



**STATUS OF THE ARTIST LEGISLATION**

**AN ANALYSIS OF BILL C-7  
BY**

**ALLIANCE OF CANADIAN CINEMA,  
TELEVISION AND RADIO ARTISTS**

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## INTRODUCTION

The Alliance of Canadian Cinema, Television and Radio Artists represents almost 10,000 professional performers, writers and broadcast journalists working in Canada's recorded media primarily in the English-language.

The members of ACTRA and the thousands of others who work in ACTRA's jurisdiction in film, television, radio and commercial industries join with other Canadian artists in welcoming the tabling of the proposed Status of the Artist legislation, Bill C-7 and urge that it be adopted at the earliest opportunity.

Canadian artists play a critical role in our society both because of the economic value of our creations and because these creations both reflect and define our society.

ACTRA members work as actors, singers, dancers, scriptwriters, writer/broadcasters, commentators, variety writers, hosts, researchers, sportscasters and other similar categories in programs which entertain, inform and educate Canadians from coast to coast.

ACTRA is a union organized into three Guilds and 15 branches in 10 cities from St. John's to Vancouver. Since the 1940s, ACTRA and its predecessors have worked to improve the social and economic status of its members and other professional Canadian artists. ACTRA's functions include regulating the conditions of work in the recorded media through collective bargaining and working to ensure that a public policy environment is created in which a Canadian production industry can flourish.

ACTRA has also created the ACTRA Fraternal Benefit Society to provide insurance plans and group RRSPs to its members. These plans are supported by contributions received from the individual members and from our engagers.

But despite the work of ACTRA and others, enormous problems remain for individual artists and for the industries in which we work. Work opportunities have diminished since 1988; earnings in ACTRA's jurisdiction are declining.

In this submission, we will address some issues relating to the problems and status of individual artists. While ACTRA's representations concern primarily its own membership, our observations apply to many other professional Canadian artists, both organized and unorganized.

### THE CURRENT ECONOMIC SITUATION

In 1990, ACTRA members earned an average \$8,540 from work as professional performers, writers and broadcast journalists in the recorded media.

According to information from Revenue Canada, professional artists in Canada are the lowest paid group of workers in our society. In 1988, self-employed artists received an average income of \$16,263. Higher on the list is the \$18,298 received by farmers; \$22,515 received by fishermen; and the \$113,810 received by doctors. The only group lower on the list is pensioners.

And yet, according to a 1990 study commissioned by the Department of Communications entitled Rethinking the Status of the Artist, the average Canadian artist has acquired 17 years of experience in the artistic field and devotes from 35 to 45 hours per week to their art.

One of the observations of the Report of the Federal Cultural Policy Review Committee, the Applebaum/Hebert Report, released in 1982 is the following:

"... the evidence is overwhelming that Canada does not provide an adequate living for most of its professional artists. It is clear to us that the largest subsidy to the cultural life of Canada comes not from governments, corporations or other patrons, but from the artists themselves, through their unpaid or underpaid labour. When creative activity is diminished because many artists are unable to earn a decent living, something is lost to us all, and our entire culture fails to fulfil its promise."

ACTRA is encouraged by Bill C-7 because it attempts to address the needs of professional artists in a comprehensive manner. While it falls short in certain areas, it provides a useful beginning. And with a few amendments, it will provide a solid foundation on which we can build in the years ahead.

## ANALYSIS OF THE PROPOSED LEGISLATION

The legislation is divided into two parts.

### Part I

The first section of Bill C-7 is a statement of General Principles which includes a recognition of the "importance of the contribution of artists to the cultural, social, economic and political enrichment of Canada". It includes a statement that it is "the right of artists and producers to freedom of association and expression".

It establishes a permanent Canadian Council on the Status of the Artist comprising 7 to 12 members with a mandate of promoting the interests of artists to the Minister of Communications.

Bill C-7 does not address a number of the concerns which we had hoped to resolve through Status of the Artist legislation.

### Taxation Issues

The government has made a commitment to provide additional personal exemptions for employed artists and to define artistic activity in the Income Tax Act. However, these changes are not sufficient to ensure the freelance status of artists for income tax purposes, a priority for all professional artists.

Over the past decade, we have seen an erosion of that status as more and more artists are classified as employees, creating a situation in which legitimate expenses cannot be deducted against earned income and which threatens copyright protection of the artist. In the income tax area, the proposal fails to address the fact that an artist's income can fluctuate greatly from year to year.

Neither Bill C-7 nor proposed changes to the Income Tax Act establish social benefit schemes for freelance artists who are by and large excluded from existing schemes because of their status. It certainly falls far short of ACTRA's objective of achieving "dual status" for Canadian artists - "freelance" for purposes of income tax and copyright and "employee" for purposes of social benefits.

This "dual status" is enjoyed by professional artists in most countries of the western world. Indeed, in some countries very special encouragement is offered to those who create artistic works.

In Sweden, there are special artists' accounts into which professional artists can shelter free from taxation the income they receive in boom years for use by them when their situation is not so positive. In Ireland, writers pay no income tax.

