that production and/or actions individually or collectively against the elected officials and staff of ACTRA.

Outside the performing arts and film and television, artists' associations have had no success in reaching collective bargaining agreements. Some have tried to negotiate and some have implemented unilateral codes of conduct that certain engagers may adhere to, but there has been little success in efforts to negotiate collective agreements. This is primarily the case because the relationship is more typically one-on-one, rather than the ensemble that prevails in the recorded media and performing arts. Thus, in the initial stages of discussions around the potential measures to promote the economic situation of professional artists, the associations working in other cultural fields such as TWUC, PWAC and CARFAC have urged the implementation of a statutory regime of collective bargaining, perceiving this to be a concrete step that would make it possible for them to conclude collective agreements on behalf of their members.

3.3 Developments Affecting Relationships in the Cultural Sector

In order to properly assess the potential implications of different bargaining models, it is important to understand certain significant changes in the past 15 years affecting the collective bargaining climate in the cultural sector.

3.3.1 Artists as Employees

The Canada Revenue Agency and its predecessor Revenue Canada have begun to consider more artists to be "employees" for purposes of Employment Insurance, the Canada Pension Plan and the *Income Tax Act*. These rulings apply to many symphony orchestras and dance companies and have been applied occasionally to others contracted on a longer term basis, such as certain actors in British Columbia's film and television industry[2]. In June 2004, the Canadian Revenue Agency ruled that an actor/technician at a theatre company was an employee, potentially affecting all other

[2] In *Walden vs. Danger Bay,* the determination that two actors were employees was overturn by the British Columbia Court of Appeal.

actors in that company and the company itself.[3] At present, the musicians in roughly one-half of Canada's symphony orchestras are considered to have a contract of service and thus to be in an employment relationship, as are the dancers in all but one of Canada's major dance companies.[4]

Thus, these musicians and dancers pay into and are eligible to receive employment insurance benefits and they pay only the employee share of the Canada Pension Plan. On the other hand, their eligibility to deduct legitimate expenses they incur in working as a professional artist is limited. Also, unless there is a contractual agreement to the contrary, their employer would be the owner of any neighbouring rights (copyright) they may have in a recorded work. The companies which employ them must pay EI premiums and CPP contributions.

Some of the unions involved in these situations have chosen to seek bargaining rights for employed artists through the labour boards. For example, Canadian Actors Equity Association has been certified by the Alberta Labour Relations Board to represent dancers at the Alberta Ballet. CAEA took this route because it was experiencing some difficulty obtaining a voluntary agreement with the Ballet. The dancers and musicians are considered to be employees for all legal purposes, a status that would extend to the province's workers compensation program, employment standards and common law provisions respecting termination of employment.

3.3.2 Labour Relations Boards and Artists

Even before groups of artists were classified as employees, in several jurisdictions, labour relations boards have extended the scope of bargaining units to incorporate more "dependent contractors" and this has affected the cultural sector significantly. A "dependent contractor" is someone who, while they may work on a contractual basis and be considered to be self-employed for income tax purposes, is nonetheless "dependent" on one employer for their income and is considered, for labour relations purposes, to be equivalent to an employee.

The concept of the dependent contractor emerged from a series of decisions by labour boards concerning a person contracted outside the union scope, with theoretical rights to work for a variety of employers and to control the way they completed their assignments. The unions consider such situations to be contracting out of bargaining unit work through which employers were undercutting the collectively bargained rates and conditions. The boards were faced with the choice that they could either find such a person to be covered by the union certificate and thus to be "protected" by the agreement, or to find such a person outside the union scope and thus to be on their own in negotiating terms of employment with the employer. As a consequence, boards strained to find reasons for them to be covered by the certificates and the concept of the "dependent contractor" emerged.

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[3] This case involved the Magnus Theatre Company in Thunder Bay. The CRA decision was appealed. On 15 June 2005, Magnus Theatre announced that it had been informed by the CRA that "actors and other cultural professionals, in providing their services to the theatre, are independent contractors rather than employees of the theatre."

[4] The case of the Royal Winnipeg Ballet in which dancers were found to be employees remains under appeal. The National Ballet of Canada is the only major dance company in which dancers are considered to be self employed.

These developments have raised significant challenges in the sector.

For example, in a process that began in the early 1980s, decisions by the Canada Labour Relations Board found that a number of artists, including hosts, writer/ broadcasters and others contracted by the CBC were "dependent contractors," included them into bargaining units with employees and removed them from the artists associations that had previously represented them. Similarly, the British Columbia Labour Relations Board has found that certain categories of performers, as well as many categories of artists who work in technical categories in film and television, are "dependent contractors" who can be organized under the labour laws of the province.

This development did not automatically affect the income tax status of those involved. Indeed some of the CBC "dependent contractors" continue to be considered by the Canada Revenue Agency as persons carrying on a business. On the other hand, the CRA does look at this new bargaining status as an element in its determinations.

The change in status coincided with a significant shift in film and television production. Previously, the vast bulk of work in Canada had been produced by federally-regulated broadcasters. But, with the rise of independent producers, broadcasters moved to limit their in-house production to news and current affairs. As a consequence, the production industry is now primarily within provincial rather than federal jurisdiction.

All of this combines together to create a very complicated situation with respect to the collective bargaining rights of artists' associations.

To continue with the previous example, in 1995 ACTRA lost jurisdiction over a considerable number of members at the CBC and this resulted in the collapse of one of the three guilds that had made up the Alliance. In the late 1980s, some members of ACTRA in British Columbia established a rival trade union and began a five-year competition for jurisdiction over media performers in British Columbia. The Union of British Columbia Performers joined the Teamsters and that union began to challenge ACTRA's jurisdiction in other provinces. While an uneasy peace was restored when the UBCP decided to become the BC branch of ACTRA in 1996, efforts to reconcile the collective agreement negotiated in British Columbia with the nationally-negotiated agreement have still not succeeded.

Some of these jurisdictional battles continue as the Teamsters pursued a claim to cover certain categories in the agreements of the Directors Guild of Canada, arguing that the persons working in these categories are "dependent contractors" and that DGC is not a "trade union" within the meaning of the labour codes.

It is important to note that the Saskatchewan Labour Relations Board has not made any rulings based on the concept of "dependent contractor." To date, its decisions have been based on determining whether or not the worker fits into the definition of employee within the meaning of the *Act.*

4.0 HOW ARTISTS AND THEIR ENGAGERS WORK[5]

To understand the issues that have an impact on the collective bargaining situation of professional artists in Canada, it is important to look briefly at how artists and those who engage their services do their work. To date, there is no comprehensive study about the patterns of work in the various artistic professions, however much of the available anecdotal evidence is relevant to the current study.

4.1 Characteristics of Artists

In cultural occupations, an employer/employee relationship generally does not exist. The culture worker is most typically self-employed and works either on their own or for a series of producers. The visual artist and the writer may well create their works before they have any contract with a gallery or publisher. The editor may be contracted to work on a specific novel. The actor may appear for a few weeks in a stage production, the next month on a television program and two months later on a radio commercial. Each of the engagers will be different and the actor will work with different groups of performers on each.

Even for those culture workers with a more steady relationship with one employer, the engagement is typically governed by a fixed term contract, like the lighting technician in a theatre, or the dancer in the ballet. Both parties need the flexibility because of the creative nature of the work and the instability of the employers, who rely on a combination of government funding, ticket revenues and sponsorships to mount their seasons. Fees and working arrangements can vary considerably between different artists working on the same production, in recognition of the different contribution each makes to the works.

It is useful to make a distinction between creative artists (such as writers, visual artists, choreographers, composers and designers) and interpretive artists (such as actors, dancers, singers and musicians) since the artists in these categories generally have different working relationships and are engaged in different ways for purposes of earning artistic income.

Creative artists are more likely to work on their own to create their art and will often do so without a pre-existing contract. The works will be licensed (or sold) after they have been created, although some may be created under a commission. Ownership of copyright is critical to these artists, since it provides moral rights which can enable them to protect the integrity of the work and economic rights that can provide future income and royalty streams.

Interpretive artists are more likely to work in an ensemble and to be engaged by someone else for professional purposes. They are asked to bring to life and give character to an artistic work created by others. For interpretive artists, the fees for the original work tend to be more important, indeed for artists in a live performance situation, this is the only source of income from the particular work. Where the work is recorded,

[5] This Section relies heavily on an unpublished Report prepared for the federal Department of Canadian Heritage. *Report on Improving the Socio-Economic Situation of Canadian Artists, 31 January 2005,* was written by Garry Neil.

downstream income flows as much from collectively bargained residual fees as it does from copyright ownership. The rights of interpretive artists in Canada's *Copyright Act* are limited.

The work of artists has certain defining characteristics and some of these are relevant to the collective bargaining issues.

- Experience and skills are no guarantee of marketplace success, the creative element of the work is difficult to define and perhaps impossible to teach.

- Because of the creative nature of the work, artists often have an ongoing economic interest in their completed work, either through copyright law or contracts and they can receive income from it for a considerable period of time. In some cases, the future income can be far more significant than income derived from its original creation.

- There are no professional standards for artists that are recognized generally by governmental authorities. Anyone can call themselves a "professional artist."

