COLLECTIVE BARGAINING FOR INDEPENDENT CONTRACTORS: IS THE *STATUS OF THE ARTIST ACT* A MODEL FOR OTHER INDUSTRIAL SECTORS?

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Introduction

Since at least the time of the industrial revolution, the common law has distinguished between contracts of service ("employment contracts") and contracts for service (arrangements through which work is performed by one person for another). The term "employee" has been used to describe individuals involved in a contract of service, while those with contracts for service are generally considered to be independent contractors.

In the employment and labour contexts, it has been important for the law to distinguish between employees and independent contractors. For example, with respect to employees, employers are subject to statutory requirements regarding withholdings and levies such as employment insurance, pension and health insurance premiums and income taxes. Employees have statutory entitlements to severance pay and, in some jurisdictions, to statutory protection from wrongful dismissal. Independent contractors, on the other hand, must rely on the common law of contract when their services are terminated prematurely. Only workers who hold employee status can benefit from the right to organize and bargain collectively; independent contractors who attempt to do so risk being found to be involved in a conspiracy in restraint of trade under anti-combines legislation.

The objective of this paper is to consider the provisions of the Canadian *Status of the Artist Act*[1], the first national legislation to provide a framework for collective bargaining by independent contractors, and to explore whether a similar regime could and should be applied to other industrial sectors.

The *Status of the Artist Act*

Legislative History

In 1992, Canada became the first nation in the world to enact a framework explicitly designed to provide collective bargaining rights to independent contractors: the *Status of the Artist Act* (hereinafter "the *Act*"). This statute applies to professional independent contractors who:

> (i) are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audiovisual works,
> (ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or
> (iii) 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 regulation.[2]

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[1] S.C. 1992, c. 33 as am.

[2] *Ibid.* at para. 6(2)(b). On April 22, 1999, regulations pursuant to subparagraph 6(2)(b)(iii) were brought into force that extended the coverage of the *Act* to independent contractors who contribute directly to the creative aspects of a production by carrying out activities in the following professional categories:

(*a*) camera work, lighting and sound design;
(*b*) costumes, coiffure and make-up design;

The *Act* was the product of intense lobbying by the cultural community for recognition of its, at the time, unique terms and conditions of employment. In 1993, some 156,600 Canadians, or just over 1% of the workforce, were classified by Statistics Canada as "cultural workers".[3] The rate of self-employment in the cultural sector was twice that of the general workforce (29% as compared with 15%) and some 40% of cultural workers had at least two jobs. The average income of artists in Canada was $25,400 in 1993 while the median income was $19,400, despite the fact that 45% of cultural workers have at least one university degree (compared with 15% for the workforce as a whole). On average, only 80% of artists' income was from their artistic endeavours, with the remainder coming from other sources.

Although a number of conventions and recommendations emanating from the International Labour Organization (ILO) recognize the rights of workers in general[4], these standards allow for derogations or even expressly exclude artists due to the special conditions in which artistic activity takes place. This situation led the United Nations Educational, Scientific and Cultural Organization

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(*c*) set design;
(*d*) arranging and orchestrating;
(*e*) research for audiovisual productions, editing and continuity.
(*see: Status of the Artist Act Professional Category Regulations*, SOR/99-191, Canada Gazette Part II, Volume 133, No.10, page 1248 (May 12, 1999)).

[3] All data taken from Statistics Canada: *Canadian Social Trends* 87-004, Autumn 1995.

[4] For example, the ILO *Freedom of Association and Protection of the Right to Organize Convention* (No. 87), 1948; the *Right to Organize and Collective Bargaining Convention* (No. 98), 1949; the *Collective Agreements Recommendation* (No. 91), 1951; and the *Voluntary Conciliation and Arbitration Recommendation* (No. 92), 1951.

(UNESCO) to adopt a recommendation concerning the status of the artist in October 1980 which was intended to extend and supplement the field of application of the ILO conventions[5]. The preamble to the Recommendation recognizes that the arts, in their fullest and broadest definition, are an integral part of life and that in order to ensure the preservation, development and dissemination of culture it is necessary and appropriate for governments to help create and sustain a climate that encourages both freedom of artistic expression and the material conditions facilitating the release of this creative talent. Signatory states, including Canada, agreed to consider the implementation of a broad range of policies to recognize and encourage the development of the role of the professional artist within society, including funding, training, professional status for artists and access to social programs such as health care, pensions and unemployment insurance .

Following Canada's signature of the Belgrade Recommendation, organizations representing various artistic disciplines lobbied federal and provincial governments for legislative solutions to address the precarious economic and social situation of freelance artists. Through voluntary recognition agreements, artists' associations such as the American Federation of Musicians of the United States and Canada, the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Canadian Actors' Equity Association and the Union des Artistes had, over the years, succeeded in negotiating contracts that established basic standards for their respective members. However, without a statutory basis for such voluntary recognition of associations of freelance workers, these organizations ran the

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[5] *Recommendation concerning the Status of the Artist*, adopted by the UNESCO General Conference at its Twenty-first Session (Belgrade, 27 October 1980), hereinafter "the Belgrade Recommendation".

risk of being found to be conspiracies in restraint of trade under anti-combines legislation. Nevertheless, the fact that these organizations had achieved the success that they had was evidence that collective bargaining could be made to work in the freelance community. These artists' associations significantly intensified their efforts to obtain legal recognition after a 1982 decision of the Canada Labour Relations Board added a number of freelance employees in the French Services Division of the Canadian Broadcasting Corporation, who were members of ACTRA and the Union des Artistes covered by collective agreements that had been reached as a result of voluntary recognition, to existing bargaining units of employees represented by certified trade unions[6].

In 1986, the then federal Minister of Communications, Marcel Masse, appointed a Task Force headed by Paul Siren and Gratien Gélinas to undertake broad consultations with the Canadian artistic profession and to develop an action plan that would result in improved conditions for Canadian artists. The Task Force reported back to the Minister on August 27, 1986 and recommended, among many other initiatives, that the Government immediately establish a national Advisory Committee on the status of the artist and that:

> ...within the next session of Parliament, legislation should be enacted to recognize organizations representing self-employed professional artists as collective bargaining

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[6] CLRB Decision No. 383: *Canadian Broadcasting Corporation* (1982), 44 di 19; 1 CLRBR (NS) 129.

agents. This should include the necessary administrative mechanisms required to apply such legislation[7].

Although the Minister of Communications did establish an advisory committee on the status of the artist, no immediate action on the recommendation for legislation was taken by the federal government. However, in 1987 and 1988, the Quebec legislature passed two statutes intended to address the status of artists within provincial jurisdiction: "*An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*" and "*An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters"*[8]. The first of these statutes established a process for the recognition of artists' associations representative of persons who offer their services, as a creator or performer, in the fields of theatre, opera, music, dance, variety entertainment, the making of films, sound recording, dubbing and recording commercial advertisements. Recognition by the body established to administer the legislation entitles the artists' association to "negotiate a group agreement, which must include a model contract for the performance of services by the artists".[9] The second statute, which applies to self-employed artists who create works in the fields of visual arts, arts and crafts and literature, also provides for the recognition of artists' associations representing individuals in these disciplines, but places greater emphasis on the content of individual contracts between these creators

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[7] Paul Siren and Gratien Gélinas, *The Status of the Artist: Report of the Task Force* (Ottawa: Supply and Services Canada, 1986), recommendation 16a).

[8] S.Q. 1987, c.72, as am. and S.Q. 1988, c.69, as am. respectively.

[9] S.Q. 1987, c.72, s.24.

and promoters of their works. The negotiation of "group agreements", containing minimum conditions for the circulation of works and "model contracts", is permitted but is not seen as the primary purpose of these artists' associations.

If one recalls the motivation behind the UNESCO Recommendation of 1980, it is not surprising that the province of Quebec was the first to grant such recognition and support to artists and their associations: that province has long recognized that the preservation of a nation's culture depends entirely upon the contribution of artists, and the vigour and vitality of the arts depend, *inter alia*, on the well-being of artists both individually and collectively. The importance of culture to national identity has also been recognized by the Canadian government, as evidenced by its insistence on a cultural exemption in free trade agreements such as NAFTA and the international negotiations for a Multilateral Agreement on Investment (MAI). The failure of the common law provinces of Canada to enact legislation supporting artists working within provincial jurisdiction is perhaps attributable to their general view, shared by the United States of America, that culture is just another industry - "arts and entertainment" - rather than a fundamental component of national survival.

In 1988, the federal Advisory Committee on the Status of the Artist that had been appointed following the Siren-Gélinas Report developed a proposal for a "Canadian Artists Code" that it presented to the Minister of Communications in June of that year. The House of Commons Standing Committee on Communications and Culture commissioned its own research into the status of the artist issue and made its interest in this subject known to the Minister of Communications. At the Standing

Committee's invitation, the Minister of Communications appeared before it on November 7, 1989 and made a commitment to introduce legislation to deal with the subject. He stated at the time:

> In Canada, the complex subject of the status of the artist has been studied by any number of commissions and task forces. In 1951, the Royal Commission on National Development in the Arts, Letters and Sciences made the following observation:
>
> > No novelist, poet, short story writer, historian, biographer or other writer of non-technical books can make even a modestly comfortable living by selling his work in Canada. No composer of music can live at all on what Canada pays him for his compositions. Apart from radio drama, no playwright, and few actors and producers, can live by the sale of their work in Canada.
>
> This, in my opinion is about as damning a statement as you can make about the understanding and appreciation of the role of art. The commission was also concerned about the lack of specifically Canadian symbols, the absence of Canadians from our broadcasting and school systems, and the paucity of our own cultural products.
>
> Unhappily, the 1982 report of the federal Cultural Policy Review Committee, the Applebaum-Hébert committee, concluded that in 30 years, despite their overwhelming contribution to Canadian life, artists' living conditions were virtually unchanged. To quote the committee:
>
> > The income of many, if not most, of these artists classifies them as highly specialized, working poor.
>
> The Siren-Gélinas task force on the status of the artist, which I commissioned in 1986, stated that it was:

> ... both remarkable and unfair that Canadian artists have been unable to garner national and international recognition for their work while labouring below the poverty line.
>
> If income is the standard by which we judge the value of a contribution to society, then the situation of our artists is totally unfair. On top of that, their incomes are entirely inconsistent with their long years of education and training and their rigorous, self-imposed discipline.
>
> (...)
>
> Clearly, then, improving the status of the artist will be one of the most important actions of this government in its current term in office. The socio-economic situation of professional artists in Canada is, to put it bluntly, grim.[10]

On December 20, 1989, the members of the Standing Committee unanimously recommended that federal legislation be developed to address the status of artists working in the federal jurisdiction, and among other things, that the right of collective bargaining be extended to self-employed artists working in areas of federal jurisdiction[11]. A working group composed of members of the then departments of Labour and Communications (now Human Resources Development and Canadian Heritage respectively) subsequently developed a Bill that was tabled in the House of Commons as Bill C-96 on December 19, 1990. This Bill died on the Order Paper when the Second Session of the

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[10] Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture, Second Session of the Thirty-fourth Parliament, 1989-90, Issue No. 2 at 2:7.

