

Evaluation of the Provisions and Operations of the Status of the Artist Act

Executive Summary

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Introduction

The *Status of the Artist Act* (hereinafter known as the Act) received Royal Assent in June 1992 and was brought fully into force in May 1995. The legislation recognizes the importance of artists in Canadian society and establishes a framework to govern professional relations between artists and producers.

The *Status of the Artist Act* is comprised of two main parts. Part I establishes the Canadian Council on the Status of the Artist, whose purpose is to act as an advisory body to the Minister of Canadian Heritage. Broadly speaking, the Council is responsible for supporting and promoting the professional status of artists in Canada through such activities as information gathering, advising the Minister, and liaising with artists' associations. Part II of the Act establishes the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT or the Tribunal), a labour board responsible for administering the provisions of the Act that govern relations between self-employed artists and producers in the Canadian cultural sector, within federal jurisdiction. The Tribunal reports to Parliament through the Minister of Labour. Responsibility for the cultural aspects of the Act (Part I) lies with the Department of Canadian Heritage.

The Act contains a provision requiring that the Minister of Canadian Heritage, in consultation with the Minister of Labour, undertake a review of the legislation in the seventh year after its coming into force. The purpose of the review is to assess the effectiveness of both parts of the legislation, and to identify what, if any, amendments are required. Prairie Research Associates (PRA) Inc. was engaged by the Department of Canadian Heritage to undertake an evaluation of the legislation as a first step in this review. This report presents the evaluation findings, offers conclusions, and provides recommendations for legislative and operational changes.

Methodology

We used four data collection methods in this evaluation:

- document review
- interviews with key informants representing artists' associations, government, federal producers, and others (n=65)
- survey of artists who are members of artists' associations, both certified and non-certified (n=296)
- survey of federal producers (n=8).

This report consolidates the findings obtained through these methods.

Findings

Relevance

Those whose opinions we canvassed in this evaluation affirmed the value and ongoing relevance of the *Status of the Artist Act*, both for its statements of principle in Part I and for the legal framework it establishes in Part II to govern collective bargaining between associations of self-employed professional artists and producers within federal jurisdiction.⁽¹⁾ The Act's provision of a legal foundation for collective bargaining relationships that were previously voluntary, without foundation in law, and (at least in theory) vulnerable to prosecution under the Competition Act is widely seen as invaluable, although some producers and producers' associations believe the legislation is unnecessary because voluntary collective agreements were the norm in their industries prior to the Act's implementation.

Although the *Status of the Artist Act* was strongly endorsed by almost all of those whom we consulted in this evaluation, there was also a consensus that the legislation by itself is insufficient to bring about significant change in artists' socio-economic circumstances. The Act's restriction to federal producers, the fact that it addresses only labour relations, and the fact that it does not apply to producers sub-contracted by producers within federal jurisdiction are seen as its main shortcomings. There was general agreement that other kinds of measures are necessary if the socio-economic circumstances of self-employed artists are to improve. Artists themselves perceive other kinds of measures to be at least as important as the legal right to collective bargaining. Respondents to the artists' survey rated this right as the least important of ten existing and potential measures to improve artists' economic circumstances, and gave measures such as deductions for business expenses, copyright, income averaging, and government grants a considerably higher rating of importance.

The preference expressed by artists for measures that benefit them as individuals may reflect the reality that collective bargaining is not equally relevant or easily applicable to all categories of artistic and cultural workers. Collective bargaining is most effective as a

means of advancing the economic interests of collectivities or groups of workers, but it is less effective at advancing the interests of individuals who, by the very nature of their chosen pursuit, work alone. Two examples from the arts and cultural sector can serve to illustrate the point: the relevance of collective bargaining to the members of a symphony orchestra seems clear enough, but its relevance to a novelist or to a visual artist is not as immediately obvious.

This is not to say that the *Status of the Artist Act* is irrelevant to certain categories of artists, but merely that other kinds of initiatives, especially those that treat the self-employed artist as entrepreneur rather than as employee, may benefit a larger number and greater variety of artists. Moreover, a variety of other measures could potentially be implemented that would benefit all self-employed artists.

Implementation

Part I of the *Status of the Artist Act* mandates the existence of the Canadian Council on the Status of the Artist as an advisory body to the Minister of Canadian Heritage. A temporary Council consisting of twelve full-time professional artists was appointed in 1991 prior to implementation of the legislation. However, its existence was never made official by the Governor-in-Council as required by the legislation, and it effectively ceased to function in 1996, approximately one year after the Act was implemented.