4.2 Characteristics of Engagers/Promoters/Producers

The work of engagers, promoters and producers in the cultural sector is also affected by a number of important factors:

- Canada's cultural market is very small and is dominated by imported goods and services. To respond to this reality, governments at all levels have implemented a range of programs, measures and legislation to encourage the creation, production, distribution, exhibition and preservation of Canadian works in all media.

- Virtually all arts and cultural activities in Canada are supported by some combination of these government initiatives. Public sector institutions, including departments of government, galleries, agencies and public service broadcasters are important engagers of artists or purchasers of artistic works. Most private sector engagers of artists, whether they operate on a for-profit or not-for-profit basis, receive direct or indirect public financial support or investment.

- Despite these government programs and support measures, the sector is faced with continuing uncertainties. Sustainability is a significant challenge in the performing arts and in the film and television, new media, publishing, and the music industries.

- In a number of sub-sectors, the artist is at the centre of the production activity and can become the engager of others, since there is no other way to realize the artistic vision.

- In visual arts and crafts, works can be sold directly to the public, or through not-for-profit or commercial galleries.

- Visual artists, composers, writers and other creative artists may license their works, rather than sell them.

- In new media, Canadian firms involved in the production of creative entertainment or educational content are generally small and insecure and are only beginning to engage professional artists in the works they create.

- In the performing arts, the organizations that engage professional artists are mostly established on a not-for-profit basis and most rely heavily on volunteers and government grants to survive. In 2003, government grants accounted for 30.6 percent of total revenues and private sector grants for an additional 21.3 percent. Volunteers accounted for 42 percent of the "total staff."[6]

- In the book and music industries, most firms creating Canadian works are established as for-profit enterprises, but they are generally very small and financially insecure. There have been significant recent upheavals in both industries, including the disappearance of the largest Canadian-owned firms producing in the English language.

- In the film and television industry, some of the players are large and stable companies that operate on a for-profit basis, such as broadcasters. But increasingly, productions are undertaken by small independent producers who establish a separate legal entity to produce each movie, program or series. This adds to the uncertainty in the sector and is one of the factors in the recent decline in the volume of English-language Canadian drama productions, which has reached crisis proportions according to a report from the Canadian Council of Audiovisual Unions.

- Technological change, globalization and convergence continue to create major challenges and some opportunities for Canadian artists and those who engage them.

[6] Lavallée-Farah. *Facing the challenge: Performing arts in the 1990's.* Focus on Culture, Vol. 14 No. 1. Statistics Canada. Ottawa. October 2002. and
The Daily. http://www.statcan.ca/Daily/English/041215/d041215b.htm. Statistics Canada. 15 December 2004.

5.0 ISSUES OF IMPORTANCE TO SASKATCHEWAN ARTISTS

In evaluating the various collective bargaining models, it is essential to consider issues that are important to Saskatchewan artists. The following questions can be posed about the various models for collective bargaining that might be introduced in the province.

1. **To what extent will the bargaining rights make a difference?**

The purpose of providing rights to artists' associations is to improve the economic situation of artists. Presumably, if they are able to negotiate with engagers collectively, they will be able to negotiate higher rates, better conditions and more security. Another observation is that voluntary bargaining is working reasonably well for at least some segments of the community, particularly in performing arts and the recorded media.

Other issues that arise under this question include the process by which the recognition of bargaining representatives will be determined for artists and engagers, the mechanism that will be used to bring parties to the bargaining table and the process through which disputes arising during the life of the agreement will be resolved.

2. **What are the implications of bargaining rights for the self-employment status of professional artists?**

For most professional artists, maintaining the self-employed status is critical. Since artists can incur significant expenses in preparing to and earning their artistic income, it is critical for most that they continue to be eligible to deduct these business expenses from their income. Expenses which can be claimed by employees are limited. If they lose the ability to deduct business expenses, they will lose economic ground that would be difficult to recapture through a collective agreement.

Also, for certain categories of artists, including writers, composers and visual artists, maintaining copyright ownership is essential to ensuring future income flows from the exploitation of the work and to maintaining its integrity (moral rights). However, under Canadian law, the first owner of copyright created by an employee is the employer and not the artist, unless there is an agreement to the contrary; the reverse situation is the case for a work created by a self-employed artist. These artists cannot afford to be considered to be in an employment situation for their artistic work.

In the coming years, it is anticipated that copyright income will become an increasingly important revenue stream for actors and musicians and engender similar concerns.

3. **What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?**

For many years, artists' associations in the recorded media and performing arts have maintained very successful collective agreements that establish national standards and apply in every province and territory. ACTRA, Equity, the Writers Guild of Canada, DGC and others are justifiably proud of their agreements.

Artists and cultural industries are generally very mobile. For example, there is considerable competition within Canada and globally for film and television production, and actors may work on the stage anywhere in Canada or internationally.

When the British Columbia Labour Relations Board became involved in the film and television industry, the provisions of the B.C. statute brought a requirement for the agreements to be negotiated and ratified provincially and this led to the fracturing of the national agreements. While provincial laws vary, it is likely the case that ratification on a provincial basis would be necessary in most provinces. Given the mobility of artists, this can be difficult to organize. More importantly, many artists and associations fear that fracturing into provincial jurisdictions, combined with the mobility of the industries, can create pressure to reduce fees and working conditions and create a "race to the bottom."

A related element in this discussion is the fact that many Canadian provinces provide incentives for cultural producers. In the film and television industry and potentially in other sectors, there is competitive pressure between provinces, with those offering the higher incentives attracting greater volumes of production activity.

4. Is it possible to find a bargaining model that will achieve broad acceptance in the artistic community?

If Saskatchewan is to provide bargaining rights to artists in the province, there must be broad support in the community for the particular approach.

There are varying views between and within the organizations that have already succeeded in negotiating voluntary agreements and some of these are in conflict:

- some would like a legal underpinning to their activities enabling them to extend their jurisdiction to non-union engagers;
- some are concerned about the potential threat to the national agreements;
- some are concerned that legislation risks fracturing their membership between categories which would be considered artists and those outside such a definition;
- some believe legislation should only be used to confirm existing collective bargaining relationships.

There are also varying views between and within the organizations representing visual artists, craftspersons, book and magazine writers and other categories which have been unable to negotiate collective agreements:

- some prefer a statutory sectoral bargaining right;
- some prefer a method through which voluntary bargaining can be encouraged;
- some believe any collective bargaining approach is irrelevant or counterproductive for professional artists.

5. How will the model affect engagers of artists, who often find themselves in a precarious economic situation?

Most artists are also concerned about the health of their engagers and do not want to impose conditions that would make it impossible for them to carry on their work. To the extent that the producers/engagers believe a collective bargaining regime is likely to increase their costs, they will be more likely to oppose it.

Many engagers of artists receive direct or indirect public financial support from one or more levels of government. Even with this support, some are in an economically unstable situation. Given that the purpose of providing bargaining rights is to improve the economic circumstances of professional artists, this would appear to create a public policy challenge.

If bargaining rights are extended to Saskatchewan artists, the engagers and artists' associations may need to collaborate to find the additional resources required to improve the economic situation of professional artists.

6. How will the bargaining model influence the generally collegial relationships that exist in the sector?

Bargaining in the cultural sector has generally proceeded on a more collegial basis than traditional labour relations, no doubt because of the symbiotic relationship between the artist and their engagers in these sectors. Each needs the other to succeed and both understand this reality.

While it is sometimes difficult for the worker on the assembly line to understand why he/she should be concerned about the performance of the company, most artists have a positive relationship with the engager because each side understands that the other must do well for the work to have a chance of succeeding. Creation can often be a collaborative process involving all of the partners in the enterprise, regardless of whether one of them is in the position of contracting the others.

Remember also that many artists have an ongoing economic interest in the work, arising either from copyright law or contractual provisions, thus their relationship with the engager can continue well after they have ceased providing services directly.

There are related elements to consider. For example, some of the existing collective agreements in the cultural sector cover categories which are likely to be considered as management in the traditional workplace and thus beyond the scope of bargaining rights. The Directors Guild of Canada includes categories which may have authority to hire and fire and to direct others engaged on the same production. These management functions may be found to exist with respect to other categories within the same bargaining unit.

7. What is the cost of the bargaining model?

It is important for the government to consider the costs of any system it might implement. This also concerns artists since resources provided to establish and maintain a bargaining system may well decrease the resources available to support the creation, production and distribution of the artistic works themselves.

8. To what extent will the model improve support for individual contracts?

There are several elements to this issue. The first set of issues relates to artists who are working in a field in which an association is seeking to bargain an agreement or in which the individual contract is signed under the terms of a collectively bargained agreement.

The second set of issues relates to a situation in which the artist works in a field in which there are no collective agreements.

The enforcement of an individual contract signed under a collective agreement is the responsibility of the association. As explained earlier, if the union or guild does not have a legal status, it may act only in the name and with the consent of the individual and this can make enforcement of the agreement more challenging. The other issues concern the use of pressure tactics by the association to obtain a first or renewal collective agreement and the related issue of the protection of individual artists who are performing official union functions.