[11] *Second Report to the House: Status of the Artist*, Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture, Second Session of the Thirty-fourth Parliament, 1989-90, Issue No. 5 at 5:5.

Thirty-fourth Parliament was prorogued, but was reintroduced in the Third Session on May 23,1991 as Bill C-7. Parliamentary consideration of the Bill took some thirteen months, with seven months of this time (October 31, 1991 to May 21, 1992) taken by the Standing Committee to hear representations from a wide variety of interested cultural groups. Third Reading and passage by the House of Commons took place on June 11, 1992 and Senate approval and Royal Assent took place on June 23, 1992. The Bill was brought into force in stages, and has only been fully in force since May 9, 1995[12].

Overview of the Status of the Artist Act

The *Act* is essentially labour legislation, and is modelled on Part I of the *Canada Labour Code*[13]. Subsection 18(a) of the *Act* directs the body that administers it, the Canadian Artists and Producers Professional Relations Tribunal, to take into account the applicable principles of labour law when deciding any question. However, the *Act* contains a number of unique features that recognize the special circumstances of freelance employment.

Like traditional labour legislation, the *Act* recognizes an artist's freedom of association[14]. In the *Act*, the term artist is defined to mean an independent contractor. Subsection 9(1) of the *Act* recognizes that for tax purposes, an independent contractor may be incorporated, or may deal with

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[12] Sections 1 to 4 were brought into force on May 14, 1993 (SI/93-75); sections 10 to 13, 15 and 16 were brought into force on June 11, 1993 (SI/93-92) and the remaining sections were brought into force on May 9, 1995 (SI/95-61).

[13] R.S.C. 1985, c. L-2, as am.

[14] Section 8.

those who engage his or her services through other arms' length arrangements: artists are "not excluded" from the application of the *Act* simply because they contract through an organization.

An important provision of the *Act*, from the point of view of artists' associations, is subsection 9(2), which deems them to be "combinations of employees" for the purposes of the *Competition Act*. This provision relieves certified artists' associations from the threat of a prosecution as a conspiracy in restraint of trade pursuant to that statute.

The *Act* establishes a separate, independent agency to administer its provisions: the Canadian Artists and Producers Professional Relations Tribunal (hereinafter "the Tribunal"). Although consideration had been given to according these responsibilities to an existing labour relations board, Parliament decided that it was appropriate to create an autonomous agency, designed to be sensitive to the specific needs of the community that it would serve. It has been explained that:

> ... the new board would be dealing with self-employed workers who work for several engagers and who have different characteristics from employees working for one employer. Also, labour relations in the artistic community have some differences from those in the economy's industrial sectors. In the former, labour relations were described as being less adversarial, in part due to the fact that producers and artists alike are involved in the creative process ...[15]

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[15] Lorraine Farkas, "Self-employed Workers and Collective Bargaining" in Vol. 2, No. 2 *Workplace Gazette* 91 (Ottawa: Human Resources Development Canada, Summer 1999) at 93.

The Tribunal is composed of a chairperson, a vice-chairperson and up to 4 other members appointed by the Governor in Council on the recommendation of the Minister of Labour in consultation with the Minister of Canadian Heritage[16]. This rather complex arrangement for appointments to the Tribunal ensures that the persons named to these positions are knowledgeable regarding the cultural sector, a factor that was critically important to the artistic community at the time the *Act* was under consideration by Parliament. It is interesting to note that recent amendments to the *Canada Labour Code* have explicitly incorporated a requirement for industrial relations experience and expertise into the criteria for appointments to the positions of Chairperson and vice-chairperson of the Canada Industrial Relations Board[17]. Although the criterion in the *Status of the Artist Act* is not as explicit as the new *Code* provision, the objective is the same: to ensure that those who are called on to interpret and apply the provisions of the legislation have expertise and knowledge of the industry or industries they are responsible for regulating.

Further recognition of the special needs of the community the Tribunal serves, and in particular the well known artistic intolerance of bureaucracy, is found in paragraph 19(1)(*a*): in proceedings before it, the Tribunal is directed to proceed "as informally and expeditiously as the circumstances and considerations of fairness permit".

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[16] Section 10.

[17] S.C. 1998, c.26, s.2.

The *Act* goes further than Canadian law traditionally has with respect to regulating union democracy[18]. While Canadian labour legislation is for the most part silent with respect to the content of a trade union's constitution and bylaws, subsection 23(1) of the *Act* sets out certain prerequisites to the certification of an artists' association: the association must adopt by-laws that establish membership requirements for artists and 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. As well, artists' associations must provide their members with the right of access to a copy of a certified financial statement of the affairs of the association. Furthermore, subsection 25(1) of the *Act* requires that an artists' association must be "duly authorized" by its members before it can apply for certification. The Tribunal must assure itself that all of these conditions precedent have been satisfied before it decides any application for certification. It would appear that these provisions were simply copied from the Quebec legislation as there are no comparable requirements in the *Canada Labour Code* other than the requirement that, upon request, a member of a trade union is entitled to a certified copy of the union's financial statement[19].

The Certification of Bargaining Agents

The provisions regarding the certification of artists' associations are perhaps the most interesting portions of the *Act*. As in traditional labour law, the process is a two stage one: first the Tribunal must

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[18] For a discussion of the Canadian approach to the regulation of union democracy see M. Lynk, "Union Democracy and the Law in Canada" (forthcoming) and M. Lynk, P. Engleman and M. McNeil, *Trade Union Law in Canada* (Toronto: Canada Law Book).

[19] *Canada Labour Code*, *supra*, note 13, s.110.

determine the scope of the sector that is suitable for collective bargaining (a process comparable to a labour board's determination of the unit appropriate for bargaining), and then it must decide whether the applicant is the organization "most representative" of artists in the sector (a process quite different from a labour relations board's obligation to satisfy itself that the applicant represents a majority of employees in the unit).

Subsection 25(1) permits an artists' association that has been duly authorized by its members to apply for certification in respect of one or more "sectors". The term "sector" is not defined in the *Act*. The Tribunal's powers, found in section 17, include the power to decide whether "a group of artists" constitute a sector suitable for bargaining. The criteria that the Tribunal must consider in making this determination are set out in section 26(1):

> (a) the common interests of the artists in respect of whom the application was made;
>
> (b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagements of artists; and
>
> (c) any geographic and linguistic criteria that the Tribunal considers relevant.

Although the Tribunal has the discretion to determine that a sector could be as finite as "all oboe players engaged by the National Arts Centre Orchestra", it has in practice adopted a much wider

approach to the definition of sectors. The Tribunal's views on this matter were first set out in Decision No. 020[20]:

> [34] Generally speaking, the Tribunal believes that national sectors are more suitable for bargaining with producers who are under federal jurisdiction when language is not a part of the artistic expression, as is the case with music, dance and the visual arts. This holds true especially when there is a national artists' association with the infrastructure necessary to serve its membership in both official languages. The Tribunal believes that it is preferable to limit the number of sectors to avoid overlap and conflict.

The Tribunal elaborated further on its philosophy in Decision No. 024[21]:

> [48] In its decision concerning La Guilde des musiciens du Québec (decision No. 020), the Tribunal set out its position regarding the application of linguistic and geographic criteria in defining a sector. In summary, the Tribunal believes that it is preferable to limit the number of sectors to avoid potential overlap or conflicts. Where language is not part of artistic expression, as is the case with music, dance and the visual arts, the Tribunal believes that national sectors are more suitable for bargaining with producers in the federal jurisdiction, provided there is a national artists' association with the infrastructure necessary to serve its membership in both official languages. However, when language is part of the artistic expression as in the case of authors,

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[20] *In the matter of an application for certification filed by La Guilde des Musiciens du Québec*, January 16, 1997, online at: <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal20/decision_20.html>

[21] *In the matter of an application for certification filed by the Association des réalisateurs et réalisatrices du Québec; the Union des artistes (no. 2 - directors/metteurs en scène and choreographers); and the Association des professionnels des arts de la scène du Québec (directors/metteurs en scène)*, December 30, 1997; online at: <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal20/decision_24.html>.

linguistic criteria assume greater importance and the Tribunal takes them into account when defining the sector.

Having determined the sector that is suitable for collective bargaining, the Tribunal must then determine whether the applicant for certification is the association most representative of the artists working in that sector[22]. It is particularly interesting to note that only artists in respect of whom the application was made and other artists' associations have standing to intervene as of right on the issue of representativeness. A producer affected by the application may intervene with respect to the suitability of the sector for bargaining, but requires the Tribunal's permission if it wishes to be heard on the question of representativeness[23]. This limitation appears to have prevented a great deal of the acrimony that persists in the industrial sector when trade unions apply for certification and employers attempt to influence the employees' choice of a bargaining agent. To date, no producer has sought the Tribunal's permission to intervene with respect to the representativeness of an applicant for certification (although some have contested the proposed sector definition[24]).