In most other western nations, artists are treated as employees for purposes of social security benefits, unemployment insurance, public health plans, etc. while being permitted to deduct their legitimate expenses against earned income.

To solve some of these basic problems, ACTRA continues to propose that the Income Tax Act be amended to provide that income generated from artistic activity is considered business income from which all legitimate expenses can be deducted. Further, that artists be permitted to average their income over a five year period.

ACTRA also continues to propose that performers be entitled to receive income protection equivalent to unemployment insurance by providing statutory encouragement for the development of private plan alternatives through vehicles such as the ACTRA Fraternal Benefit Society.

Contributions for such a fund should be made by the Unemployment Insurance Commission since freelance performers will often make contributions to the scheme through other employment with little prospect of claiming benefits from such temporary employment.

ACTRA also supports other additions to this section of Bill C-7, including statutory recognition of the Public Lending Right and protection for artist's contracted fees, residuals and royalties in the Bankruptcy Act.

## Part II

The second section of Bill C-7, the bulk of the legislation, deals with the collective bargaining issue. This is designed to provide a statutory basis for the work which ACTRA and other unions have been undertaking successfully for 50 years or more in Canada.

It proposes establishing the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT). The Tribunal is responsible for overseeing the collective bargaining in the sector, including the certification process and mediation.

Bill C-7 is limited in its application to federal undertakings and to "independent contractors" determined to be professional. The provisions are further limited to authors as defined in the Copyright Act and to performing artists.

Bill C-7 specifically exempts the activities of artists' organizations from the Competition Act.

The draft legislation does not apply to "employees, within the meaning of Part I of the Canada Labour Code, including those determined to be employees by the Canada Labour Relations Board and members of a bargaining unit that is certified by that Board".

The Bill establishes in detail the powers, mandate and procedures which will govern the operation of CAPPRT and, therefore, labour relations in the federal cultural sector.

### Inadequacies of the Legislation

In the collective bargaining regime, ACTRA has two major concerns.

- 1) Bill C-7 would subordinate the rulings of CAPPRT to those of the Canada Labour Relations Board. The CLRB would appear to have supremacy in determining who is an employee and, therefore, that Board could render the new Tribunal moot if it were to find that all artists are "employed".

This limitation is a major problem because of the developing jurisprudence in the labour field. In a 1982 decision, the Canada Labour Relations Board made sweeping generalizations about persons working in categories at the CBC who are "economically dependent", even where such dependence exists only for a small portion of the income of such persons and for a brief period of time. Using this test, the CLRB found that a large number of people were "employees" and not independent contractors for labour relations purposes. This is the case for a number of artists who continue to be independent contractors for purposes of income tax.

Recently, ACTRA has been certified in British Columbia to represent performers working in film and television who are "employees" for purposes of provincial labour legislation. However, this status is far from secure and it is likely that on reflection some represented by ACTRA would be considered employees, some would be dependent contractors and many would be independent contractors. This uncertainty prevails equally for musicians and performers working on stage.

As a result, there is a real danger that in the next few years, the uncertain status of professional artists for various legal purposes could result in a forced division of existing organizations in ways which do not serve the interests of the members. Challenges to the right of

professional artists to organize as ACTRA, Union des Artistes, American Federation of Musicians or Canadian Actors' Equity Association under the existing labour relations acts and jurisprudence will serve only the interests of those who engage our services.

- 2) The draft legislation attempts to prohibit a closed shop in the cultural field and by so doing it challenges ACTRA's ability to control the use of non-members. As written, the Bill would seem to prevent ACTRA from maintaining the prohibition on non-members working in radio commercials. It would also restrict our ability to prevent non-Canadians from working in our jurisdiction, even where Canadians do not enjoy a reciprocal entry relationship with another nation.

To meet these and other more technical concerns, ACTRA proposes the following changes to Part II of Bill C-7:

- 1) Section 6(2)(a) add "one or more" before "artists" in the second line.

Section 6(2)(a)(iii) "any other person or corporation who or which engages one or more artists within the Constitutional jurisdiction of the Government of Canada, and".

These proposals are meant to ensure that organizations covered by the legislation are not inadvertently excluded from its operation.

- 2) Section 8(1) add "a corporation or other organization" after "through" and delete remaining words.

This amendment is intended to ensure that artists intended to be covered by the proposed legislation are not inadvertently excluded.

- 3) Section 8(3)(a) and (b) add at the end of each "unless such persons shall be independent contractors at common law".

This proposal is intended to provide some objective limit on the ability of the Public Service Staff Relations Board and the CLRB to declare an artist to be an employee. While ACTRA's preference would be for CAPPRT to have equal status with the CLRB and the PSSRB, at a minimum ACTRA requires an assurance that neither the CLRB nor the PSSRB could declare to be an employee an artist who is an independent contractor.

- 4) Section 8(4) add a provision that dues paid to artists' associations shall be deemed to be "union dues" for purposes of Section 8(1)(i)(iv)(a) of the Income Tax Act and of

**Section 189 of Bill C-62, an Act to amend the Excise Tax Act, the Criminal Code, the Customs Act, Customs Tariff, Excise Act, Income Tax Act, Statistics Act and the Tax Court of Canada Act.**

This proposal is intended to ensure that the dues paid to ACTRA and other professional artists' associations are considered the equivalent of union dues for the purposes of the Income Tax Act and the Goods and Services Tax.