The primary method for applying economic pressure by artists' associations has been the Constitutional requirement that members agree they will work only for an engager which has signed an agreement with the association. The unions and guilds that maintain collective agreements regularly publish a list of companies for which members may not work. In the past, concerted action to refuse to accept contracts has been examined as a possible violation of competition laws since the engager will not have access to a qualified and skilled workforce unless they agree to meet the minimum standards. However, there is no definitive Canadian jurisprudence on this question and there has been no recent challenge to any of the union "unfair engager" lists. The second situation concerns members who are contracted on a production when a collective agreement expires, or when the union or guild has a dispute with the engager. As discussed above, since the member and union officials may be individually liable under contract law for actions in this respect, this issue has not been tested and the union and guilds have found other ways to deal with the challenge.

Anecdotally, some officials with artists' associations believe that their work opportunities have been curtailed as a consequence of their involvement with the association. Typically this does not involve an action by an engager during a contract, but an alleged refusal of engagers to issue subsequent contracts.

The second set of issues relates to artists who regularly enter contracts that are not governed by a collectively bargained agreement. If they are involved in a dispute about the terms, they need access to an appropriate dispute settlement process. Even many of the artists who do not support a collective bargaining model, would like access to an improved system to assist them to resolve disagreements.

9. What might be the unintended impact of bargaining rights on individual artists?

It is essential that any bargaining system introduced not have an adverse affect on individual artists.

6.0 COLLECTIVE BARGAINING MODELS

6.1 *Status of the Artist Act* and the Canadian Artists and Producers Professional Relations Tribunal

The federal *Status of the Artist Act* was passed in 1993. Part I outlines a number of principles concerning the important contribution artists make to society and the need for society to support artists. Part II, the operative provisions, creates a framework to regulate the relationship between associations, guilds and unions representing self-employed professional artists and producers operating in federal jurisdiction and establishes the Canadian Artists and Producers Professional Relations Tribunal (Tribunal) to oversee the system.

The Tribunal was created in 1993 and began functioning when the Act came into force in May 1995.

6.1.1 The Canadian Artists and Producers Professional Relations Tribunal

The Tribunal has five members, including its Chair and Vice-Chair. The functions of the Tribunal are the following:

- defining the sectors of cultural activity that are suitable for bargaining;
- certifying the artists associations to represent these sectors;
- hearing and deciding complaints of unfair practices filed by artists, associations or producers.

6.1.2 Artists Covered by the Act

The application of Part II is limited to "independent contractors determined to be professionals." The Act specifies that these professionals must be authors of works protected by the *Copyright Act*, directors of audiovisual works, performers, choreographers and any others who "contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound recording, dubbing, or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by the regulations."

The Professional Categories Regulations that came into affect in 1999 provide for additional categories eligible for coverage under the Act. Practitioners who contribute directly to the creative aspects of a production by carrying out one or more of the following activities are included:

Category 1 – camera work, lighting and sound design
Category 2 – costumes, coiffure and make-up design
Category 3 – set design
Category 4 – arranging and orchestrating
Category 5 – research for audio-visual productions, editing and continuity.

6.1.3 Regulating Professional Relations

Certification by the Tribunal gives an artists' association the exclusive right to represent self-employed artists in a specific sector with respect to collective bargaining and their relations with producers. To be eligible to apply for certification, an artists' association

must adopt by-laws that establish membership requirements for artists; give its regular members the right to take part and vote in the meetings of the association and to participate in a ratification vote on any scale agreement that affects them; and provide its members with the right of access to a copy of the association's financial statement to the end of the previous fiscal year.

In considering the merits of an application for certification, the Tribunal must determine the scope of the sector that is suitable for collective bargaining and then it must decide whether the applicant is the organization "most representative" of artists in the sector.

The Tribunal takes into account the following factors when determining the suitability of a sector for bargaining:

- whether the independent artists in the proposed sector have common interests;
- whether there is a history of professional relations among those artists and the producers to whom they provide services;
- whether any scale agreements regarding terms of engagement already exist;
- any relevant geographic and linguistic criteria.

Once it has identified the sector that is suitable for collective bargaining, the Tribunal has broader scope than the labour board in making the determination of whether the applicant is "most representative" of the artists working in that sector. It considers the size of the sector, the size of the applicant's membership, and whether there are any competing applicants for certification. To be granted certification, the artists' association need not represent a majority of artists working in that sector. The Tribunal may also conduct a representation vote but to date has only done so on one occasion. Under the legislation, artists and artists' organizations affected by the application have the right to be heard by the Tribunal on the issue of “representativeness,” but producers do not. There are rules under which the Tribunal may revoke a certificate.

The legislation also entitles producers to form associations for the purpose of bargaining and entering into scale agreements with artists' associations and outlines a relatively informal process for this purpose. In order to obtain the exclusive right to bargain on behalf of its members, an association of producers must simply file a copy of its membership list with the Tribunal, keep it up to date, and send a copy of the list to every certified artists' association from whom it has received a notice to bargain or with whom it has entered into a scale agreement.

Once certified, an artists' association is entitled to issue a notice requiring federal producers who engage artists in its sector to bargain with it. Producers are also entitled to issue a notice requiring an artists' association certified in respect of a sector to begin bargaining. The objective of these negotiations is to reach an agreement that provides for minimum terms and conditions, thus artists are free to negotiate fees and conditions more favourable to them.

The legislation requires parties to bargain in good faith to reach a settlement. However, there is no requirement for them to reach a first agreement, or any provision for arbitration if the parties fail to come to an agreement within a specified time frame.

Section 35 of the legislation imposes a duty of fair representation on certified artists' associations.

The legislation requires every agreement to contain a provision for final settlement, without pressure tactics, of all differences between the parties or among artists bound by the agreement, arising from its interpretation, application, administration, or alleged contravention. In the event that an agreement does not contain the required provision for final settlement, the difference is to be submitted to an arbitrator selected by the parties or appointed by the Minister for final settlement.

Pressure tactics are defined by the legislation to include:

- a cessation of work or a refusal to work or to continue to work by artists or artists' associations...and a slowdown of work or other concerted activity....done to compel a producer to agree to terms or conditions of engagement; or
- the closing of a place of work, a suspension of production or a refusal to continue the engagement of one or more artists by a producer, done to compel artists....to agree to terms or conditions of engagement.

Pressure tactics may be used either beginning thirty days after a binding scale agreement expires and ending on the day that a new scale agreement is entered into; or beginning six months after the date of certification of an artists' association and ending on the day that a scale agreement is entered into, where there is no scale agreement binding the producer and the association in respect of that sector.

6.1.4 Analysis

After close to 10 years operation, CAPPRT has largely accomplished its primary function of certifying associations of artists for purposes of collective bargaining and has certified the following associations as exclusive bargaining agents in defined sectors, listed in the order in which the certificate was issued:

1. Société des auteurs de radio, télévision et cinema
2. Union des écrivaines et écrivains québécois
3. Canadian Actors' Equity Association
4. Association québécoise des auteurs dramatiques
5. Canadian Association of Photographers and Illustrators in Communications
6. Société professionnelle des auteurs et des compositeurs du Québec
7. Periodical Writers Association of Canada
8. Writers Guild of Canada
9. ACTRA Performers Guild (ACTRA)
10. Union des Artistes
11. Playwrights Guild of Canada
12. American Federation of Musicians of the United States and Canada
13. La Guilde des musiciens du Québéc
14. Le Regroupement des artistes en arts visuels du Québec
15. Conseil des métiers d'art du Québec
16. Association des réalisateurs et réalisatrices du Québec
17. The Writers' Union of Canada
18. Canadian Artists' Representation / Le Front des artistes canadiens
19. Editors' Association of Canada / Association canadienne des réviseurs
20. Associated Designers of Canada

21. Association des professionnels des arts de la scène du Québec (APASQ-CSN)
22. Association des professionnelles et des professionnels de la vidéo du Québec and Syndicat des techniciens du cinéma et de la vidéo du Québec
23. Canadian Guild of Film Composers
24. Directors Guild of Canada

The Act has not significantly changed collective bargaining in the cultural sector. While the work of the established artists' associations has been given a secure legal footing, there has been only minor expansion of jurisdictions to areas that had previously operated outside a union agreement.

The certification process has not brought collective agreements in sectors in which such agreements did not exist prior to the entry into force of the Act. The Guild of Canadian Film Composers recently filed notice of its intention to bargain with the CBC. CARFAC is currently negotiating with the National Gallery of Canada on behalf of visual artists. CARFAC has also concluded a new schedule of conditions for galleries, but this is a voluntary code of appropriate fees and conditions and not a collective bargaining agreement. The code has no more force of law than any code promulgated before the enactment of the federal Act.

There are several reasons for the slow pace of extending bargaining into other cultural sectors. The bargaining process is relatively new to some of the associations, there has been no history of collective bargaining and the organizations may have difficulty in acquiring the capacity to exploit the benefits of being certified. This is the case in the visual arts field and crafts. It is also the case in those sectors that artists tend to work independently and alone and may often complete their work before they sign any contract. The final reason is the narrow scope of federal jurisdiction. Outside of the CBC, National Film Board, National Arts Centre, National Gallery and a few other agencies and selected government departments, few artists are engaged by an employer working under federal jurisdiction.