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[22] Section 27.

[23] Subsections 19(3), 26(2) and 27(2); see also paragraph 24 of Tribunal Decision No. 008 (*In the matter of an application for certification filed by the American Federation of Musicians of the United States and Canada*, March 5, 1996); online at <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal1/decision_08.html>.

[24] See, for example, Tribunal Decision No. 028 (*In the Matter of an Application for Certification Filed by The Writers' Union of Canada and the League of Canadian Poets*, November 17, 1998); online at <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal20/decision_28.html> .

To ensure that any artist who may be affected by an application for certification is provided with an opportunity to make his or her views known, the *Act* contains a requirement that the Tribunal give public notice of every application for certification it receives[25]. Although the Act does not specify how such public notice is to be given, the Tribunal has adopted a practice of publishing notices in the *Canada Gazette*, in newspapers and trade journals and on its Internet site[26]. The legislative requirement and the Tribunal's practice recognize the reality of freelance employment: because freelancers do not necessarily work at a definable worksite, the traditional labour relations board practice of requiring the employer to post a notice in the workplace would not be an effective means of communication for this constituency. Although it is not a common occurrence, a number of individual artists have taken the opportunity to make their views known to the Tribunal in the context of specific applications for certification. To assist such individuals in its proceedings, the Tribunal has developed a plain language guide to its procedures that it makes available in hard copy format and on its Internet site.

With respect to the determination of representativeness, the Tribunal has made the following observations:

> [10] In circumstances such as the present case, where there are two artists' associations that have applied to represent the same artistic sector, the Tribunal must carefully reflect on the factors that it will consider when determining whether it is

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[25] Subsection 25(3).

[26] Located at <http://capprt-tcrpap.ic.gc.ca>.

satisfied that either one of them is the "most representative" of artists in the sector that it has found to be suitable for bargaining.

[11] Clearly, the test is not that which is used in traditional labour relations, where an applicant for certification must demonstrate that it represents a majority of the employees in the bargaining unit (for example, 50% + 1). Had Parliament wished to impose this criteria, it would have included in the *Status of the Artist Act* provisions analogous to sections 28 to 31 of the *Canada Labour Code* (R.S.C. 1985, c. L-2, as am.). It did not.

[12] Nevertheless, the Tribunal must consider a number of the traditional factors used in any democratic system. Among the factors that the Tribunal believes it is appropriate to consider are the overall size of the sector, the total number of votes cast and the number of votes cast for each applicant for certification.

[13] The Tribunal is of the view that Parliament left it with significant discretion to determine representativeness in recognition of the fact that, when dealing with independent contractors, it is often difficult if not impossible to determine the exact size of a sector.[27]

It is therefore clear that the Tribunal does not consider it necessary for an artists' association to provide proof that it represents more than 50% of the artists working in a given sector in order to be entitled to be certified to represent that sector. Indeed, in a case where the applicant was the only

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[27] Tribunal Decision No. 027 (*In the matter of applications for certification filed by the Union des Artistes and the Association des professionnels des arts de la scène du Québec*, July 24, 1998); on line at:
<http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal20/decision_27.html>.

association purporting to represent artists in a particular discipline, the Tribunal certified it although it had as members only 16% of the artists working in the sector.[28]

Unlike union certifications in respect of bargaining units, which subsist indefinitely, certifications under the *Status of the Artist Act* are treated as fixed term, renewable licences[29]. While this may reflect the *Act*'s origins as a joint effort by the department of Labour and Communications, the latter being more familiar with the concept of fixed term, renewable broadcasting licences, there is a practical reason for the difference: under standard labour relations acts, the legal "raiding" period (the period in which a competing union can seek to displace the incumbent bargaining agent) and the revocation period (the period in which employees in the bargaining unit can apply to have the bargaining agent removed) is tied to the expiry date of the collective agreement. This is based on the fact that there is ordinarily only one collective agreement in force for each bargaining unit.

The regime provided in the *Status of the Artist Act* permits a number of scale agreements to be in existence for any given sector: for example, in addition to master agreements with associations

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[28] Tribunal Decision No. 014 (*In the matter of an application for certification filed by the Periodical Writers Association of Canada*, June 4, 1996); on line at: <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal10/decision_14.html>.

[29] Subsection 28(2) reads as follows: "Certification is valid for a period of three years after the date that the Tribunal issues the certificate and, subject to subsection (3), is automatically renewed for additional three year periods." Subsection (3) provides for the possibility of non renewal where an application for revocation or replacement of the certified artists' association has been filed.

representing independent film producers[30], the ACTRA Performers Guild (APG) has agreements with a number of different broadcasters that apply to freelance performers working in the film and television sector. As a result, it was not possible for the legislator to tie the legal raiding/revocation period in respect of a sector to the expiry date of a collective agreement. So long as the Tribunal continues to define sectors on a national basis, the effect of this provision will likely be to make it difficult to displace an incumbent bargaining agent, as the only legal period for an application of this nature is in the three months immediately before each third anniversary of certification or renewal certification[31]. However, to make information regarding sector definitions (and, not coincidentally, the dates of the legal raiding period) generally available to interested parties and the public, the Tribunal is obliged by statute to keep a "register" of all certificates it has issued, and their dates of issue[32]. This register can be consulted at the Tribunal's offices, or on the Internet at http://homer.ic.gc.ca/capprt/regis_e.html.

Collective Bargaining under the Status of the Artist Act

The immediate effect of certification is to give an artists' association the exclusive authority to bargain on behalf of artists in the sector[33]. The primary objective of such bargaining is to enter into a "scale agreement". The *Act* defines a scale agreement as "an agreement in writing between a producer

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[30] Namely the Canadian Film and Television Production Association (CFTPA) and its francophone counterpart, the Association des Producteurs de Film et Télévision du Québec (APFTQ).

[31] Subsection 28(3).

[32] Subsection 28(4).

[33] Subsection 28(5)(*a*)

and an artists' association respecting minimum terms and conditions for the provision of artists' services and other related matters"[34].

Scale agreements are thus unlike collective agreements, in that they establish only the **minimum** terms and conditions of engagement. This unique feature of the collective bargaining protocol that has evolved in the cultural sector was remarked upon by the Canada Labour Relations Board in a decision that flowed from the Board's 1982 decision[35] to include freelancers at the Canadian Broadcasting Corporation in bargaining units of employees represented by certified trade unions. In the case in question, the Canadian Wire Service Guild ("the Guild") had filed a bad faith bargaining complaint with the CLRB over the CBC's insistence that some of the benefits and working conditions of the group of contract employees who had been added to the Guild's bargaining unit would continue to be governed by individual contracts of employment. The Guild's position was that this insistence on the survival of individual contracts of employment was contrary to and incompatible with the whole concept of collective bargaining and a union's exclusive right to bargain. In rejecting the union's complaint, the Board stated:

> To dispose of the complaint presently before us, we shall deal first with the question of the continuance of individual contracts. Can CBC lawfully insist on the continuation of individual contracts covering some aspects of the employees' conditions of employment?

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[34] Section 5.

[35] *Supra*, note 6.

The immediate response of many labour relations practitioners to this question would be an abrupt no! The very idea of individual contracts is offensive in most industries where employees have traditionally opted for collective bargaining. The overwhelming perception is that there is no room for private negotiations between employer and employee once a collective bargaining regime is in place. Indeed, there have been occasions where employers have been found to have committed an unfair labour practice when they attempted to bypass the bargaining agent by embarking on direct negotiations with employees in the bargaining unit.

(...)

In contrast to the permanent status of the newsroom employees, the contract employees who were added to the Guild's bargaining unit by the Board in 1982 are employed in current affairs and public affairs in French radio and television programming as Moderators, Commentators, Interviewers, Readers, Narrators, Panelists, or Meteorologist (Commentator) in areas outside Quebec. Their contracts which can be of a duration from two weeks up to one year are usually entered into with the producer of a given show and their tenure is linked to the existence of the particular show for which they have contracted. If their talents are in demand they can enter into contracts for more than one show at any given time. The nature of the industry is however: if the show is discontinued, so are their contracts.

Given these circumstances, would the continuation of the individual contracts in the form that CBC proposes be incompatible with the legislative scheme of the Code? We think not, in fact, in our opinion the Code contemplates the continuation of individual contracts in some form by the very definition of dependent contractors who are included within the meaning of "employee" under the Code.

(...)

The talent field in the broadcasting industry is obviously unique and one that requires special considerations. The practice of individuals negotiating conditions over and

> above the collective agreement is obviously foreign to most other industries and this is a concept that challenges the notion of the exclusivity of the trade union as a bargaining agent which is fundamental to the Code. However, this practice apparently works in other areas of the sports and entertainment worlds and we can see no reason at this time for the Board to transplant practices from other industries into this one simply because these practices are standard elsewhere. We feel that this industry should be given a meaningful opportunity to find its own level of collective bargaining standards which best suit the parties involved.
>
> If the Guild cannot operate in this milieu then serious doubt is cast upon the wisdom of the decision of the Board in 1982, vis-à-vis the appropriateness of including the contract employees in the Guild's bargaining unit.[36]

Within the regime provided by the *Status of the Artist Act*, there is no question that an individual artist is free to negotiate a personal services contract above the minimums established in the scale agreement. On the other hand, the producer may not pay a professional artist working in a sector for which an artists' association has been certified, any less than the amounts provided in the applicable scale agreement. As a consequence, the scale agreement functions as a form of "minimum labour standard" that is uniquely tailored to the conditions of the particular sector. Even a brief review of the scale agreements between various artists' associations and producers provides evidence of the

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[36] CLRB Decision No. 629: *Canadian Wire Service Guild, Local 213* v. *Canadian Broadcasting Corporation*, (1987) 70 di 26.

comprehensive, complementary and creative solutions that the parties have developed for their particular sectors[37].