- 5) **Section 9(1) add after "Vice-chairperson", "each of whom must have knowledge of labour relations in the cultural sector".**

This amendment is designed to ensure that those appointed to the new Tribunal will have some knowledge of the peculiar nature of labour relations in our sector.

- 6) **Section 16(o) add a new (vii) "a person is an independent contractor at common law".**

This amendment will confirm that the new Tribunal has authority to determine if an artist is an independent contractor and, therefore, able to receive the benefits of the proposed legislation.

- 7) **Section 17(a) delete "the applicable principles of labour law".**

In ACTRA's view, it is not necessarily appropriate for the CAPPRT to be bound by the principles of labour law. It may be that some of these principles can be applied but in other cases such principles may be inappropriate. Deleting this provision permits the Tribunal itself to make such determinations based upon the factors before it.

- 8) **Section 22(2) delete.**

This is one of the clauses which affects our ability to control the use of non-members. ACTRA's position is that the provisions of the new Act which ensure that an artists' association has a duty of fair representation (Section 34) are sufficient to meet the public policy concerns.

In traditional labour law, a union is obligated to represent fairly all of those who are members or otherwise covered by the collective agreement. Bill C-7 proposes in Section 34 to impose this same obligation on artists' associations.

Any individual who claims they have been discriminated against or otherwise unfairly treated will have a right to challenge the artists' association before CAPPRT. As a



result, measures which the professional artists' associations negotiate with engagers to protect limited work opportunities for the membership, or for Canadians generally, would have to be capable of being defended before the Tribunal.

In the alternative, the following amendments are required:

- a) Add "or not admitted to membership" in the sixth line after "association".
- b) Add "or other violation of reasonable membership rules imposed by an artists' association".
- c) Add a new sentence, "This section shall not apply with respect to legitimate rules which limit the use of non-Canadians in the appropriate sector unless a reciprocal relationship exists with another country."

In this least preferred option, the most unfair aspects of the proposal would be eliminated.

These amendments would provide that discriminatory regulations could be imposed on non-Canadians unless such other countries permit the reciprocal entry of Canadian performers. At the present time, entry into Canada for foreign artists is substantially easier than is the entry of Canadian artists to other countries.

It is virtually impossible for a Canadian performer to accept a contract for work on one television program or series or a feature film or commercial in the U.S., Great Britain or other countries. Yet, artists from those countries can work without hindrance from ACTRA on any Canadian production which is entirely privately financed.

ACTRA has negotiated with engagers modest limits on the use of foreign artists where there is a substantial public investment in the film or television program; for example, Telefilm, the CBC, a provincial funding agency or tax concessions. If the new Act is used successfully to challenge these modest restrictions in the presence of the continuing inability of Canadian performers in film and television to work abroad, there will be outrage in the community.

- 9) Section 25(1)(c) delete "geographic and" from first line.

In ACTRA's view, if geographic interests are relevant for the determination of certification and the appropriate sector, such criteria can be argued under the proposed

section "a" which addresses the "common interest" of the artists.

- 10) Section 32(3)(a) change "before the agreement was signed" to "before notice to bargain is given".

This amendment provides that once bargaining is commenced all members of a producers' association shall be bound by the process. If an individual member can withdraw prior to the signing but after negotiations have concluded, potentially the entire section is rendered moot.

- 11) Section 38(2) add "or whose contract has been terminated" after "disciplined" in the third line.

This provision as drafted has been taken from labour law without modification as appropriate for the circumstances of professional artists.

In ACTRA's business, all work is done on fixed term contracts. The intent of clause 38(2) is to provide for a remedy where an artist's services are cancelled as a result of a failure on the part of the artist. The most usual case where this occurs is a non-renewal of contract. To fail to include this provision would again potentially render moot the intention of this section of the Bill.

- 12) Section 43 add "or the appropriate qualifying fee required of a non-member".
- 13) Section 44. Additional language is required to provide some limited authority to the mediator, including, for example, the power to force the parties to meet.

While ACTRA has not proposed specific language in this case, there would seem to be a requirement to provide some broad powers for the mediator. This may be a case in which it is appropriate to adapt provisions from labour law.

- 14) Section 65(1) add "one of" after "by" in the second line.

This minor amendment is designed to ensure that the status of an existing collective agreement cannot somehow be challenged by one of its parties merely by refusing to agree to a reference to CAPPRT.

CONCLUSION

The tabling of proposed legislation on the Status of the Artist is a watershed. If enacted with some improvements and modifications, it would represent the beginning of a new stage in the efforts to improve the lives of Canada's professional artists. It would be a solid foundation on which very practical measures can be built. It would place Canada in the forefront of international efforts in this field. Most importantly, it would be an important step in ensuring that the necessary support measures are in place to permit Canadian artists the freedom to undertake their work. This will benefit all Canadians.