In 2003, the federal government undertook a comprehensive review of the *Status of the Artist Act*. After research and consultation with the community, the outside consultant put forward the following recommendations with respect to Part II. Presumably, the community and the outside experts felt that these areas represented weaknesses with the existing provisions:

- provide for arbitrated settlement of all issues where the parties are unable to conclude a first agreement;
- link the right to apply pressure tactics in first agreement situations to the date of notice to bargain, rather than to the date of certification;
- consider mechanisms to increase the efficiency of the collective bargaining process. To this end, consideration should be given to establishing one bargaining authority for all federal government departments;
- review the categories of cultural workers eligible for coverage under the *Status of the Artist Act*.[7]

[7] Prairie Research Associates. *Evaluation of the Provisions and Operations of the Status of the Artist Act.* Ottawa. 2003. The report and analysis can be found at www.pch.gc.ca.

6.1.5 Protection for Job Action

As the UNESCO General Conference was meeting in Belgrade, there were significant threats arising for key unions and guilds that represent Canadian artists. The federal Competition Bureau was looking at the agreements negotiated by ACTRA, AFM and UDA in the audiovisual industry and considering whether these were "combinations in restraint of trade." Since the bargaining did not proceed under labour laws, the agreements did not benefit from the exemption provided to traditional collective agreements. All three groups had documents seized as part of these investigations and at one stage lawyers for the advertising industry recommended that their clients not execute the production agreement negotiated with ACTRA.

One of the principal affects of the implementation of the *Status of the Artist Act* has been that the Competition Bureau appears to have accepted that the certified associations have an equivalent status to trade unions for purposes of the *Competition Act.* All of the investigations underway in the early 1990s were halted and the ACTRA Commercial Agreement was signed by the industry. Each of these investigations involved activities taking place within provincial jurisdiction, rather than federal jurisdiction. Thus, it may be appropriate to investigate the implications of the federal statute on potential future actions of the competition authorities, but such a study is beyond the scope of this Report.

6.1.6 CAPPRT and Issues of Importance to Saskatchewan Artists

1. **To what extent will the bargaining rights make a difference?**

The primary effect of the federal legislation has been to confirm the existing voluntary agreements, with some ability for the more successful unions to secure their jurisdiction and bring a few additional engagers into the fold.

There has been no expansion of bargaining into fields in which collective agreements did not exist prior to the legislation. The negotiations between CARFAC and the National Gallery are the first concrete effort to move into such a field.

2. **What are the implications of bargaining rights for the self-employment status of professional artists?**

The legislation is specifically limited to "independent contractors" and thus it could not contribute to eroding the self-employed income tax status of the artists represented by the certified associations. Similarly, it would be difficult for the Canada Revenue Agency to contend that a provision of a collective agreement, concluded by one of the certified associations covering work in federal jurisdiction, is evidence of employee status.

However, there is a concern that this provision may be narrow. If there is a future reclassification of artists working in federal jurisdiction as "employees" by CRA, the legislation would exclude such artists from the Act and this could splinter bargaining units or open up those units to potential raids from other unions.

3. What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?

Since this is a federal Act, nationally-negotiated voluntary agreements that fall within the parameters of the Act are fully protected. An example would be agreements entered into by SARTEC, ACTRA, UDA and AFM with the Canadian Broadcasting Corporation and Radio Canada. While these associations and others certified by the Tribunal maintain other national agreements, these have been negotiated with engagers operating within provincial jurisdiction and the federal Act would have no impact on these agreements.

4. Is it possible to find a bargaining model that will achieve broad acceptance in the artistic community?

There was a broad consensus supporting the legislation when it was first proposed. However, some organizations in the sector may have been primarily interested in the provisions of Part I of the Act. On the other hand, while there were many comments about Part II, no artists' association opposed the concept of bargaining rights contained in the draft.

5. How will the model affect engagers of artists, who often find themselves in a precarious economic situation?

Since the application of the Act is limited to federal jurisdiction and the primary affect of the legislation has been to confirm existing collective bargaining agreements, rather than to encourage new ones, the Act has been generally neutral on private sector engagers. Some government departments have been reluctant to enter an agreement with a certified association, however, financial "hardship" is generally not an issue.

6. How will the bargaining model influence the generally collegial relationships that exist in the sector?

The Act reflects the key needs of the sector. Historic relationships are respected and the Act protects the rights of individual artists to negotiate fees and other provisions that are in excess of the minimum standards of the association agreement. Bargaining in the sector has proceeded more or less the same as before the Act was introduced. The independent nature of the Tribunal helps to ensure that the interests and circumstances of the community are taken into account in all decisions and actions.

7. What is the cost of the bargaining model?

The Tribunal has five full-time members and ten full-time equivalent staff positions and its budget for the 2005/2006 fiscal year is roughly $2,200,000.

There has been some consideration about merging the operations of the Tribunal and the Public Service Staff Relations Board with the Canada Labour Relations Board. A discussion paper in 1998 suggested this be done by having one chairperson and separate divisions to assume responsibility for each of the three Acts (*Status of the Artist Act, Canada Labour Relations Act* and *Public Service Staff Relations Act*). Because the Tribunal is established as a federal public sector institution, there are reporting and other

statutory requirements that it must meet and this requires a certain level of staff support. The issue of housing the Tribunal continues to be under consideration as a result of the 2003 review of the Act.

When the Act was first introduced, the community advocated for an independent tribunal to be created, fearing that administration by a labour board would negatively affect the collegial bargaining relationships in the sector.

8. To what extent will the model improve support for individual contracts?

The Act has eliminated the threat from competition laws with respect to activities in federal jurisdiction and may have done the same with respect to identical activities in provincial jurisdiction. The Act has also confirmed the status of recognized associations for purposes of resolving disputes under the agreements.

The federal system has no affect on individual engagement agreements. Furthermore, individual arrangements entered into with federal engagers are matters of contract law and within provincial jurisdiction.

9. What might be the unintended impact of bargaining rights on individual artists?

The system does not appear to have had any unintended impact on individual artists, and the Prairie Research Associates' study did not reveal any concerns in this respect. Membership in artists' associations regulated by the Act must be voluntary. While they may have certain collectively bargained obligations to give preference of engagement to union members, in the end engagers in the sector may hire whomever they want, whether a union member or not. The non-member artist would be contracted under the terms of the collective bargaining agreement and the union would be obligated to provide services to that artist for the duration of the contract. In return, the non-member artist is generally required to make a payment to the union in lieu of membership dues. This situation is identical to what prevailed before the *Status of the Artist Act* came into effect.

6.2 Québec's Acts and the *Commission de reconnaissance des associations d'artistes et des associations de producteurs (Commission)*

There are two Acts in Québec that regulate the relationship between professional artists and their engagers.

The *Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists,* which covers most interpretive artists, was adopted first.

The *Act Respecting the Professional Status of Artists in the Visual Arts and Crafts and Literature and their Contracts with Promoters* was adopted one year after the initial Act. It covers most creative artists.

In each case, the primary purpose of the statute is to recognize the unions, guilds and professional associations representing artists and to regulate or encourage collective bargaining between them and the producers, promoters and employers who engage artists. The substantial difference between them reflects the history of collective bargaining in the sector.

The key difference is that the one governing performing, recording and film artists, in a sector with a long established history of voluntary collective bargaining, includes a provision for first contract negotiations and an arbitration process if the parties are unable to reach agreement within a set time. The other Act encourages bargaining but stops short of requiring it to take place. Instead, this Act requires that individual contracts be entered into between the artists covered by the Act and those who engage them, and regulates the content of such contracts.

The *Commission de reconnaissance des associations d'artistes et des associations de producteurs (Commission)* was established for the purpose of administering the Acts. To date, they have authorized 15 associations to bargain collectively with producers, in all cultural sectors. To date, no association of producers has been certified to bargain collectively with artists' associations, although there are three applications in process. The associations certified to represent artists are the following:

1. Alliance québecois des techniciens de l'image et du son (AQTIS)
2. Canadian Actors Equity Association (CAEA)
3. Société des auteurs de radio, télévision et cinéma (SARTEC)
4. Société Professionnelle des Auteurs et Compositeurs du Québec (SPACQ)
5. Conseil des Métiers d'art du Québec (CMAQ)
6. Union des Écrivaines et Écrivains Québécois (UNEQ)
7. Associations Québécois des Auteurs Dramatique (AQAD)
8. Conseil du Québec de la Guilde Canadienne des Réalisateurs (CQGCR)
9. Guilde des Musiciens du Québec (GMQ)
10. Regroupement des artistes en arts visuels du Québec (RAAV)
11. Union des artistes (UDA)
12. Associations des professionnels des arts de la scène du Québec (APASQ-CSN)
13. ACTRA Performers Guild (ACTRA)
14. Writers Guild of Canada (WGC)
15. Association des réalisateurs et réalisatrices du Québec (ARRQ)

6.2.1 Artists Covered by the Act

Unlike the federal Act which seeks to define the artists covered under it, the Québec Acts identify the field of work. It applies to the following fields of artistic endeavour:

- The stage; including the theatre, the opera, music, dance and variety entertainment, multimedia; the making of films; the recording of discs and other modes of sound recording; dubbing; and the recording of commercial advertisements.
- Visual arts (painting, sculpture, engraving, drawing, illustration, photography, textile arts, installation work, performance, art video or any other forms of expression of the same nature); arts and crafts (working of wood, leather, textiles, metals, silicates or any other material); literature (creation and translation of original literary works, such

as novels, short stories, dramatic works, poetry, essays or any other written works of the same nature).