The existence of these minimum standards enables producers to more accurately predict their production budgets, as they know with certainty what the basic labour costs will be. They no longer need to negotiate individually with each contractor who is to be engaged for the production: the producer can offer "scale" and the artist immediately understands what this entails. However, artists who are capable of commanding a higher fee and benefits for their services are not, by law or by the scale agreement, prevented from negotiating better conditions than those contained in the scale agreement[38]. The effect of the legislation's minimal intrusion into the labour market is to create an underlying safety net for the majority of working artists and to eliminate the worst forms of "competition to the bottom" that occurs when work is scarce.

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[37] For example, the APG has an agreement with the CFTPA and APFTQ of more than 140 pages in length that, in addition to remuneration issues, covers matters such as performers' qualifications, conditions of engagement, time for make-up, dressing and costume fitting, auditions, rehearsals, retakes, publicity stills, pilot programs and use rights. These parties have also created an "Independent Production Incentive Program" to encourage the production of low-budget Canadian film and television projects.

[38] Subsection 33(4) of the *Act* provides that "a scale agreement applies notwithstanding any inconsistency with a contract between an artist and a producer, but it shall not be applied so as to deprive an artist of a right or benefit under the contract that is more favourable to the artist than is provided for under the agreement." The Tribunal is the final authority for determining whether the provision of the contract or the scale agreement is "more favourable" to the artist.

The *Act* contemplates the creation of associations of producers for the purpose of bargaining with an artists' association[39]. The process for creating such an association and obtaining recognition is relatively simple under the *Act*, all that is required is for the association to file a copy of its membership list with the Tribunal, to keep it up to date, and to send a copy of the list to every certified artists' association with which it deals. The mere filing of the membership list with the Tribunal gives the producers' association the exclusive right to bargain on behalf of its members. The relative informality of the process for the creation of producers' associations under the *Status of the Act* is somewhat surprising given the comparable provisions of the Quebec legislation[40] and the *Canada Labour Code*[41].

In Quebec, it is necessary for a producers' association to have in place certain by-laws regulating the internal affairs of the association (for example, membership and voting requirements) before it can be recognized. An application for recognition must be made to the Commission de reconnaissance des associations d'artistes et des associations de producteurs, which in turn must define the field of activities over which the association will have jurisdiction and then determine whether the applicant association is the most representative of producers working in that field of activities. The

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[39] Section 24.

[40] S.Q. 1987, c.72, *supra*, note 7 at Chapter III.1

[41] *Supra*, note 13, at sections 33 and 34. For the purposes of this analysis, the comparison is with the provisions of this statute that govern employer organizations possessing a legally enforceable exclusive right to bargain. It is recognized that under the *Canada Labour Code*, employers may voluntarily form an employers' organization for bargaining purposes, although experience has shown that during difficult economic times such organizations tend to break apart.

process for recognition of a producers' association under the Quebec statute requires the Commission to conduct as thorough an inquiry as those it conducts with respect to the recognition of an artists' association before granting recognition to a producers association.

Under the *Canada Labour Code*, there are two circumstances in which a process is prescribed for the recognition of an employers' organization. In the first circumstance, section 33 allows the Canada Industrial Relations Board to designate an employers' organization to be the "employer" for collective bargaining purposes when such an organization already exists and a trade union applies for certification for a bargaining unit comprised of employees of two or more of the member employers. In such a case, the Board must satisfy itself that each of the employers that is a member of the organization has granted it appropriate authority to discharge the duties and responsibilities of an employer.

The second circumstance, governed by section 34 of the *Code*, relates to industries in which geographic certification is possible (primarily long-shoring). When the Canada Industrial Relations Board certifies a trade union as bargaining agent for a unit composed of the employees of two or more employers engaged in long-shoring in a particular geographic area, the Board must concurrently require those employers to appoint a representative for the purposes of collective bargaining with the union. In the event that the employers fail to choose a representative, the Board is empowered to appoint one. The statute contains provisions imposing certain duties on an employer representative (eg. a duty of fair representation) and grants it certain powers (eg. the ability to require each of the employers of

employees in the bargaining unit to share in the costs of negotiating and administering the collective agreement).

It is curious that despite the experiences which led the legislators to strengthen these provisions of the *Canada Labour Code* in 1991[42], they apparently did not consider it necessary to include comparable provisions for producers subject to the *Status of the Artist Act*. To date, this lack of legislative support for producers' associations has not become an issue, as very few exist[43]. Unfortunately, the absence of such producers' associations makes it very difficult and expensive for certified artists' associations to negotiate agreements applicable to artists working in a particular sector, as they must serve notice to bargain and negotiate with each producer individually[44]. To overcome this

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[42] Section 34 of the *Canada Labour Code* was amended by Bill C-44, *An Act to amend the Canada Labour Code*, which was considered and passed during the same session of Parliament that dealt with Bill C-7, the *Status of the Artist Act*. The amendments, which received Royal Assent on November 29, 1991, added a dispute resolution mechanism relating to the choice of an employer representative following the granting of a geographic certification order and clarified the employer representative's powers and responsibilities. It also provided the Canada Labour Relations Board with the power to determine any questions arising under section 34. These amendments were necessitated by ongoing differences between the Maritime Employers' Association and Quebec Ports Terminals Inc., which were affecting labour relations in the port of Trois-Rivières/Bécancour. For a summary of the many difficulties encountered in enforcing these provisions, see CLRB Decision No. 1124, *Maritime Employers' Association and Quebec Ports Terminals Inc*., (1995) 98 di 33; 96 CLLC 220-005.

[43] As of this writing, only one producers' association has registered with the Canadian Artists and Producers Professional Relations Tribunal pursuant to s.24: the Professional Association of Canadian Theatres, which represents producers of stage productions in both the federal and provincial jurisdictions.

[44] It is estimated that there are more than 6,000 producers subject to the *Status of the Artist Act*: each federal government department and agency is a separate producer within the meaning of the *Act*, as are each of the broadcasting undertakings licenced by the Canadian Radio-television and

difficulty, a practice has been established that involves the use of "model contracts" developed by the artists' association. Any producer who wishes to engage the services of an artist who is a member of a certified sector is informed that it must adhere to the model contract. Whether this practice could withstand inquiry under the provisions of the *Act* that impose a duty to bargain in good faith[45] remains to be seen.

As of this writing, only three first agreements have been negotiated subsequent to the certification of an artists' association by the Canadian Artists and Producers Professional Relations Tribunal[46]. Some fifteen scale agreements that pre-existed the coming into force of the *Status of the Artist Act* have been renegotiated since that date, all of them without resort to the dispute resolution provisions of the *Act*. There are at least four reasons for the low rate of successful collective bargaining under the *Act*.

Firstly, although the Act has been in force since May 9, 1995, the first certifications were issued only in the early part of 1996. There has thus not been a great deal of time as yet for the artists'

Telecommunications Commission (this number may increase considerably as a result of the recent CRTC decision that certain types of transmissions via the Internet constitute "broadcasting": see CRTC Notice (Broadcasting)1999-84 - Report on New Media (May 17, 1999); on line at <http://www.crtc.gc.ca/ENG/BCASTING/NOTICE/1999/P9984_0.txt>).

[45] Section 32.

[46] The three are: ACTRA Performers Guild and Vision TV; Société professionnelle des auteurs et des compositeurs du Québec and Radio-Canada; and Société des auteurs, recherchistes, documentalistes et compositeurs and Télé-Métropole Inc.

associations to serve notice and bargain first agreements with federal producers. Secondly, some of the certified artists' associations have very limited resources with which to undertake their new responsibilities under the *Act*. As a recent report prepared for the Canadian Conference of the Arts observed:

> Inevitably, applying for certification involves increased costs (especially for experienced legal advice), and collective bargaining and monitoring take time and resources. There is reason to be concerned therefore about the condition of those ASOs [arts service organizations] which are candidates for certification but are not fully self-financing (to some extent at least because their members pay fees voluntarily rather than as a work requirement). Such ASOs will probably always need some public sector funding.
> (...)
> The ecology of the arts is highly interdependent. To apply successfully for designation as a collective bargaining agent, and, even more importantly, to carry out that mandate effectively once certified, ASOs which are not entirely self-financing will need adequate core funding from public sources. At present, this is a matter of concern federally and in Quebec (the only jurisdictions where Status of the Artist legislation is in place), but the issue will become important in any other province which passes such a law. At the moment, it would appear that Quebec, through the Conseil des arts et des lettres, is building a cadre of strong service organizations, but it is far from certain that the federal government and the Canada Council are doing so.[47]

The Tribunal has also remarked on the financial difficulties faced by certified artists' associations:

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[47] Jocelyn Harvey, *A Portrait of Canadian Arts Service Organizations in 1999* (Ottawa: Canadian Conference of the Arts, March 1999).

> [72] The Tribunal notes with concern the current circumstances of both CARFAC [the Canadian Artists Representation / Le Front des artistes canadiens] and the CCC [the Canadian Crafts Council], as expressed in the oral evidence of both parties. These are national organizations of artists and craftspeople and both groups find themselves understaffed and relying primarily on the support of volunteers for their operations since neither national body receives government funding. One of the primary mandates of the Tribunal is to certify artists' associations as bargaining agents to secure, for artists, fair working conditions and adequate fees for their labour. Without adequate financial support, these artists' associations are unable to function on behalf of the artists for whom the *Status of the Artist Act* was established.[48]

It is self-evident that the right to collective bargaining is illusory if the individuals who are intended to benefit from this protection, and their associations, do not have adequate resources to take advantage of their statutory rights. Long term, stable funding for artists' associations is thus as much of an issue for them as it is for other cultural institutions.

A third impediment to collective bargaining under the *Status of the Artist Act* was discussed earlier in this paper: the failure of producers to form producers' associations for the purpose of negotiations with certified artists' associations[49]. This means that the collective bargaining structure has built in inefficiencies that exacerbate the resource issues discussed above.