There are several related explanations for the early demise of the Council, including lack of time and expertise on the part of the Council's members and lack of direction from the Department of Canadian Heritage. Perhaps most importantly, establishing the Council as an official entity was at odds with the federal government's wish to avoid creating new entities and to eliminate overlap and duplication among existing ones. Indeed, the mandate of the Council is somewhat similar to that of existing advocacy organizations, particularly the Canadian Conference of the Arts and the Canada Council for the Arts. One possibility would be to amalgamate the Canadian Council on the Status of the Artist with organizations of similar purpose. Alternatively, some key informants suggested amending Part I of the legislation to eliminate the Council entirely, given that the federal government already funds several arts organizations that play advisory roles similar to the one mandated for the Council.

Part II of the *Status of the Artist Act* establishes a legal framework to govern professional relations between associations of self-employed artists and federal producers, and creates the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT or the Tribunal) to administer it. After seven years of operation, the Tribunal has largely accomplished its primary function of certifying artists' associations for the purpose of collective bargaining with federal producers; since May 1995, it has defined 23 sectors as suitable for collective bargaining and certified 21 associations to represent those sectors. The Tribunal has, however, been less active in carrying out other aspects of its mandate, such as hearing matters dealing with failure to bargain in good faith and complaints of unfair labour practices. While the Tribunal's volume of work in the latter area may increase in the future, some key informants said that the structure

of the Tribunal may be too elaborate for the work it is required to do and suggested that its functions be transferred to an existing labour relations board, such as the Canada Industrial Relations Board (CIRB).

Merging CAPPRT with another federal labour board or tribunal could have several benefits, including more efficient use of expert staff resources, greater coherence and consistency of decisions relating to labour relations, improved client service through a single access point and faster turnaround, and reduced costs. However, key informants cautioned that such a merger may not be well received by the arts community, which believes that CAPPRT is more informed about and therefore more sensitive to the concerns of artists than are existing labour relations boards. A transfer of CAPPRT's functions to the CIRB could therefore be contemplated, key informants emphasized, only if specialized training were provided to CIRB personnel or if CAPPRT personnel were retained.

The administrative provisions and procedures set out in Part II of the Act are generally regarded as appropriate by the parties concerned. However, negotiation requires significant expenditure of time and financial resources that can be burdensome, particularly for the smaller artists' associations. Key informants identified two potential changes to the legislation that would help to mitigate this difficulty and lead to more successful negotiations. First, the legislation should include a provision for first contract negotiation within a stipulated time frame and provide for arbitration if the parties are unable to come to an agreement within that period. Such a change would help to avoid lengthy mediation processes and would make the *Status of the Artist Act* consistent with the Canada Labour Code and provincial status of the artist legislation in Québec. Second, the legislation should contain a mechanism to encourage federal producers to form associations for the purpose of collective bargaining. In this context, there is considerable support among artists' associations, government representatives, and federal departments and agencies for the creation of a single, centralized bargaining authority for all federal government departments. This could lead to reductions in the time and expense that artists' associations and producers alike must devote to negotiation, and would considerably rationalize the collective bargaining process.

There were two other suggestions for minor amendments to the administrative provisions of the Act. Some key informants said that section 46 of the legislation should be amended so that the right to apply pressure tactics in first agreement situations is linked to the date of notice to bargain, rather than the date of certification; the provision as written enables artists' associations, at least in theory, to apply pressure tactics without first sending notice to bargain. Secondly, a few key informants suggested that the legislation should be amended so that any question may be put to the Tribunal for a determination or declaration outside a proceeding.

Two main issues related to the clarity of the legislation and its interpretation by CAPPRT emerged from this evaluation. At the root of the first is a fundamental philosophical disagreement over the meaning of the term "artist." Some key informants believe the Tribunal has gone too far in categorizing certain cultural workers as artists, while others believe it has been suitably forward-thinking in this regard. With the exception of a few

key informants who recommended revising the Professional Category Regulations to include a wider range of artistic functions, no clear suggestions for changes to the legislation were offered.

The second issue was a perceived lack of clarity regarding the appropriate scope and content of scale agreements that may be negotiated pursuant to the Act, particularly with respect to copyright. While most key informants do not perceive any conflict, either real or potential, between the *Status of the Artist Act* and the Copyright Act, some parties, including some federal government departments, argue that certain Tribunal decisions have led to uncertainty over which statute governs copyright and the fixing of royalties payable for the use of copyright works. Despite the Federal Court of Appeal's dismissal of the Attorney-General of Canada's application to set aside a Tribunal certification decision with respect to pre-existing work, the issue remains unresolved from the perspective of various interested parties, which maintain that the current interpretation puts the *Status of the Artist Act* in direct conflict with the Copyright Act. Despite strong opinions on both sides of the issue, the matter is really one for the courts, and not for this evaluation, to decide. However, the situation will certainly continue to evolve over time.