The Acts then are limited, in the first case to "a creator or performer" who works in the fields and, in the other case, "every creator" in the covered fields.

Act Respecting Performing, Recording and Film Artists

Despite its title, the Act covers all artists working in the fields of theatre, opera, dance, television and films, multimedia, the music industry and commercials. In addition to actors and other performers, this covers the scriptwriters, music composers, editors, cinematographers, directors, sound and lighting technicians, choreographers and other creative artists involved in these productions.

In its introductory clauses it specifies that an artist who provides their services through a corporation continues to be covered by the Act and that an artists who "regularly binds himself to one or several producers by way of engagement contracts … is deemed to practice an art on his own account." The unions in the province interpret this clause as providing certainty for the self-employed status of artists for purposes of the income tax provisions and other statutes.

As with the federal Act, the Québec law sets out conditions necessary for an association to be recognized. It must be organized for purposes of collective bargaining, it must be free from producer influence and its constitution must establish certain basic member rights.

Once an association makes an application for recognition, the *Commission* must be satisfied that the sector is appropriate for bargaining purposes and that the association represents the majority of artists in that sector. Unlike the federal law, this provision is similar to labour code requirements and the *Commission* may require a vote in order to ensure majority support. There are rules about how an association may lose the recognition. In granting recognition, the *Commission* has supported historic divisions in the sector and has acknowledged sectors based on language of production.

After the notice to bargain has been delivered, the parties are required to negotiate in good faith to reach an agreement. If they are unsuccessful in reaching a first agreement, either party may apply to the *Commission* to seek binding arbitration on the outstanding issues. For subsequent negotiations, the parties must apply jointly for binding arbitration if they are unable to reach a settlement. There are rules about when a party may use "pressure tactics" to get the other to come to an agreement. A recent change to the Act makes any bargaining agreement binding on a successor of the producer.

The Act provides that the agreement concluded by a certified artists' association is binding on all artists in the sector. If the agreement has been concluded by a certified producers' association, it is binding on all producers in that sector. It also provides certain minimum standards for the agreements, for example, they must contain a grievance arbitration procedure to enable disputes about interpretation to be resolved during the life of the agreement.

Act Respecting Artists in Visual Arts, Crafts and Literature
Artists' associations may be recognized as the representative of artists in the sector. The rules regarding qualification to apply for recognition and circumstances under which the recognition can be withdrawn are identical to the other Act.

However, this Act had specified there can be only one association in each of the three fields covered by the Act:

- visual arts (RAAV);
- arts and crafts (CMAQ);
- literature (UNEQ).

The recognition is to be given to the association that is "the most representative of all the professional artists working in a particular field," relying on factors such as the largest number of members, distributed throughout the artistic activities within that sector and distributed throughout the province. The most recent amendments provide authority for the *Commission* to recognize a second association in the field of literature to cover the publishing of dramatic works written for the stage. AQAD has applied to be certified as the artists' association for this activity.

The rights of the recognized associations include the right to "draw up model contracts stipulating the minimum conditions of circulation of the works of professional artists and propose the use of such contracts to promoters."

A key provision of the Act obligates engagers to enter into individual contracts when they engage an artist who is covered by the recognized association. These contracts must adhere to certain minimum standards, including that they:

- be executed in writing;
- specify the nature of the work;
- specify the fees to be paid and the nature of the license being provided to the engager; and
- contain minimum standards for contracts that provide exclusivity to the engager for future work from the artist.

Either party may seek arbitration of a dispute that arises under the terms of the contract. There are obligations on the engager to keep appropriate records regarding the sales of the artistic work and there is a right for the artist to audit the books. Finally, there is also a clause specifying that works on the premises of the "promoter" are there "temporarily" unless the promoter is also the owner of the work.

While the associations have the right to negotiate a collective agreement, there is no requirement on the engagers to negotiate or any provision for arbitration of a first agreement.

6.2.2 Analysis

The Québec Acts have had a greater impact than the federal law. They have provided to the established unions a legal foundation for the voluntary agreements they had already been able to negotiate with producers in the province. While they have not resulted in significant new bargaining agreements in the sector, they have extended the use of individual contracts in all parts of the visual arts, crafts and literature fields.

Because there is a far larger volume of work that takes place under provincial jurisdiction, they have allowed the established associations to enforce their jurisdiction over productions that had previously taken place outside of the agreement.
A common criticism in the community is that the *Commission* is too bureaucratic and legalistic in its approach. For example, it requires associations to be represented by lawyers for most of their dealings which can be prohibitive for the smaller associations in the sector. In contrast, the federal Tribunal permits non-legal association staff to put forward the case.

There were also concerns with the length of time the *Commission* took to make some of its decisions and recent changes to the Act set a time limit. The early decisions were complicated in part by the need to draw the line between who is an artist and who is not an artist since this was not as explicit as it is in the federal Act. In the final analysis, the provincial and federal models are similar in this respect, but the *Commission* needed to conclude its analysis without the benefit of statutory guidance.

When the Québec film and television production association (APFTQ), applied for recognition as a producers' association under the Act and therefore legally responsible to bargain on behalf of all producers working in the province, the U.S. film and television producers and distributors threatened to boycott Québec. The immediate challenge was resolved at the bargaining table, with a special status being given to the U.S. producers in the most recent bargaining with provincially-based unions and guilds. A hearing on the original application has been scheduled for fall 2005.

The Writers Guild of Canada is currently experiencing a challenge arising from the insistence of the APFTQ to negotiate a separate agreement with the province's English-language scriptwriters. After several years of bargaining and discussion by the producers association of seeking arbitration of a "first agreement" through the Commission, the parties reached a settlement in 2004. Some of the provisions of the agreement vary from the provisions of the agreement negotiated nationally between the WGC and the Canadian Film and Television Production Association (CFTPA). The WGC and CFTPA are currently discussing whether the provincial agreement violates the "most-favoured nation" provisions of the national agreement by providing better terms to provincial producers.

6.2.3 Québec's Acts and Issues of Importance to Saskatchewan Artists

1. **To what extent will the bargaining rights make a difference?**

While still limited, the Québec Acts have had a greater impact on the sector than the federal Act, primarily because they cover the overwhelming bulk of activity that takes place in the sector. Associations which have had a history of successful bargaining have been able to bring non-union productions under the agreement. There is a greater use of individual contracts in the visual arts, crafts and publishing. However, artists' associations in these fields remain unable to conclude collective agreements.

2. What are the implications of bargaining rights for the self-employment status of professional artists?

Québec has greater control over its income tax system than any other province. Because the Act governing performing arts and film and television contains the clause deeming the artist to be "practic(ing) an art on his own account", the unions in the province believe they have halted the erosion of self-employed status. There has been no definitive ruling on this issue since the Acts were first adopted.

Theoretically, it may be possible in future to have a situation in which a professional artist in Québec is considered to be carrying on a business when their income is assessed for purposes of provincial taxes and in a contract of service when that same income is assessed for purposes of federal taxes, since an independent assessment is possible by each revenue agency. In the case of other provinces, there is agreement that the federal government is responsible for the rules governing the determination of taxable income. The provinces may establish rules relating only to how much of this income they will tax and at what rate.

3. What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?

There are no requirements in the Acts for provincially-based bargaining, however, the Act does require that the agreement be ratified by "the members included under a draft group agreement." The extent of this requirement has not been tested although the difficulties experienced by the Writers Guild of Canada have raised concerns among the unions. ACTRA now collects the results of its ratification votes on a provincial basis based upon the membership of its branch. Note that this is not equivalent to residence status, or to the location of the work. Any member of ACTRA may choose to join the Montréal branch and work anywhere in the country. The Directors' Guild of Canada is certified in Québec through its Conseil du Québec de la Guilde Canadienne des Réalisateurs.

Once an association has been certified, they become the exclusive bargaining agent for artists in that sector and can only lose the right in accordance with the provisions of the Acts. The process for removal of recognition can be launched either by an association of producers or by 25 percent of the artists in the sector. An application can only be made within the three months preceding every fifth anniversary of the date that recognition came into affect. The *Commission* is then obligated to test whether the association still represents the majority of artists in the sector. This provision has also not been tested.

4. Is it possible to find a bargaining model that will achieve broad acceptance in the artistic community?

There were many concerns when the legislation was first introduced, most particularly around whether the recognition process would respect the historical and linguistic divisions between the existing artists' associations. There have also been concerns about the complexity of dealing with the *Commission*, but some of these were addressed in recent amendments to the Acts.

5. How will the model affect engagers of artists, who often find themselves in a precarious economic situation?

There is anecdotal evidence that one of the outcomes of the first Act is that certain producers in the audiovisual field have moved production outside the province in order to escape the requirement to adhere to a union agreement. However, because new agreements are not being negotiated in areas where they had not existed previously, the overall affect is minimal.