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[48] Tribunal Decision No. 029 (*In the Matter of an Application for Certification filed by the Canadian Artists' Representation/ Le Front Des Artistes Canadiens*, December 31, 1998); on- line at http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal20/decision_29.html

[49] See footnotes 43 and 44 and accompanying text, *infra*.

A fourth reason for the small number of scale agreements negotiated pursuant to the *Status of the Artist Act* has to do with the federal government's failure, as a producer, to enter into meaningful negotiations with any of the certified artists' associations, despite the fact that at least two of these associations, the Union des écrivaines et écrivains québécois and the Writers' Guild of Canada, have served notices to bargain on a number of government departments. The lack of financial and human resources noted above has also meant that artists' associations have been reluctant to make complaints to the Tribunal under the duty to bargain in good faith provisions of the *Act*. In addition to their cavalier treatment of the notices to bargain that were served on them, federal government departments have apparently refused to discuss matters related to copyright with the certified artists' associations. Not coincidentally, two of these departments have sought to have copyright excluded from the scope of the matters that can be the subject of bargaining under the *Act*.

Like an employee, a self-employed individual sells his or her skills (labour) to an engager. However, a self-employed person can also sell the product of his or her labour - the finished work itself. Self-employed creators of artistic, dramatic, literary or musical works can take advantage of the provisions of the *Copyright Act*[50] to protect their copyright interests in their works. Thus, although there is a presumption in the *Copyright Act* that the copyright in works created by employees in the course of their employment belong to the employer[51]; the copyright in works created by a self-employed individual can be the subject of negotiation. A copyright holder is entitled to assign the

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[50] R.S.C. 1985, c. C-42, as am.

[51] *Ibid*. at section 13(3).

copyright in a work to someone else in whole or in part and can grant an exclusive or non-exclusive licence for the use of some or all of their copyright interests in the work (for example, the right to translate a written work into another language or to adapt it into another form). A visual artist who sells one of his works does not automatically transfer the copyright in the work to the purchaser by the mere fact of the sale; by retaining the copyright, the original creator continues to have the right to reproduce and sell copies of the work in other forms such as a lithograph or print. Obviously, for a self-employed person, the ability to exploit his or her copyright in a work is a valuable and important economic right.

Prior to the coming into force of the *Status of the Artist Act*, there were only two avenues for managing copyright available to copyright holders: they could self-manage (which means collecting royalties or licence fees themselves and enforcing their copyrights through civil litigation when they can prove that a copyright has been violated) or they could assign their copyrights to a copyright collective society created pursuant to the *Copyright Act*. That statute provides a process through which such collective societies can administer copyright on behalf of the creator by establishing and enforcing use fees through means of tariffs filed with the Copyright Board of Canada.

Various copyright collective societies intervened in a number of the initial applications for certification made to the Tribunal, seeking a declaration that certified artists' associations were not entitled to bargain matters related to copyright. The Tribunal consistently refused to grant such declarations, stating:

> [20] The objective of the bargaining undertaken by an artists' association subsequent to certification is to put in place one or more scale agreements prescribing the minimum terms and conditions under which the artists covered by the agreement will provide their services to producers in the federal jurisdiction. The content of the scale agreement is a matter for negotiation between the certified artists' association and the producers; the scale agreement could touch on matters of copyright but need not necessarily do so.[52]

and

> [36] What is included in this right to bargain? Subsection 31(1) of the Act states that the purpose of bargaining is to enter into a scale agreement. A scale agreement is defined as "an agreement in writing between a producer and an artists' association respecting minimum terms and conditions for the provision of artists' services **and other related matters**".
>
> [37] In these early stages of collective bargaining on behalf of artists who are independent contractors, the Tribunal is not inclined to begin defining or limiting the subjects that can be included in the category of "matters related to the provision of artists' services". In our view, it would be unacceptable to divide the provision of services from the use of the work. A producer who commissions a work must be able to use or disseminate the work for which he or she has paid.[53]

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[52] Tribunal Decision No.001 *(In the matter of an application for certification filed by the Union des écrivaines et écrivains québécois,* December 8, 1995); on-line at <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal1/decision_01.html>.

[53] Tribunal Decision No. 005 (*In the matter of an application for certification filed by the Union des écrivaines et écrivains québécois*, February 2, 1996); emphasis in original. On line at <http://capprt-tcrpap.ic.gc.ca/decisions/decisionstribunal/decisionstribunal1/decision_05.html>.

In these early decisions, the Tribunal appears to have envisioned that a scale agreement could contain provisions relating to the copyright in works that a producer commissioned from an artist. But what of works created independent of a commission: works created by a self-employed person on his own account, and subsequently sold to someone else? Can a scale agreement establish minimum terms and conditions for such transactions and/or can an artists' association certified under the *Status of the Artist Act* represent a creator in negotiations over the use of such pre-existing works? These were the issues that were raised by the intervention of two federal government departments, Canadian Heritage and Public Works and Government Services Canada, in the Tribunal's 1998 proceedings on The Writers' Union of Canada (TWUC) application for certification.

There are two copyright collective societies in existence that assist writers with their copyrights: CANCOPY[54] (which deals with reprography and electrocopying rights) and TERLA[55] (which deals with rights to electronic reproduction). TWUC was one of the founding members of both of these copyright collective societies, and neither of them objected to TWUC's application for certification. There is no copyright collective society in Canada that assists writers in managing their "grand droits" - for example, the right to translate a book into another language or to adapt a novel into a script or screenplay. Nevertheless, the two federal government departments endeavoured to persuade the Tribunal to limit the definition of the sector that the applicant would be entitled to represent so as to prevent the association from negotiating with producers over the terms and conditions that would apply

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[54] The Canadian Copyright Licensing Agency.

[55] The Electronic Rights Licensing Agency.

to pre-existing (i.e. non-commissioned) works. Once again, the Tribunal refused to limit the scope of bargaining:

> [58] The statute must be given an interpretation that will fulfill Parliament's intention of improving the socio-economic status of artists in Canada. The Act mandates certified artists' associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the Act. Parliament did not expressly exclude matters related to copyright from the ambit of collective bargaining. Indeed, the Act contains no express limitation on an artists' association's right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.
>
> (...)
>
> [64] In certain sectors, the members of an artists' association may decide that it is appropriate for their association to seek to include matters related to their copyright in pre-existing works in a scale agreement. This collective bargaining activity does not make the artists' association the agent of the artist for the purpose of granting licenses or assignments of copyright for those works, but merely seeks to establish the minimum terms and conditions that would apply when an artist decides to licence or assign a particular copyright to a producer who is a party to the scale agreement. In the example given above, if the artist has already assigned his or her copyrights to a collective society for administration, then the artist would instruct the producer to deal with that organization; otherwise the artist can enter into individual negotiation with the producer, with the terms of the scale agreement setting the floor for the negotiations.

> [65] The Tribunal hopes that this explanation of the manner in which the regimes created by the *Status of the Artist Act* and the *Copyright Act* can complement one another will clarify matters for the community. It therefore declines the government intervenors' request to modify the sector definition so as to prohibit collective bargaining in respect of the use of pre-existing works.[56]

The regime contained in the *Status of the Artist Act* consists of a system that determines, in advance, the minimum remuneration that will apply to an artist's work, by means of negotiation between an artists' association and producers who may wish to use an artist's work at some time in the future. At the point in time when a producer actually commissions a work or seeks to obtain the right to use an existing work, further negotiations between the creator and the producer may take place. In contrast, the regime envisioned in the *Copyright Act* involves a system in which the fees for the use of an existing work ("royalties") are established by a copyright collective society, subject to the approval of the Copyright Board. Although producers may intervene in hearings before the Board regarding any particular tariff, there is no negotiation process involving the users of copyrighted works, and the Board is the final authority regarding the amount that must be paid for the use of a work.

The Tribunal endeavoured to reconcile these two very different systems for establishing the remuneration to be paid to artists for the use of their works by suggesting that the choice should be left to the creator. In the Tribunal's view, the advent of the *Status of the Artist Act* provided artists with a

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[56] Tribunal Decision No. 028, *supra*, note 24 . This decision is currently the subject of an application for judicial review in the Federal Court of Appeal (Court file: A-750-98).

third alternative for the management of their copyrights: collective bargaining. Until the Federal Court of Appeal rules on the application for judicial review that has been made in respect of the Tribunal's decision in the TWUC case, the question of whether copyright can in fact be the subject of collective bargaining under the *Status of the Artist Act* will remain uncertain. It can only be hoped that the Court will see the wisdom of the Tribunal's efforts to reconcile the regimes provided by the *Copyright Act* and the *Status of the Artist Act*, as this is the approach that holds the most promise for improving the economic conditions of self-employed creators.

Disputes and dispute resolution under the Status of the Artist Act

Can independent contractors strike? Although the term "strike" is not used in the *Status of the Artist Act*, the definition it provides for the term "pressure tactic" contains similar elements to those found in the definition of a strike in the *Canada Labour Code*:

> a cessation of work or a refusal to work or to continue to work by artists or artists' associations in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity by artists or artists' associations respecting the provision of their services, done to compel a producer to agree to terms or conditions of engagement...[57]

Like other labour relations legislation, the *Act* limits the time period in which the use of pressure tactics is lawful. Either party may engage in pressure tactics only in the period beginning thirty days

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[57] Section 5. The provision goes on to define "pressure tactics" by producers that parallel an employer's lockout rights.

after a scale agreement has expired and ending on the day that a new agreement is entered into. That pressure tactics by freelance artists can be as effective as strikes by employees was demonstrated in June 1999 when a strike vote taken by freelance film and television performers represented by the ACTRA Performers Guild threatened to shut down all independent film and television production in Canada, reportedly a three billion dollar per year industry. Fortunately, negotiations for the renewal of the agreement between the artists' association and the producers were successful and pressure tactics were avoided.

