18. CRITERIA FOR APPLICATION

The Tribunal shall take into account

(a) in deciding any question under this Part, the applicable principles of labour law, and

(b) in determining whether an independent contractor is a professional for the purposes of paragraph 6(2)(*b*), whether the independent contractor

(i) is paid for the display or presentation of that independent contractor's work before an audience, and is recognized to be an artist by other artists,

(ii) is in the process of becoming an artist according to the practice of the artistic community, or

(iii) is a member of an artists' association.

18. CRITÈRES D'APPLICATION

Le Tribunal tient compte, pour toute question liée :

a) à l'application de la présente partie, des principes applicables du droit du travail;

b) à la détermination du caractère professionnel de l'activité d'une entrepreneur indépendant – pour l'application de l'alinéa 6(2)*b)* – du fait que ses prestations sont communiquées au public contre rémunération et qu'il a reçu d'autres artistes des témoignages de reconnaissance de son statut, qu'il est en voie de devenir un artiste selon les usages du milieu ou qu'il est membre d'une association d'artistes.

CORRESPONDING SECTIONS:

SAA: 18	*CLC:* -	*PSLRA*: -

JURISPRUDENCE:

2001 CAPPRT 035 (APVQ-STCVQ), para. 25

Awarding of costs only in exceptional circumstances

Accordingly, the Tribunal prefers to adopt the labour relations' practice to the effect that costs will only be awarded in exceptional circumstances. Circumstances warranting such a measure could include, for example, when one or more provisions of the *Act* are violated, when irreparable harm is caused to one of the parties, or when the conduct of one or more parties at a hearing is unreasonable, frivolous or vexatious in light of all the circumstances.

1996 CAPPRT 017 (UDA), para. 24

Excluding "employees" redundant

The *Status of the Artist Act* covers only professional artists who are found to be independent contractors in accordance with the criteria in subsection 18*(b)* of the *Act*. The Tribunal is therefore of the opinion that there is no need to specify that employees of producers are excluded from the sector. Any professional artist who meets the criteria

established by the *Act* and who works in a sector for which a certified artist's association has negotiated a scale agreement must be able to claim the benefit of the terms of the scale agreement, even though in a different context the individual in question may be an "employee".

2003 CAPPRT 041 (APVQ-STCVQ), para. 301

Peer recognition

The NFB argues that only artists recognized as such by their peers should be recognized as artists within the meaning of the *Act*. Although it is correct to say that, historically, some persons were recognized as artists by their peers or by third parties with whom they established a relationship, the *Act* does not make this distinction.

2004 CAPPRT 048 (CAEA & NCC), para. 20

Membership in an artists' association

Although membership in an artists' association is not a determinative factor, it is, however, an indication that the individual has attained a professional status for the purposes of paragraph 18(*b*) of the *Act*.

1996 CAPPRT 014 (PWAC), para. 16

Periodical writers

In the Tribunal's view, periodical writers are authors of literary works within the meaning of the *Copyright Act*, and the purchase of their works by a publisher or producer with the intent that it be disseminated to the public in some fashion is sufficient to bring the author within the scope of 18*(b)* of the *Act.*

2002 CAPPRT 038 (Christopher v. CAEA), para. 18

In interpreting any question that arises under Part II of the *Act*, the Tribunal is guided by the applicable principles of labour law (paragraph 18(*a*) of the *Act*). An essential component of federal labour law is Parliament's legislative authority in this area of law. In this respect, the Tribunal endorses the statements of the Canada Labour Relations Board, as it was then, in *Finn et al.* v. *Canadian Brotherhood of Railway, Transport and General Workers* (1982), 47 di 49, at pp. 63-64:

Tribunal will conform to judicial decisions

> But the dictates of judicial decision-makers must remain the Board's final guide. We said this in an earlier decision in the following terms:
>
> "Members of labour relations boards, whether they be full time or part time, and whether they be on a tripartite board or a non-representational board, like this Board, are not appointed because of their competence in the field of constitutional law. Notwithstanding this some considerable expertise is developed in some cases. (...) What the Boards frequently seek to find is a 'practical' and 'functional' solution. In this respect the nature of the judgment may be more labour relations oriented than activity focused as in the courts. This is not to say the Boards do not follow the judicial decisions. They do even if they disagree or find it makes little labour relations sense."
>
> (*Northern Telecom Canada Limited*, *supra*, pp. 76-77; and 150)

Artists' wish to be represented confidential

2001 CAPPRT 035 (APVQ-STCVQ), para. 21

In dealing with an objection limited to the members of the federation and assuming that it would determine that certain members are "artists" within the meaning of the *Act*, the Tribunal would allow the producers to know the artists' wish to be represented by an artists' association. This would go against the fundamental principle applicable in labour law that it is paramount to keep the wish of employees (or artists) to be or not to be represented by a union (or artists' association) confidential. In the case at bar, the producers have the right to intervene on the issue of determining the sector, but they cannot intervene on the issue of determining representativity, without the Tribunal's permission. The Tribunal is of the opinion that it should not allow the producers to do indirectly what they cannot do directly.

"Supervisor" and "supervised" in same bargaining unit

1996 CAPPRT 017 (UDA), para. 28

In deciding any question that arises under Part II of the *Status of the Artist Act*, the Tribunal is directed by subsection 18*(a)* of the *Act* to take into account the applicable principles of labour law. One of these principles is that supervisors should not be included in the same bargaining unit as those whom they supervise.

Conductors and musicians in the same sector

1997 CAPPRT 019 (AFM), para. 19

The applicant has persuaded the Tribunal that the freelance conductors who are subject to the *Status of the Artist Act* do not perform managerial functions in the sense that this term is commonly understood in the labour relations milieu. For example, freelance conductors do not have responsibility for the discipline of musicians; this responsibility rests with symphony management. Accordingly, the Tribunal finds that it is appropriate to include conductors in the same sector with instrumental musicians.

Conductors and musicians in the same sector

1997 CAPPRT 020 (GMQ), para. 24 and 25

Subsection 18(*a*) of the *Act* requires the Tribunal to take into account the applicable principles of labour law. One of these principles is that employees in managerial positions should not be included in the same bargaining unit as those whom they supervise. According to the applicant, in most cases a conductor serves as leader of a group of musicians and has few, if any, administrative duties. In other cases, where a conductor serves as musical director, he or she can have certain administrative duties, but musical directors who are independent contractors are few in number and are also musicians. The applicant also pointed out that, historically, the function of conductor has normally been covered by the collective agreements negotiated with Quebec producers by the Guilde.

The Tribunal accepts the applicant's argument that the conductors who are independent contractors subject to the *Status of the Artist Act* do not, for the most part, perform managerial functions as this expression is commonly understood in the labour relations milieu, and it therefore finds that it is appropriate to include them in the same sector as performing musicians.

1997 CAPPRT 024 (ARRQ/ UDA/ APASQ), para. 118 to 120 and 128

The reasons behind this labour law principle were explained by a panel of the Canada Labour Relations Board ("CLRB") in *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91):

> The basis of the exclusion of certain 'management' persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g. the authority to dismiss or discipline fellow employees). (...)

In *British Columbia Telephone Company* (1976), 20 di 239; [1976] 1Can LRBR 273; and 76 CLLC 16,015 (CLRB no. 58), the CLRB also commented on the nature of management exclusions, observing that "the performance of functions of a highly technical or professional nature is not a bar to the inclusion in a bargaining unit." In the same decision, the CLRB rejected the proposition that the power to "recommend" is generally equivalent to the power to decide. In the CLRB's view, an individual must meet a stringent decision-making test before he or she should be excluded from the bargaining unit on the basis of managerial functions.

Choreographers and performing artists in the same sector

The Tribunal agrees that a significant level of managerial responsibility must be exercised before a function should be excluded from collective bargaining. The NFB opposed the inclusion of choreographers in the same bargaining unit as performers, on the grounds that their work includes the direction of performers, but provided no detail as to the nature of the directorial responsibilities that a freelance choreographer might exercise at the NFB.

[...]

With respect to those independent choreographers who may be engaged by producers subject to the *Status of the Artist Act*, the Tribunal is of the view that the administrative and supervisory responsibilities they undertake, while important, are of secondary importance to their artistic responsibilities. In these instances, it is the producer, or the director, who has the ultimate responsibility for the engagement, discipline and dismissal of the performers. Accordingly, the Tribunal finds that the level of supervisory responsibility exercised by an independent choreographer in these circumstances is not sufficient to warrant excluding them from a sector that includes dancers and other performers. Moreover, because choreographers have a demonstrable community of interest with dancers and other performers, the Tribunal concludes that it is appropriate to include them in the same sector as performing artists.

2002 CAPPRT 037 (APASQ), para. 173 and 175

Designers and their assistants in the same sector

Paragraph 18(*a*) of the *Act* provides that the Tribunal shall take into account the applicable principles of labour law. As the intervenors indicated, one of these principles states that individuals who occupy management positions and the individuals they supervise not be included the same bargaining unit.

[...]

In this case, the relationship between set and costume designers and their respective assistants bears more resemblance to the relationship between a conductor and his or her

musicians than to the relationship between a stage director and the performers or designers. The stage director is the "maître d'oeuvre" of the production, while the designer is not. The administrative duties are primarily the producer's responsibility, not the designer's. Set and costume designers and their assistants contribute in a collaborative manner to the creative aspects of a production, and in most cases they report to the same person. The Tribunal therefore concludes that they share a community of interest and that it is appropriate to include them in the same bargaining sector.

2003 CAPPRT 044 (DGC), para. 57

Directors and assistants directors in the same sector

Directors and first assistant directors work in tandem and, although it is clear that the director provides the vision and the first assistant director implements that vision, the former does not "manage" the latter in a strict authoritative sense. The Tribunal believes that the relationship between a director and a first assistant director bears more resemblance to the relationship between a conductor and his musicians. For this reason, the Tribunal finds it appropriate to include directors and first assistant directors in the same sector.

2006 CAPPRT 051 (Petch), para. 40, 41, 42 and 46

As directed by paragraph 18*(a)* of the *Act*, the Tribunal took into account the applicable principles of labour law. Paragraph 18*(a)* of the *Act* states as follows:

> 18. The Tribunal shall take into account
> *(a)* in deciding any question under this Part, the applicable principles of labour law;
> (...)

The Tribunal cannot be limited to the cases that are referred to by the parties

The Tribunal has turned to the jurisprudence from the courts and labour boards for guidance on the duty of fair representation. The consideration of principles applicable in other spheres of labour relations and their application in the context of the *Act*, did not involve the introduction of evidence.

The original panel's determination, in regards to the nature of the grievance and more specifically the appropriateness of the heightened standard of representation ultimately decided by the Tribunal, was based on existing case law available to the parties at the time they formulated their arguments. The fact that neither party referred to these decisions did not prevent the Tribunal from relying on them. In determining matters before it, the Tribunal cannot be limited to the cases that are referred to by the parties and doing so does not constitute a denial of natural justice.

[...]

The facts considered by the Tribunal were on the face of the record and not ones that it took judicial notice of. The Tribunal did not engage in an independent search for further evidence or data. Both parties have had full opportunity to present their version of the case. The Tribunal took no new facts into consideration.

2007 CAPPRT 052 (AFM), para. 27

Leader

The Tribunal accepts the AFM's submission that this is in effect a technical amendment and is satisfied that "leader" falls within the definition of performers and directors of performers at subparagraph 6(2)*(b)*(ii)) of the Act. Since the AFM has historically represented "leaders" as well as "conductors", the Tribunal finds it appropriate to include these artists in the proposed sector. To avoid any confusion, "leader" will be added to the text of the French version of the new certification order.