6. How will the bargaining model influence the generally collegial relationships that exist in the sector?

There does not appear to have been any negative impact in this respect. The Acts address the realities of the sector and the *Commission* has respected the historic divisions among the associations.

7. What is the cost of the bargaining model?

The *Commission* is comprised of four members and has a staff of two persons. The President and Vice-President work full-time, the other Commissioners serve on a part-time basis. The budget for the *Commission* in the current fiscal year is roughly $670,000.

8. To what extent will the model improve support for individual contracts?

The Act respecting performing artists authorizes the appropriate use of pressure tactics and its enactment may have played a part in the decision of competition authorities to wind-up investigations that had been underway.

The Act concerning visual arts, crafts and publishing has made the use of individual contracts mandatory and this has caused the use of individual contracts to become more widespread. On the other hand, there is anecdotal evidence that individual contracts are still not used in all cases, despite the legal requirement. There is no evidence that the use of arbitration to resolve disputes has been used extensively, either for these individual contracts or for the negotiation of a first collective agreement in the case of the Act covering the performing arts and media.

9. What might be the unintended impact of bargaining rights on individual artists?

The system provides that all artists in a sector that is represented by a recognized association are bound by any collective agreement that covers that sector. However, artists are not obligated to become members of the association and they remain free to negotiate individual conditions of engagement. There is no evidence to suggest there is any widespread unhappiness with this arrangement.

Collective Bargaining Rights and Saskatchewan Artists

Preamble

Given the scope of the Report sought from the author, it is evident that some Saskatchewan artists support the recommendation of the Saskatchewan Ministerial Advisory Committee on the Status of the Artist to establish a *Fair Compensation Model*, which is analyzed in Section 6.4. Others appear to favour a model to extend collective bargaining rights to professional artists by authorizing the Saskatchewan Labour Relations Board to regulate bargaining in the cultural sector, an option that is analyzed in Section 6.3.

The author was not requested to review other possibilities. However, it is assumed that at least some Saskatchewan artists would be content with the existing legal framework for collective bargaining and the status quo is analyzed in this report only indirectly. Other Saskatchewan artists are likely to have no opinion on the issue and a few may support an alternative model that cannot be analyzed in this Report since it is not defined.

6.3 Saskatchewan Labour Relations Board, *The Trade Union Act* and *The Construction Industry Labour Relations Act.*

Like other labour laws, the two relevant Acts in Saskatchewan establish a process to regulate collective bargaining activities between employers (or groups of employers) and unions representing the employees. The process, rights and obligations are straightforward:

- there is a certification process for determining that a majority of employees in an appropriate bargaining unit support the trade union;
- there is a requirement for the parties to negotiate in good faith to achieve a collective agreement;
- unfair labour practices are delineated and prohibited to protect employees and the unions from any attempt by the employer to interfere with their rights and to protect the employer against unfair practices by the union;
- a union is obligated to represent fairly all workers in its bargaining unit;
- strike and lock-out activities are regulated;
- specific additional issues are addressed, including union security, technological change, voting procedures and so on; and
- remedial and enforcement mechanisms are provided.

In the Act regulating the construction industry there are special provisions that take into account the unique circumstances of that sector. These include the facts that when the legislation came into affect, workers were generally represented by craft unions, such as those that represent electricians, plumbers or carpenters, work sites may have a different group of workers represented by different unions, and companies generally require a different combination of workers for different projects.

The SLRB is established to regulate the system, including making determinations on the appropriateness of bargaining units and authorizing unions to represent such units. The SLRB has authority to assist the parties to reach an agreement, up to the right to impose a first agreement in certain cases.

The rules governing the certification and decertification process are provided exclusively in the *Trade Union Act*. Theoretically, it might be difficult to re-create the craft unions in the absence of the construction industry Act since jurisprudence in traditional labour law is based on the attachment of workers to a particular employer.

6.3.1 Analysis

The Trade Union Act would likely apply to artists who are considered to be employees, such as the musicians of the Regina Symphony Orchestra. The Act would not apply to professional artists who are independent contractors for purposes of their artistic activity and the SLRB confirmed this position in a 1997 case in which the Board determined that the AFM was a union but that musicians performing at a casino were not covered by the Act. To date, the Board has not provided bargaining rights for "dependent contractors." (See page 15.)

Thus, utilizing the SLRB to oversee collective bargaining in the entire cultural sector could be accomplished only through a legislative change. In theory, the following approaches might be considered:

- an amendment to *The Trade Union Act;*
- an amendment to *The Status of the Artist Act;*
- special legislation, perhaps modeled on *The Construction Industry Labour Relations Act.*

It is difficult to provide an authoritative analysis of the potential impact on the cultural sector of a bargaining model that is based on the use of the SLRB without definitive language for legislation that would provide this authority and therefore what follows is speculative.

Like the construction industry, where it is organized, the cultural sector has used a model based on the artistic discipline or "craft." All scriptwriters are in one union, the film directors are in another and the musicians are in a third. Some artists are members of more than one union or guild in order to cover all elements of a multi-disciplinary practice. A different combination of artists is typically engaged for each movie. The first issue is whether any model which uses the SLRB to regulate collective bargaining in the cultural sector would accept this discipline basis for bargaining units as opposed to the workplace model more typical of traditional labour relations. There would appear to be such a precedent in Saskatchewan's construction industry.

If the enabling legislation confirmed or authorized a workplace model rather than a discipline model, it would likely be opposed vigorously in the sector since the historical discipline ties are generally strong and have existed in Saskatchewan for many years.

Assuming the preliminary obstacles can be overcome and that a model to authorize the SLRB to oversee a system of labour relations based on artistic discipline (craft-based) could be agreed, a reasonable assumption is that it would provide certain standards for the conduct of the collective bargaining relationship and for the union's representation of

the artists in its sector. It is also assumed that it would regulate the use of pressure tactics and require a dispute resolution mechanism in the collective agreement.

The following analysis is based on two different hypothetical models:

Model A Provides a process, rights and obligations for all categories of artists in all parts of the cultural sector that are equivalent to those provided to other workers and their trade unions, including the right of the SLRB to impose a first agreement. In this model, the rights provided to stage actors and their associations would not differ from those provided to visual artists and their associations.

Model B This model assumes there will be different approaches to interpretive artists and creative artists, based on the different historical experiences and Québec's example. The Model distinguishes between those parts of the community where voluntary agreements are common and generally work well (such as stage actors), and those parts where voluntary agreements are not currently in place (such as visual artists).
The model for interpretive artists, where voluntary bargaining has taken place more or less successfully for many years in Canada, is based on a traditional labour law approach and is identical to Model A. The model for creative artists, where no bargaining has taken place in Canada, assumes there would be no statutory requirement to conclude an agreement. It would remain voluntary, perhaps with some process to encourage bargaining.

6.3.2 SLRB and Issues of Importance to Saskatchewan Artists

1. To what extent will the bargaining rights make a difference?

Model A. If such a model were implemented based on the above assumptions, it would make a difference. It would provide a legal foundation for the collective bargaining activity that currently takes place and would enable the existing unions to secure their jurisdiction over some producers who currently produce on a non-union basis. If asked again to consider musicians working at the casino, the SLRB would be required to certify the AFM as the bargaining agent for the musicians. The Writers Guild of Canada would have legal basis for bargaining with Saskatchewan's independent film and television producers and companies would be required to deal with the WGC for scriptwriters.

With respect to the parts of the cultural sector where bargaining has not generally occurred, there would be an even greater impact. It would enable The Writers Union of Canada or the Saskatchewan Writers Guild (if they are properly constituted to bargain collectively), to require a Saskatchewan publishing house or the Saskatchewan Publishers Group to negotiate a collective agreement. It would enable CARFAC Saskatchewan to negotiate a collective agreement with individual galleries to govern their relationship with individual artists, or with a group of galleries. It would enable the Periodical Writers Association of Canada to negotiate an agreement with publishers for their acquisition of freelance pieces.

Model B. Since the provision for them would be identical, this version would have an equivalent result for the unions and guilds that have already achieved some success negotiating voluntary agreements with engagers. It would provide a legal foundation for the work and would allow them to extend their jurisdiction to all engagers operating in the province. The examples above for the AFM and WGC would have an equivalent outcome.

Depending on the nature of the rights granted, the effect on the unions which do not presently have collective agreements (such as CARFAC and TWUC) would be far less significant. The rights granted under the Québec model have not resulted in a considerable expansion of bargaining agreements. While the rights granted under federal law have also not brought an expansion of the number of collective agreements covering artists, this is not unexpected given the narrow scope of federal jurisdiction.

In the absence of a statutory requirement to conclude a collective agreement, it is unlikely that galleries and publishers will do so. To this time, where they have been approached to reach a voluntary agreement they have declined, and there would not seem to be any additional incentive for them in this scenario.