Whether pressure tactics by producers would be as effective is debatable. In 1969, the Woods Task Force[58] observed:

> 607. ... the employer's economic sanction equivalent to the union's right to strike rarely is the lockout: it is his ability to take a strike. ... it is important to note that the employer's capacity to take a strike depends largely on his right to stockpile goods in advance of a strike and to use other employees and replacements to perform work normally done by strikers. Together with the lockout, these possibilities constitute the employer's quid pro quo for the worker's right to strike; this is as it should be, in our view.

In the cultural field, "stockpiling goods" is clearly not an option. The question then arises as to who the employer could use as replacement workers in a situation in which all of the people who have the skills it wishes to engage are members of the sector represented by the artists' association with

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[58] *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: The Queen's Printer, 1969).

which it is in conflict. Although there has been no experience with the use of pressure tactics by producers under the *Status of the Artist Act*, logic would suggest that the economic imperatives that are at play are quite different than those that pertain to a labour dispute involving employers and employees.

With respect to dispute resolution, the *Canada Labour Code* provides for the possibility of third party dispute resolution efforts ("conciliation") prior to the acquisition of the legal right to strike or lockout[59]. No such provision exists in the *Status of the Artist Act*: the parties are free to engage in pressure tactics if they have failed to reached a new agreement thirty days from the expiry date of the scale agreement (or 6 months after initial certification, in the case of first agreements). Third party dispute resolution assistance, in the form of mediation, may be provided by the Minister of Labour at any time[60], but such assistance has no effect on the acquisition or use of the right to impose pressure tactics.

Although the *Status of the Artist Act* contains a lengthy list of prohibited practices[61] that appear to mirror the unfair labour practice provisions of the *Canada Labour Code*, there have as yet been no complaints heard or decided by the Tribunal under these sections. It is therefore difficult to assess whether the tests that have been developed and applied by traditional labour relations boards

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[59] See sections 72 and 89 of the *Canada Labour Code*, *infra*.

[60] Section 45.

[61] Sections 50 and 51.

will be relevant to situations that occur involving producers and self-employed contractors. It is clear, however, that one remedy available to labour relations boards, the reinstatement in employment of an employee found to have been improperly terminated, will be of limited use to the Tribunal: in most cases, the production that is or was the subject matter of the complaint is likely to no longer be running by the time a complaint is heard and a decision rendered. Prior to the coming into force of the *Act*, some artists' associations had developed mechanisms to deal with situations of this nature, including issuing declarations that a particular producer was an "unfair engager". Monetary fines could be assessed by the artists' association against such an unfair engager, and no artist would be permitted to sign a contract with the producer until the fines were paid.

The Changing Labour Force

In addition to converting full-time jobs into contract work, employers have adopted a number of responses to the economic challenges posed by technological change, foreign competition and globalization. Apart from the increase in the number of self-employed in the labour force, surveys by Statistics Canada have documented increases in part-time workers and "telecommuters".[62] This so-called "non-standard" work accounted for 44% of total employment growth in the 1980s and has continued to be a feature of the Canadian labour force throughout the 1990s.[63] However, as the

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[62] For a thorough discussion of this topic, see *Collective Reflection on the Changing Workplace: Report of the Advisory Committee on the Changing Workplace* (Ottawa: Public Works and Government Services Canada, 1997).

[63] *Ibid.*, at 9.

Advisory Committee Report notes, the generic term "non-standard" is of limited analytical usefulness because the problems created by each type of non-standard employment differs. It must therefore be stressed that this paper focuses only on the particular needs of those who have been classified by Statistics Canada as "own account self-employed" - the people who are independent contractors, whether incorporated or not, who do not hire paid help.

A 1998 study for the federal department of Human Resources Development contained the following description of the trends involving own account self-employment:

> In 1997, there were nearly 1.5 million own-account self-employed people in Canada. That represented almost 10 per cent of total employment. Between 1989 and 1995, the number of self-employed Canadians grew by one-half. Between 1976 and 1995, self-employment almost doubled while total employment grew by less than 40 per cent over the same period.
>
> This pattern of growth is a relatively recent phenomenon. Prior to the 1970s, the incidence of self-employment had been falling. Structural shifts in employment from agriculture, since farmers are often classified as self-employed, to manufacturing had cut self-employment numbers. However, since 1976, growth in self-employment has been steady and largely insensitive to economic cycles.
>
> The increasing incidence of own-account self-employment (OASE) has been observed for both men and women, for all age groups, in all education groups (at least in the 1990s), in all regions (again at least in the 1990s) and in all industry and occupational groups except agriculture. During the 1990s, the largest increase in the incidence of OASE was reported in business services and construction. As for occupations, growth

> for self-employment has been greatest in construction and professional, sales and service occupations.[64]

The forces that have led to this development have been explained by Hugh Collins:

> During most of this century industrial organization has tended toward vertical integration of production. Although sectors of the economy differ considerably in their degree of concentration into large firms, the general pattern unfurling has been the replacement of small businesses linked by commercial contracts by organizations which direct production through bureaucratic controls. Since the recession at the beginning of the 1980s, however, this trend has been reversed. As well as the decomposition of capital into separate corporate entities in an endeavour to replicate efficient capital markets, managers of large firms have exhibited a greater interested in disintegration, by arranging aspects of production through subcontracting, franchising, concessions, and outsourcing. Similar developments have occurred in the public sector as one aspect of the policy of privatization. [65]

Although Collins was describing the situation in Great Britain, his analysis of the effects of these factors for workers is equally applicable to North America:

> Legal regulation of the employment relationship has hitherto matured alongside the growth in vertical integration of production. This coincidence explains in part the limited

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[64] Evaluation and Data Development, Strategic Policy Branch, *Own-Account Self-Employment in Canada: Lessons Learned, Final Report* (Ottawa: Human Resources Development Canada, February 1998).

[65] Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, (1990) 10 Oxford Journal of Legal Studies 353 - 380 (footnotes omitted).

scope of legal protection for employees. Employment protection rights such as the right to claim unfair dismissal or a redundancy payment typically vest only in employees whose jobs fit into the complementary paradigm form of employment in vertically integrated production: employment which is full-time, stable, and for an indefinite duration. The recent trend towards vertical disintegration of production places many workers outside this paradigm and therefore beyond the range of employment protection laws.

As the size of the group of workers excluded from legal protection has increased, both in absolute numbers and as a proportion of the workforce, labour lawyers have become concerned for the plight of these 'marginal workers', who include temporaries, casuals, the self-employed, part-timers, and homeworkers. The predicament confronting most of these workers is, however, no more than a legislative artefact. Because employment protection laws limit rights according to hours of work, length of service, and place of work, many employees fail to acquire rights simply by virtue of the choice of the legislature. (...)

... By turning an employee into a subcontractor, the management of a large firm substitutes commercial contracts for employment relations. This contractual arrangement not only applies to the rapidly increasing numbers of self-employed workers, but also to many of the other groups of marginal workers listed above, for homeworking is often regarded as self-employment, and temporary or casual work can often be described as consulting, freelancing, or subcontracting. In addition, the provision of services by independent contracting is a prevalent form of acquiring labour in many industrial sectors such as construction. Despite the form of the contractual relation in all these instances, however, in substance the workers frequently appear to be in an equivalent position of social subordination and economic dependence to that of

> ordinary employees, and so in need of those employment protection rights from which they are often excluded by virtue of having ceased to qualify as employees.[66]

The advantage to employers of transforming employees into so-called "independent contractors" are obvious. In Canada, the considerations are the same as those Professor Arthurs identified in 1965 with respect to dependent contractors:

> The obligation to comply with a variety of social welfare and tax statutes depends on the existence of an employment relationship, as indeed does exposure to vicarious liability or consumer complaints. Conversely, the employer receives the benefits of increased sales or faster service by contractors whose income depends on their own exertions instead of an assured wage. A fluctuating demand for services is often more economically met by casual arrangements with a dependent contractor than by a burdensome continuing employment relationship. The dependent contractor may work for less. His individual bargaining power is substantially less than that of an organized group of employees. Capital and maintenance costs of equipment can be shifted to the dependent contractor, thereby further enhancing the bargaining power of the employer, while undermining the contractor's ability to withhold his services. Not the least of the attractions of dealing with a dependent contractor is his inability to claim the protection of the labour relations legislation. Finally, the dependent contractor may be used to undermine the union's bargaining power, which stems from its control of the labour supply.[67]

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[66] *Ibid.*, at 353-354.

[67] H.W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, (1965) 16 U.T.L.J. 89 at 96.

Whatever the forces at play, it is clear that they are fundamentally affecting the composition of the Canadian labour force. The social consequences of these changes were documented by the 1997 Report of the Advisory Committee on the Changing Workplace:

> ... in the 1990s, polling data indicate that work continues to be an essentially important activity for Canadians, as it is for the citizens of other developed nations. However, the changing world of work creates new problems, as well as new opportunities. For example, Canadians who telecommute, and spend their workdays at the home-computer screens, face distinct problems of social isolation. Those who depend on a series of short-term job assignments may find it hard to stick to a predictable pattern of day-to-day life and thereby avoid a disorganized lifestyle. And those who have no assurances of job security are unlikely to be able to find the same sense of occupational identity as those who can expect their jobs to continue.[68]

[68] *Collective Reflection on the Changing Workplace*, *supra* note 62 at 16 - 17.

Should collective bargaining be extended to independent contractors?

There is no apparent, principled reason for excluding workers from coverage under our labour legislation merely because, by employer fiat, they have been declared to be self-employed, independent contractors rather than employees The rationale for extending the benefits of collective bargaining to independent contractors - the "own account self-employed" - is identical to that articulated by Professor Harry Arthurs in respect of those he termed "dependent contractors" - persons in a position of economic dependence on someone who engaged their services:

> Unequal power, between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area - employment relations - public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area - commercial competition - collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as "independent contractors" rather than "employees" they lack the legal status which is a prerequisite of the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation. They are prisoners of the régime of competition.[69]

At the time of his study, Professor Arthurs concluded:

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[69] Arthurs, *supra*, note 67 at 89.