Impacts

As previously noted, there is consensus that the *Status of the Artist Act* has accomplished its primary objective of providing a legal framework for collective bargaining between artists' associations and federal producers. Although such collective bargaining had been occurring for decades prior to implementation of the legislation, it was on a voluntary basis only and had no foundation in law. The *Status of the Artist Act* has rectified this situation by creating a legal foundation for collective bargaining that previously did not exist.

To date, the legislation has had its most significant impact on professional artists' associations. Certified artists' associations we interviewed reported that certification gives their organizations a legitimacy and credibility they otherwise would not have. Artists' associations value the Act highly for giving them the ability to "speak with one voice" with employers and to bring economic pressure to bear; many associations said that in the absence of the legislation, their ability to represent the interests of their members would be seriously compromised. Overall, many key informants agree that artists' associations are now better organized than when the legislation was first implemented and better able to work on behalf of their members.

On the other hand, with very few exceptions, artists' associations reported that the Act has so far had little effect on the socio-economic circumstances and working conditions of their members.

Artists' associations offered three main explanations for the Act's limited impact in this area. First, many of the larger, more established associations already had voluntary scale agreements in place with federal producers; second, most of the smaller and more

recently established associations have not yet negotiated any scale agreements under the Act; and third, the majority of artistic and cultural production falls under provincial jurisdiction.

Producers, for their part, reported that the Act has so far had little, if any, impact on their organizations. Some were involved in collective bargaining with artists' associations on a voluntary basis prior to implementation of the Act; others said that the impact of the Act has been negligible because they do not employ a large number of self-employed artists. Some producers did, however, have concerns about the legislation and its potential implications for their organizations. Concerns were expressed about the appropriateness of collective bargaining for third party organizations, about the applicability of the legislation to certain artistic sectors, and about what some producers perceived as the Tribunal's bias in favour of artists' associations.

At the same time, it should be noted that several producers acknowledged the importance of the legislation for providing a legal framework for collective bargaining and for clarifying the respective roles of artists' associations and producers with respect to professional relations. These ideas were echoed by artists' associations and government representatives, who also praised the Act for providing a democratic process that allows the parties involved to come to their own agreements and for creating predictability and stability within the labour market by establishing normal pay rates.

Recommendations

1. The *Status of the Artist Act* serves a useful purpose in recognizing the importance of artists in Canadian society and in providing a legal framework for collective bargaining between associations of self-employed artists and federal producers. The Department of Canadian Heritage may also wish to explore other policies and programs to improve the socio-economic circumstances of self-employed artists.
2. Given that the federal government funds arts organizations that provide advocacy and advice on behalf of Canadian artists, consideration should be given to whether these organizations could fulfill the role of the Canadian Council on the Status of the Artist while respecting the intent of Part I of the *Status of the Artist Act*.
3. The Department of Human Resources Development Canada, in consultation with the Department of Canadian Heritage, should consider ways of streamlining the administration and service delivery structure of the Canadian Artists and Producers Professional Relations Tribunal while remaining sensitive to the concerns of artists and artists' associations. Consideration should be given to a variety of options, ranging from the status quo to amalgamation of CAPPRT with another federal labour board or tribunal.

4. Part II of the *Status of the Artist Act* should be amended to include a provision for ensuring first contract negotiation and arbitration. Such a change would make the legislation consistent with the Canada Labour Code and provincial status of the artist legislation in Québec.
5. Section 46 in Part II of the *Status of the Artist Act* should be amended to link the right to apply pressure tactics in first agreement situations to the date of notice to bargain, rather than to the date of certification. Such a change would align the legislation with standard labour relations practices.
6. Possible mechanisms to increase the efficiency of the collective bargaining process should be explored. To this end, consideration should be given to establishing one bargaining authority for all federal government departments.
7. The Department of Human Resources Development Canada, in consultation with the Department of Canadian Heritage, should consider how the Professional Category Regulations defining the categories of cultural workers eligible for coverage under the *Status of the Artist Act* should be reviewed.
8. The Department of Canadian Heritage may wish to undertake more research to explore and clarify the relationship between the *Status of the Artist Act* and the Copyright Act.

Notes

1. Producers in the federal jurisdiction include all broadcasting undertakings under the jurisdiction of the Canadian Radio-television and Telecommunications Commission, federal government departments, and the majority of federal government agencies and Crown corporations.