2. What are the implications of bargaining rights for the self-employment status of professional artists?

If the enabling legislation does not make some reference to the self-employed or independent contracting status of professional artists, there may be some risk to that status. In a 1997 case involving musicians at the Thunder Bay Symphony Orchestra, the Tax Court found that the Master Agreement between the Thunder Bay Symphony and the Thunder Bay Musicians' Association was a collective agreement and it contained “employee” benefits. This was an element in the finding that each core musician was an employee of the Thunder Bay Symphony and not an independent contractor.

On the other hand, the federal and the Québec Acts make reference to professional artists covered by the Acts as independent contractors and this seems to reinforce this status with federal and provincial tax authorities. While specific language in a Saskatchewan law could not be determinative since the issue of employee status in the province is a federal matter, given that the jurisprudence is mixed, recognition of the self-employed status in Saskatchewan law might have a positive impact. A potential risk of a provision reinforcing self-employed status is that artists could be removed from coverage by the Act if the Canada Revenue Agency rejects this status and finds that an individual has a contract of service for their artistic work and is thus employed.

Assuming that the self-employed status was confirmed in some manner in the enabling legislation, one potential benefit of having a system overseen by the SLRB is that they would be less inclined to intervene in any future circumstance in which a group of artists were reclassified as employees. Since the SLRB would have authority to oversee the bargaining of artists’ associations whether it was done on behalf of employees or self-employed, there is less likelihood of having competing applications or contradictory decisions.

Model A and B
This analysis applies equally to each model. Since the risk to self-employed status rises to the extent that a collective agreement looks and feels like an "employee" agreement, there would be no risk for creative artists under Model B. This is based on the conclusion that implementation of such a model is unlikely to result in new collective agreements covering artists in sectors where they did not exist before the legislation was adopted.

3. What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?

Providing provincial certification creates the possibility that a provincial organization may apply for recognition in a field where a national organization has operated historically. A risk might also arise from a provincially-based engager group seeking to negotiate a separate agreement. The degree of risk to, or support of, nationally negotiated voluntary agreements depends on the nature of the language used in the enabling legislation. In part, the challenge in the British Columbia cases relates to explicit language in the B.C. law which limits recognition to provincially-based trade unions and requires that negotiations occur on a provincial basis.

The Act governing the construction industry explicitly protects the national collective bargaining agreements that existed at the time the legislation came into force.

> 21. Nothing in this Act prevents:
> (b) the operation and renegotiation of a national collective agreement that is in effect immediately prior to the coming into force of this Act.

Such a clause would likely preclude a development analogous to the situation between the Writers Guild of Canada and the APFTQ. But note as well that this clause would prohibit the implementation of a new national collective agreement, a limitation that might be problematic in the cultural sector.

Model A and B
The analysis would apply equally to each model based on the existence of a collective agreement, although the actual outcome depends entirely on the nature of the language used to provide the bargaining rights in the first instance.

4. Is it possible to find a bargaining model that will achieve broad acceptance in the artistic community?

It appears there is not yet a consensus in the community around any one model. However, with additional information and discussion about the different possibilities, it may be possible to achieve consensus support around one or another model.

5. How will the model affect engagers of artists, who often find themselves in a precarious economic situation?

Model A. By extending the reach of existing unions to work that is currently produced outside the provisions of the collective agreement, there would be some additional cost to the particular engager. Examples include dinner theatres, smaller venues which

engage musicians, as well as some smaller budget audiovisual productions. The issue of whether this would constitute an undue hardship is open to debate since they are working in fields in which there are well established professional fees. To the extent that engagers involved in this expansion are not-for-profit organizations that rely on government funding and grants to survive, the challenge could be more significant.

Presumably, the objective of extending collective bargaining rights to fields in which voluntary agreements do not yet exist is to improve the economic circumstances of artists, through higher minimum rates and additional benefits. The impact increases to the extent that the collective agreements accomplish this objective for painters, sculptors, authors, editors or other artists. Thus, the extension of collective agreements to the book and magazine publishing industry and galleries would have an impact on those who acquire, license or otherwise utilize the artistic works.

Model B. As in Model A, there would be some additional costs incurred by producers who work on a non-union basis in fields in which voluntary collective bargaining currently takes place, since this model would extend the voluntary agreements. There may be some concerns about hardship to the extent that these producers are not-for-profit organizations with an insecure financial base.

There would be no additional costs incurred in the fields in which voluntary bargaining does not take place since it is unlikely this model will result in new collective agreements being negotiated.

6. How will the bargaining model influence the generally collegial relationships that exist in the sector?

Any statutory extension of bargaining rights to new sectors will be perceived by some as being an imposition. The resulting negotiations may be more adversarial than would otherwise be the case. However, if the parties are able to reach an agreement without outside assistance, they are likely to establish a relationship that reflects the unique circumstances of the sector and this is likely to be more collegial than in traditional industries.

To the extent that the parties to the bargaining or the collective agreement turn to the SLRB for assistance, there may be some legitimate concern, at least initially. Since the members and staff of the SLRB have come from traditional economic sectors which tend to have a more adversarial model of labour relations, their approach to the cultural sector may not be properly nuanced.

Model B, which provides different levels of rights in different fields and seeks to encourage voluntary collective bargaining rather than requiring bargaining in good faith, may be foreign to an agency and staff accustomed to stronger rules. This may have implications for engagers unwilling to negotiate.

This challenge would presumably be temporary since the SLRB would acquire the skills needed to deal with the peculiar nature of the artistic relationships. This could be accomplished through new members and staff with a background in the sector or through research, training and experience.

7. What is the cost of the bargaining model?

The expectation would be that the SLRB would require additional members and staff to deal with the new legislative responsibilities and would incur additional costs. However, since the Board currently has the necessary infrastructure required by any public agency, the additional costs should be lower than would be the cost of establishing an entirely new and independent tribunal modeled on the SLRB.

8. To what extent will the model improve support for individual contracts?

For both **Model A** and **Model B**, establishing bargaining rights would provide protection for pressure tactics or job actions launched by an artists' association, provided they fall within the legal parameters set by the Act. It is important to note there is some question about whether a provincial law could achieve the desired outcome since the threat of action arises from the federal *Competition Act*. The system would also protect individuals involved in those actions and protect against discrimination because of the individual's involvement in union activities, to the extent the individual has a contract.

Where the individual contracts are signed under the terms of a voluntary collective agreement, legal enforcement remains in the hands of the individual. The unions and guilds that are party to these voluntary agreements act under their terms to attempt to resolve any disputes that arises from the contracts. However, as explained above (page 13), if the dispute must be settled in court, the guild or union can act only with the consent and in the name of the individual. With certification and legal recognition of the collective agreements, the union or guild would be able to act in its own name and this would improve their ability to resolve disputes.

There is nothing inherent in the proposed model that would have an impact on the enforcement of individual contracts that are entered into outside the terms of a collective agreement. The SLRB and the Acts for which it is responsible specifically address collective bargaining between groups of workers and employers rather than individual contracts.

Model A and B
This analysis applies equally to each model.

9. What might be the unintended impact of bargaining rights on individual artists?

Existing collective agreements entered into between artists associations and engagers, whether on a voluntary or mandatory basis, generally provide that the engager makes the final decision about whom they will engage. Provisions requiring engagers to give "preference of engagement" to existing union members are common and there are specialized fields where engagers may be able to hire outside the existing membership only in exceptional circumstances. However, Canada's cultural sector has no agreement that absolutely restricts hiring to existing union members. This is the case both because the agreements have been negotiated historically on that basis and because the federal *Status of the Artist Act* would prohibit such a practice for agreements entered into under its auspices.

It is therefore reasonable to assume that any Saskatchewan system would:

- in some manner provide that all artists in a sector represented by a recognized association are bound by any collective agreement that covers that sector;
- confirm that agreements in the sector establish minimum standards; and
- prohibit an association from requiring union membership as a condition of engagement.

Thus, individuals would remain free to pursue their profession and to negotiate individual conditions of engagement. Where there is a collective agreement, its terms would establish a floor for the individual contract. The individual working in a field where there is a collective agreement would also remain free to decide whether or not to join the union or guild that is certified for their sector. A non-member would likely be required to make some payment to the association in return for enjoying the benefits of the collectively bargaining agreement.

Model A and B

This analysis applies equally to each model, depending entirely on the extent to which legal bargaining rights are established in law.

6.4 Fair Compensation Model Proposed by the Ministerial Advisory Committee on the Status of the Artist

MACSA has recommended a system, called the Fair Compensation Model, designed to encourage voluntary collective bargaining in the sector. The system is also designed to provide support to individual artists if they encounter a problem with respect to a contract they have entered into with an engager. The model begins with a recommendation for amendment to the *Status of the Artist Act.* There would be two elements to the amendment. It would:

- establish legal authority to intervene and provide dispute resolution in support of voluntary collective bargaining between artists and engagers; and
- the authority's powers would include the ability to hold hearings designed to recommend minimum industry standards within the arts sector.

MACSA suggests that a "quasi-judicial authority" be established to administer these powers. It would be able to "invite" parties together and through mediation attempt to have them come to an agreement for a voluntary collective agreement.

Should the parties be unable to negotiate an agreement, or should a situation exist in which "there are no appropriate means by which to bargain industry standards," the authority could "make recommendations regarding minimum industry standard working conditions." It would arrive at these "recommendations" after conducting public hearings to which all interested parties would be invited.