> The undoubted achievement of collective bargaining in enhancing the economic and social position of organized employees and in curbing the grosser forms of industrial autocracy suggests that the use of countervailing power by groups other than employees may be desirable. [70]

The Woods Task Force also remarked on the situation of individuals in "non-standard" work relationships:

> 254. At the other extreme are workers who have no recourse to protect their interests aside from the right to quit. It is difficult to find a valid rationale for exemptions which apply to agricultural workers and domestic servants. If collective bargaining is to be supported by public policy, its benefits should be made available to as many groups as possible on an equal basis. Where particular problems arise, as in the case of "dependent contractors", special provisions under the legislation rather than total exemption can provide a more defensible alternative.[71]

In his work, Professor Arthurs gave specific examples of the types of occupations that he considered to be "dependent contractors": self-employed truck drivers, peddlers, taxi-cab operators, farmers, fishermen and service station lessees. In his view, these people inhabited a "no-man's-land" between divergent policies and inconsistent attitudes towards competition and countervailing power:

> It is because our public policy insists that entrepreneurs act individually, while inviting employees to act collectively, that these economic realities become crucial in the decision to grant employee status to dependent contractors or withhold it from them

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[70] *Ibid.*, at 113-114.

[71] *Supra*, note 58 at 86.

> under the labour relations acts. Denied such status, or voluntarily rejecting it, clusters of dependent contractors have to cope as individuals with the hazards of a market populated by industrial giants. Such a situation, as will be seen, further emphasizes the contractor's dependence and represents and irritant in the relationship between organized employees and management.[72]

In 1968, the Woods Task Force recommended that collective bargaining rights be extended to such dependent contractors:

> 442. We are concerned about accessibility to collective action by groups of self-employed persons who are economically dependent for the sale of their product or services on a very limited market or who for other reasons may have economic characteristics of employees. We have in mind such groups as fishermen, owner-drivers of taxis, and independent owner-drivers of trucks and delivery vans. We recommend that the Canada Labour Relations Board be given discretion to recognize these groups as bargaining agents within a specified market and that upon such recognition they receive the protection of section 410 of the *Criminal Code* and section 4 of the *Combines Investigation Act* from the criminal law restraint of trade and from the operation of combines legislation, except where there is evidence of a collusive arrangement between such groups and those who employ their services.[73]

In the years following Professor Arthurs' article and the Woods Task Force Report, several jurisdictions adopted legislation to grant collective bargaining rights to limited groups of dependent

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[72] *Supra*., note 67, at 95.

[73] *Supra*, note 58 at 139-140.

contractors.[74] The development of this "dependent contractor" concept was criticised as unnecessary by Professor Michael Bendel, primarily on the grounds that labour boards had already possessed the ability to extend employee status to almost all "near-employees" by applying an "organization" test rather than the traditional common law test:

> In applying the organization test, tribunals have to examine whether the putative employee is in business on his own or whether the services he is providing constitute an integral part of the business of the alleged employer. In *Market Investigations Ltd.* v. *Minister of Social Security*, Cooke J. stated that earlier authorities 'suggest that the fundamental test to be applied is this: "is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service'.
>
> (...)
>
> The aspect of the organization test which makes it so attractive in the labour relations context is that integration into another person's business, the key feature of the test, is a very useful indicator of economic dependence.[75]

Notwithstanding Professor Bendel's suggestion that labour relations boards have long had the ability to deal with "near-employees", it is not sufficient to merely sweep these workers under the

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[74] For example, the *Canada Labour Code* permits the Canada Industrial Relations Board to grant certification to bargaining units composed of vehicle owner-operators, share-of-the-catch fishermen or persons who perform work or services for another person subject to arrangements that place them "in a position of economic dependence on and under an obligation to perform duties for that other person".

[75] Michael Bendel, *The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law*, (1982) 32 U.T.L.J. 374 at 381-382 (footnotes omitted).

umbrella of existing labour relations legislation. The framework for collective bargaining must be tailored to take into account the different imperatives that govern the relationship between self-employed contractors and engagers. A number of recent studies have remarked on the need for special measures to address the growing number of independent contractors in the labour force. The Task Force that conducted the review of Part I of the Canada Labour Code in 1995 ("the Sims Report") questioned their exclusion from the collective bargaining regime, although it identified one difficulty with existing labour relations statutes:

> There is also a growing use of contract workers. ...Added to these contract employees are the growing numbers of freelance contractors who make their living bidding sequentially on various types of work in the arts, in computer-related or office automation fields like desktop publishing, driving or operating equipment, or various forms of consulting. While some of these people are truly "independent entrepreneurs", many more are highly dependent on whatever businesses or organizations offer the work they perform.
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> There are several differences between the situation of these employees and those in more traditional jobs, whether unionized or not. The most obvious differences are their insecurity and the absence of the usual benefits of full-time employment, such as supplemental insurance programs and pensions. They also suffer diminished access to those retraining and adjustment options that are sometimes organized through the traditional workplace when it undergoes change. They have no recall rights and no real opportunity to challenge the arbitrary withdrawal of whatever source of work they may have.
>
> Some would suggest that the world offers no security and that this is simply the shape of things to come. However, we think it important to question whether this is in

> the long term best interests of individuals, of our economy, our national finances or our enterprises.
>
> ... Unions allow employees to negotiate in groups, improving their relative bargaining position. But our system so far presumes that unions will bargain with an employer for all employees who work in an identifiable bargaining unit. But the assumption that there will be one identifiable employer with a defined group of employees is breading down for many of the same reasons that transient work is increasing. The question arises about legislative support for other forms of bargaining, beyond the model in our labour codes. [76]

Similarly, in his chapter for the Report of the Advisory Committee on the Changing Workplace[77], Serge Brault observed:

> As we have seen, almost half the jobs created in the country in the past 20 years fall into the category of non-standard employment, meaning that they do not fit the traditional mould. Accordingly, they are also outside the realm of the current philosophy of work, and existing labour legislation. New types of workers have appeared who are often neither entirely employees nor entirely independent contractors, and who do not work wholly in the workplace or wholly outside it. They often deal directly with the client - the new task master - and yet, at the same time, they seem to respond to a legal need to keep them at arm's length from the organization. Their role has changed from that of "salespersons" or "tellers" to that of "account executives" or "consultants". In the new economy, workers are increasingly given a

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[76] *Seeking A Balance*, Report of the Task Force to Inquire into Part I of the Canada Labour Code (Ottawa: Public Works and Government Services Canada, 1995) at 240-241; on-line at <http://hrdc-drhc.gc.ca/hrdc/labour/labind_e.html>.

[77] *Collective Reflection on the Changing Workplace*, *supra*, note 62.

"role", "mandate" or "mission" rather than a job description. This new organization challenges the workability of existing labour law, both in terms of its philosophy and its concepts.

(...)

... In the final analysis, there is a need for a framework that enables businesses to innovate and to adopt new practices - something which is not possible under the current model - without negating our most deeply-held community values.

From a legal point of view, salaried employment must give way, as the cornerstone of the system, to the concept of a contract of activity, one that would imply rights and obligations for each contracting party. This is a much broader concept for it acknowledges and encompasses the multiple realities of the knowledge-based economy, which are ill-suited to a framework designed for a very different system of industrial production.

It is also necessary to re-examine the concept of the workplace and its impact. As we have seen, legislation has always linked the workplace to the employer. Moreover, certain rights and responsibilities, such as certification are directly associated with it. This linkage may have been reliable and appropriate up to now, and may remain so in some respects, but very often, it is neither.

The concepts referred to earlier must be reviewed so that those who wish to have access to collective bargaining may do so under the legislation. Collective bargaining remains a central concept in the way work is structured and remunerated. But beyond this micro-economic role, collective bargaining also plays a role in the economy as a whole with regard to the redistribution of wealth between capital and labour. Accordingly, collective bargaining is for the most part a private sector mechanism better adapted and responsive to the requirements of individual workplaces than are public policies of income redistribution. That being said, there is a need to

> consider implementing a model for bargaining of more universal application that would rely more on particpatory processes than on confrontation.[78]

Industrial relations practitioners rarely, if ever, characterize labour legislation as human rights legislation, even though the most important human rights document of our time, the *Universal Declaration of Human Rights*[79], affirms the most basic human freedoms to include the right to just and favourable conditions of work, the right to equal pay for equal work, the right to just and favourable remuneration ensuring for a worker and his family an existence worthy of human dignity and, not incidentally, the right to form and to join trade unions for the protection of his interests[80]. The extension of collective bargaining rights to self-employed contractors is justifiable on the grounds of human rights considerations alone. However, if arguments based on simple social justice are not sufficiently persuasive, there are also practical economic reasons for bringing own-account self-employed contractors within the ambit of collective bargaining. Permitting the creation and perpetuation of a second-class workforce of contingent workers who have no collective rights but who compete for work with each other and with unionized employees reduces the revenues available to all working people within an economy. By levelling the playing field, labour relations legislation applicable to self-employed contractors would create the conditions through which, over time, their wages and benefits would approach those of permanent employees. Although this would remove some of the economic

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[78] *Ibid*. at 58 - 64.

[79] General Assembly Res. 217A, UN GA 3rd Sess., UN Doc. A/RES/217A (III) (1948).

[80] *Ibid*., at Article 23.

advantages to employers of using contract labour, it would ensure that these people do not become charges on our social welfare system.

Conclusion

Proposals to simply extend existing labour laws to those in "non-standard" work relationships suffer from two serious flaws. Firstly, they do not recognize that traditional collective bargaining regimes, based as they are on the premise of an on-going employer-employee relationship, are not necessarily suitable to the nature of the relationship between a contractor and an engager. Secondly, existing labour relations legislation does not deal well with contractors who are economically dependent upon more than one engager. Fortunately, the model contained in the *Status of the Artist Act* addresses both of these aspects.