Finally, MACSA suggests that the recommended standards would be binding on the Saskatchewan government. The government would "articulate a similar expectation for all organizations, businesses, contractors or sub-contractors who receive public funds." The report concludes that "while the standards would not be enforceable outside the

public sector and the publicly funded sector, they will ultimately have an impact on what artists are prepared to work for and gradually, working conditions for artists will improve." In the appendix summarizing the system, MACSA went one step further by suggesting that when the industry minimum standards are set, "rates are non-binding except where public funds (including grants) are involved."

As the model matures, MACSA envisions that an Artists and Producers Commission(er) would be established to continue the administration and to provide additional services to the community such as the collection of data, the establishment of group programs for pension, health benefits and workplace injury insurance, and educational programs about contracting for artists' services.

The Committee also discussed the difficulty for artists' associations taking job actions in support of efforts to conclude collective agreements. The Report suggests that artists involved in such actions may risk penalties under the *Competition Act* or individual breach of contract allegations. It recommends that, where voluntary collective bargaining agreements are in place, legislative protection be provided for any job action which "artists' associations deem necessary to protect their agreements."

Analysis

6.4.1 Legal authority to intervene

Establish legal authority to intervene and provide dispute resolution in support of voluntary collective bargaining between artists and engagers

This part of the proposal would establish mediation services in support of voluntary collective bargaining between artists and engagers with authority vested either in an existing government department or agency or in a new structure established by the legislation.

At the present time, parties to a voluntary collective agreement can and do regularly seek outside support to assist them to renew the terms of an existing agreement. It is not uncommon for artists' associations and their engagers to seek the services of a mediator they select themselves, or for one party or the other to apply to a department of labour for appointment of a mediator. Thus, for artists' associations with existing agreements, the authority to intervene would seem to bring little added value.

The second element of the authority appears to be designed for situations in which artists' associations are attempting to negotiate agreements with engagers for the first time. Presently, artists' associations are free to attempt to negotiate agreements with engagers; as an example, TWUC and PWAC have launched such efforts in the past. To date, they have not convinced publishers to bargain with them and they have been unable to mobilize the economic pressure necessary to achieve this objective. This is primarily because of the insecure circumstances of the artists they represent. First time authors have little clout and publishers frequently have many alternatives available to them. Established authors have only the security of the existing contract, there is no guarantee of future contracts, and they are in any case more likely to be able to negotiate fees and conditions more advantageous than the minimum standards which would be contained in a collective agreement.

The ability of the authority to intervene at the request of only one party to the talks may be of benefit to an association of artists that has not yet reached a first agreement, since the authority may through moral suasion be able to convince a reluctant engager to conclude an agreement. For most artists associations, the principal challenge is to convince the engager to begin the bargaining process in the first instance and authority intervention at this preliminary stage could be valuable since most engagers in the sector, who rely on government financial support or other measures, would be reluctant to turn down an official request to meet and talk.

6.4.2 Legal authority to recommend industry standards

The authority's powers would include the ability to hold hearings designed to recommend minimum industry standards within the arts sector.

An association of artists that has been unable to negotiate a collective agreement could ask the authority to consider this issue and the authority would be empowered to conduct Public Hearings and establish industry standards that would apply to the government and its agencies. Through this process, the government would become a model engager and this could have an influence on others.

However, it appears the intention is for the standards established as a result of this process to be also binding on those who receive government grants. Assuming that this is the case, most engagers would be encouraged to participate in the bargaining process and to work to reach an agreement, since this will provide them with more control than they would have over standards set by a public authority through public hearings. If the standards are not binding on them, it becomes merely a question of whether the moral suasion of the government agency will be sufficient to convince them to bargain or to accept the industry standards.

The authority's power to hold hearings designed to set industry standards may raise interesting questions for some guilds and unions which have collective agreements and are looking to secure their jurisdiction over engagers who presently operate outside those agreements. An engager may look to the authority to establish industry standards that vary from the existing agreements. Presumably, it will be incumbent on the guild or unions to demonstrate why an existing agreement should be endorsed as the industry standard. Similarly, the terms of a Code that has been implemented unilaterally by a guild or union may also be scrutinized through this process.

If the standards are mandatory on anyone receiving government support and thus act to encourage collective bargaining, there is an important related issue. An engager may legitimately ask questions about the association with which they are expected to bargain. Does this association have the authority to speak on behalf of the artists used by that publishing house? What if the five authors whose works are to be published in the next few months are not members of the writers' group that is seeking to bargain with it? Could those five writers form an association and seek to bargain with the publisher even if the authority has previously published its minimum industry standards? The MACSA model does not appear to provide guidance about how these questions would be resolved.

6.4.3 Fair Compensation Model and Issues of Importance to Saskatchewan Artists

1. To what extent will the bargaining rights make a difference?

In the absence of specific language that would establish the system, it is difficult to be conclusive. There would appear to be no challenge to the continuation of existing voluntary agreements arising from the proposed the model. The authority would also provide a stamp of approval for existing agreements and this would give them a legitimacy they do not currently possess in the province.
As a model engager, the government would provide leadership to encourage reluctant players to abide by the rates and conditions established by the authority.

Assuming the standards are obligatory on the government and its agencies and on those receiving public funding, the power of the authority to establish minimum industry standards would make a significant difference. Effectively, it would enable the authority to establish standards that would cover a good deal of the activity involving professional artists in the province. Engagers would have an incentive to bargain directly with the union or guild in order to exercise more control over the final terms of an agreement. Excluded from this scope would be commercial galleries, dinner theatres, the casino, bars with live music and a few other engagers in film and television, performing arts, book and magazine publishing, music and sound recording industry and new media which do not receive any public funding.

But, if the system is effectively mandatory for publicly funded operations, this may raise questions about how to determine the representativeness of certain associations and how to circumvent or resolve competing claims.

2. What are the implications of bargaining rights for the self-employment status of professional artists?

While there is a risk that any collective agreement could be considered as an indication of employee status, this model carries the lowest risk since it would be different from other models and unique to artists. In any case, the presumption is that the enabling legislation would explicitly provide acknowledgement of the self-employed status.

3. What is the impact of bargaining rights on the integrity of nationally negotiated voluntary agreements?

Because the bargaining model does not start with certification of a bargaining agent to represent a defined unit, there is a risk that any group of artists could form an association, seek to bargain with an engager and seek to have the authority establish minimum industry standards. This could create a potential challenge for an existing voluntary agreement and the authority may have no legislative authority to resolve it.

It is assumed that the authority would respect established national standards in making its decisions.

4. **Is it possible to find a bargaining model that will achieve broad acceptance in the artistic community?**

It appears there is not yet a consensus in the community around any one model. However, with additional information and discussion about the different possibilities, it may be possible to achieve consensus support around one or another model.

5. **How will the model affect engagers of artists, who often find themselves in a precarious economic situation?**

If all engagers receiving public funds are obligated to abide by the industry standards established by the authority, they could be faced with additional costs to the extent to which the legislation achieves the objective of improving the economic circumstances of professional artists. As with any of the models that succeed in improving the conditions of engagement or artists, this success could affect the flow of work opportunities.

6. **How will the bargaining model influence the generally collegial relationships that exist in the sector?**

Aside from the potential, but probably low, risk of competing claims to represent a similar group of artists, the model is attempting to respect fully the historic organizing and bargaining models in the cultural sector.

7. **What is the cost of the bargaining model?**

This is difficult to assess because the nature of the authority is unclear. However, it would appear that the intention is to start small and this would limit the cost of implementation. If the authority is established as part of an existing agency the costs will be lower and if it is established as an independent authority, the costs will be higher.

8. **To what extent will the model improve support for individual contracts?**

Statutory protection for individuals against a breach of contract action if their union or guild has instituted pressure tactics would be beneficial, as would protection for union activities. While the protection for the individual would be difficult to implement beyond the term of an existing contract, which are often of short duration, it would remove a threat to the individual, and would give broader scope for associations to apply economic pressure on reluctant engagers. It is important to note there is some question about whether a provincial law could achieve the desired outcome since the threat of action arises from the federal *Competition Act*.

The existence of individual contracts in the cultural sector at the present time is uneven. In some cases, contracts are part of the normal business practice, in other cases they are rare. However, where they exist, all contracts entered into by any two parties are legally enforceable. If there is a dispute about the terms of a contract, this can be resolved through direct discussion, mutual agreement to mediation or arbitration, or ultimately by either party through the courts.

If the new authority is given the power to assist the parties to resolve disputes, this would create an alternative that is presumably less expensive and more efficient. It

should be noted that, without a specific legislative change, there is nothing that would prevent either party from taking action in court even if the new authority exists.

9. What might be the unintended impact of bargaining rights on individual artists?

If the minimum industry standards process is affectively a mandatory system, there may be issues of concern. Since the model does not start with a certification process, there would be no requirements on the associations to represent artists fairly and thus discriminatory treatment may not be prohibited. Beyond that potential, there would appear to be little impact on any individual artist except that they might have access to a dispute resolution system that is less expensive and more efficient in case they should have a dispute arising from a contract.