First, with respect to the nature of the relationship between an independent contractor and an engager, the *Status of the Artist Act* provides for the possibility that a particular individual may have skills for which he or she can demand greater compensation than that contained in the scale agreement applicable to the engager who wishes to retain those skills. By providing, as it does, that scale agreements establish only minimum terms and conditions relative to such engagements and protecting the right of individuals to negotiate contracts above these minimums, the *Act* establishes a floor for the compensation of workers without imposing upper limits on the amounts that a contractor and an engager can negotiate. The terms and conditions contained in the scale agreement negotiated between the artists' association and the producer thereby function as a form of minimum labour standard which,

unlike general employment legislation, is uniquely tailored to the circumstances of the particular industry or sector to which it pertains.

The second issue, that of contractors who routinely work for a variety of engagers in the course of a week, month or year, is dealt with in the *Act* by means of the sectoral approach to certification. Parallels to this exist in the construction and long-shoring industries, where multi-employer or sectoral certification was introduced to provide a countervailing power for employers faced with trade union control over the supply of labour by means of closed shop arrangements coupled with union hiring halls.[81] In such circumstances, the trade union or artists' association becomes the one constant in the "employment" relationship. A significant benefit of this approach is that many of the insured benefits normally provided by an employer can be provided by the union. Group life, health, dental insurance and pension plans are examples of coverages that independent contractors can more appropriately obtain from their union or association when the period of attachment to a particular employer is too short to qualify them for coverage.

Although the *Status of the Artist Act* is more appropriately designed to recognize the unique relationships between independent contractors and engagers, there are three areas in which amendments would be required for the model to be suitable for other industrial sectors.

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[81] For a description of the system in place in the construction industry, see *The Construction Industry and Craft Unionism,* Chapter 15 in George W. Adams, Canadian Labour Law (Aurora: Canada Law Book, 1985); for a description of the system in place in the long-shoring industry, see E. MacPherson, *Improving Access to Collective Bargaining: The Mandatory Employer Bargaining Association* (LL.B. paper, Faculty of Law, University of Ottawa, 1992) [unpublished].

The first has to do with the acquisition of the right to apply pressure tactics (strike/lockout) in first agreement situations. The *Act* provides that pressure tactics in a first agreement situation can be applied "beginning six months after the date of certification of an artists' association and ending on the day that a scale agreement is entered into" [82]. This raises the possibility that either party could engage in pressure tactics without ever having entered into meaningful negotiations. It would be advisable if the acquisition of the right to apply pressure tactics in such cases were tied instead to the service of a notice to bargain, so that there would be some legislative obligation to endeavour to reach agreement before engaging in strike or lockout activity.

The second area in which the *Act* is weak relates to the structure it establishes for collective bargaining. As noted earlier in this paper, it is extremely expensive for an artists' association or trade union to negotiate on an engager by engager basis. The right to collective bargaining is illusory if it cannot be effectively asserted, and it cannot be effectively asserted if these organizations are unable to put agreements with producers in place due to a lack of adequate resources. One mechanism that could be used to overcome this deficiency would be to require engagers to form mandatory engager associations for collective bargaining purposes.

In the industrial context, the Woods Task Force suggested that there were circumstances in which the strength of a union or group of unions required an offsetting employer alliance and gave as examples the trucking, long-shoring, construction and printing industries in which a number of relatively

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[82] Subsection 46(*a*)

small employers faced a common union or council of unions.[83] Joseph Rose identified two further rationales for the use of employer bargaining associations: the encouragement of wider based bargaining and the contribution they can make to industrial relations stability.[84] In both Rose's analysis and that of the Bairstow Commission,[85] wider based bargaining was seen as desirable for its contribution to industrial stability: it was postulated that consolidating bargaining structures (both union and employer) would reduce the frequency of industrial conflict, promote uniformity of working conditions within an industry (thereby reducing labour turnover), and encourage labour-management co-operation.

In the case of self-employed contractors, these traditional rationales are less relevant. The imposition of a mandatory engager association has less to do with countervailing power or industrial stability and more to do with creating a practical and effective structure for collective bargaining. The provisions of the *Canada Labour Code* applicable to the long-shoring industry[86] would provide a good starting point for the development of an appropriate model for this purpose.

The third area in which the *Status of the Artist Act* could be strengthened would involve including a positive affirmation of the broad scope of the matters that could be the subject of collective

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[83] Woods, *supra*, note 58 at para 530-531.

[84] Joseph B. Rose, Public Policy, Bargaining Structure and the Construction Industry (Toronto: Butterworths, 1980).

[85] *Report of the Inquiry Commission on Wider-Based Collective Bargaining*, Frances Bairstow, Chairman (Ottawa: Labour Canada, 1978).

[86] *Canada Labour Code, supra* note 13, s.34.

bargaining. As described earlier in this paper, the scope of bargaining rights under the *Act* is a matter that is currently before the courts in respect of the right of certified artists' associations to negotiate matters related to copyright. In order to ensure that the objective of providing a minimum social safety net for self-employed individuals is met, and to ensure that the agreements that are negotiated are tailored to the particular circumstances of each industry, the legislation should make it clear that there are no statutory limitations on the matters that can be bargained.

The changes to the nature of the relationships between those who sell their labour and those who buy it have led to significant levels of insecurity in society. As the Honourable Alfonso Gagliano, Chair of the Advisory Committee on the Changing Workplace noted in his opening message in the Committee's Report, there is a link between the smooth functioning of the workplace and productivity, competitiveness and the profitability of corporations. These in turn affect exports, investments and job creation[87]. As recent events involving independent truckers in the provinces of Quebec and British Columbia have demonstrated, governments can no longer afford to delay in dealing with the human consequences of uncertainty and instability in the workplace; legislative action is required to ensure that a basic social safety net is available to all working Canadians.

There are many ways in which governments can endeavour to improve the living conditions of their citizens. With respect to those who are independent contractors (the "own-account self-employed"), legislatures can play a paternalistic role by enacting laws to provide minimum labour

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[87] *Collective Reflection on the Changing Workplace*, *supra*, note 62 at *vi*.

protections. This requires a significant commitment of public service resources to police and enforce the law, and numerous regulations and exemption orders to try to tailor a prescriptive general regime to meet the exigencies of various industries. As well, in many instances, these legislative minimums become the maximum.

Alternatively, legislatures can enact provisions which give such individuals the ability to work together to improve their own employment conditions. The collective bargaining regime contained in the *Status of the Artist Act* provides a useful model for minimal governmental intrusion into the relationship between those who sell and those who buy labour, while still providing them with the means to develop appropriate economic and social support structures, relevant to their industry, that will assure labour stability.

Unfortunately, there has been insufficient experience with collective bargaining and too few scale agreements consummated under the *Status of the Artist Act* to permit a conclusion at this time that the *Act* has had a positive impact on the working conditions of cultural workers generally. Indeed, it will be a number of years before we can say with any certainty that the fruits of collective bargaining under this *Act* have improved the economic situation of Canadian artists. Nonetheless, the scale agreements that have been negotiated demonstrate the same trend found in the industrial sector: those with access to collective bargaining generally benefit from terms and conditions of employment that are superior to those applicable to unorganized workers.

Several unanticipated benefits have been realized from the passage of the Quebec and federal statutes, however, as documented in the report prepared for the Canadian Conference of the Arts:

> Though it is to early to make a full assessment of the impact of the two tribunals, there is evidence from some responding ASOs that certification has not only brought economic benefits to their members (clearly, the major purpose) but has also indirectly strengthened the organizations themselves. As the designated collective bargaining agent for a given sector, with whom producers must negotiate, some report that they are able to recruit and retain more members, thereby increasing their revenues and permitting them to offer even more services for the membership, Over time, another advantage of certification decisions is that they will also help clarify areas of responsibility and limit duplication and overlap.[88]

In designing any new model of collective bargaining, it is necessary to strive for an appropriate balance between the interests of all of the parties affected: in this case, independent contractors, their associations, engagers and the public. Clearly, the legislative choices that are made will impact upon the balances that are finally achieved and certain interest groups will feel that their interests have been given less weight than those of others. However, if social justice is to be achieved, it is necessary that these choices be made. We cannot, as a society, continue to permit independent contractors to be denied access to an effective mechanism for improving their economic situation.

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[88] *A Portrait of Canadian Arts Service Organizations in 1999, supra*, note 47, at 6.

COMPARISON OF SELECTED PROVISIONS:
STATUS OF THE ARTIST ACT PART II
AND
CANADA LABOUR CODE, PART I

STATUS OF THE ARTIST ACT, PART II	CANADA LABOUR CODE, PART I
artist an independent contractor described in paragraph 6(2)(*b*) (i.e. professionals who are authors of works within the meaning of the *Copyright Act*, directors, performers and other professionals who contribute to the creation of an artistic production)	**employee** any person employed by an employer; includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.
artists' association any organization, or a branch or local thereof, that has among its objectives the management or promotion of the professional and socio-economic interests of artists who are members of the organization; includes a federation of artists' associations.	**trade union** any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employee.
producer a government institution or broadcasting undertaking; includes an association of producers.	**employer** any person who employs one or more employees; in respect of dependent contractors, the person whom, in the opinion of the CIRB, has a relationship with the dependent contractor to such extent that the arrangement governing the relationship can be the subject of collective bargaining.
association of producers not defined; producers may form an association for the purpose of bargaining and entering into scale agreements, and can obtain the exclusive right to bargain on behalf of its members by filing its membership list with the Tribunal.	**employers' organization** any organization of employers the purposes of which include the regulation of relations between employers and employees; in certain circumstances, the CIRB can designate an employers' organization as the employer and in others (eg. long-shoring), the CIRB can require employers to appoint an "employer representative".

sector not defined. The Tribunal determines the sectors that are suitable for bargaining taking into account the common interests of the artists; the history of professional relations among those artists, their associations and producers; and any geographic and linguistic criteria that the Tribunal considers relevant.	**bargaining unit** a group of two or more employees determined by the CIRB to be appropriate for collective bargaining, or to which a collective agreement applies.
scale agreement an agreement in writing between a producer and an artists' association respecting minimum terms and conditions for the provision of artists' services and other related matters.	**collective agreement** an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters.