Brief to the Standing Committee on Canadian Heritage (CHPC)

As part of the study on the Status of the Artist Act and its impact on improving the minimum terms and conditions of engagement for artists

March 31, 2022

The Union des artistes

The Union des artistes (UDA) is a professional union that represents 13,000 professional artists working in French in Quebec and elsewhere in Canada, as well as all artists working in a language other than English.

UDA members include dancers, opera and popular singers, actors and comedians, just to name a few. The UDA's mission is to defend the social, economic and moral interests of its members, most of whom are self-employed. It therefore represents them at municipal, provincial and federal political levels, but also on the international scene.

The UDA also offers continuing education for artists as well as economic development tools such as the Caisse de sécurité des artistes, a security fund, and the Artists' Foundation.

Highlights

- The *Status of the Artist Act* (SAA) and Quebec's *Act respecting the professional status and conditions of engagement of performing, recording and film artists* are the only laws in the country that establish a real labour relations regime specific to artists with a framework for the collective bargaining of terms and conditions of engagement.

- The Union des artistes insists on the importance of having an SAA that puts forward concrete measures to **protect artists in their work environment**. In this brief, the UDA discusses a few measures that should be introduced to better protect artists and simplify the application of the SAA*,* including:

    - **Simplifying the definition of artist** in the SAA, similar to what is provided in Quebec's legislation to make it easier to apply the SAA;
    - **Encouraging as much as possible the collective bargaining of artists' conditions of engagement** by allowing as many artists as possible to use the SAA mechanism if they do not already have representation;
    - **Reviewing the *Status of the Artist Act Professional Category Regulations***, which were last revised in 1999 to include a wider range of occupations;
    - Explicitly stating that **the SAA applies to any artistic production that may be featured in various media platforms** in a way that is similar to Quebec's legislation;
    - Taking the necessary steps to ensure that **all producers receiving federal government funding guarantee minimum terms and conditions of engagement;**
    - Incorporating an **arbitration mechanism for the first scale agreement of** a collective agreement at the request of one of the parties; and
    - Adding a provision that **any change in the legal structure of the producer does not alter previously established** certifications, scale agreements and artists' contracts.

1. Introduction

The *Status of the Artist Act*[1] ("the SAA") is an important tool for artists to collectively bargain for minimum terms and conditions of engagement with producers under federal jurisdiction in the unique context of the arts.

Although some other provinces have adopted status-of-the-artist acts,[2] the SAA and the *Act respecting the professional status and conditions of engagement of performing, recording and film artists*[3] in force in Quebec ("the Quebec Act") are the only laws in the country that establish a true labour relations regime specific to artists with a framework for the collective bargaining of terms and conditions of engagement.

The Union des artistes ("UDA") has negotiated on behalf of the artists it represents several scale agreements with producers under federal jurisdiction who are subject to the Quebec Act by virtue of its certifications.[4]

The SAA is based in part on the Quebec Act, so it is not surprising that the two statutes share many similarities. However, the SAA has certain great features that are not found in the Quebec Act.

One of them is the broad and general powers of the Canada Industrial Relations Board ("CIRB") over disputes arising under the SAA,[5] including complaints of bad faith bargaining and unfair labour practices.[6] This allows parties to access justice though a unique, specialized court to settle their disputes. There is also a "freeze" provision that prohibits a producer from changing any terms or conditions of engagement of the artists retained during the negotiation period of a scale agreement.[7]

The SAA has undergone very few substantive amendments since it was adopted in 1992. The main amendment was to abolish the Canadian Artists and Producers Professional Relations Tribunal and transfer its responsibilities to the CIRB. It is therefore appropriate to undertake a review of the SAA with a view to a possible revision that would address some of its shortcomings.

2. Application

a) Artist

The SAA provides the following definition of an artist:[8]

> **6 . . . (2)** This Part applies . . .

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

[2] *The Arts Professions Act*, SS 2009, c. A-28.002 [Alberta]; *Status of Ontario's Artists Act, 2007*, SO 2007, c 7, Sch 39 [Ontario]; *Status of the Artist Act*, SNS 2012, c. 15 [Nova Scotia]; *Status of the Artist Act*, SNS 2017, c. S-24.1 [Newfoundland and Labrador].

[3] CQLR, c. S-32.1 ["the Quebec Act"].

[4] Order Nos. 10419-U and 10420-U

[5] See in particular section 17(p) of the SAA.

[6] SAA, s. 53.

[7] SAA, s. 32(b).

[8] Through the definition of artist in s. 5.

b) to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and 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.

The UDA believes that the definition of artist in the SAA could be simplified.

In comparison, the Quebec Act provides the following definition of artist:[9]

> . . . a natural person who practises an art on his own account and offers his services, for remuneration, as a creator or performer in a field of artistic endeavour referred to in section 1.

The fields of artistic production in question are the stage, including the theatre, the opera, music, dance and variety entertainment, multimedia, the making of films, the recording of discs and other modes of sound recording, dubbing, and the recording of commercial advertisements.[10]

The general terms of the phrase “who practises an art on his own account” and the words “creator” and “performer” in the Quebec Act seem to us an effective way to designate a wide range of artistic practices or occupations. We believe this approach also seems to be more adaptable to possible new developments than the more enumerative approach of the SAA.

Moreover, the use of concepts from the *Copyright Act*—artistic work, dramatic work, etc.—with all the interpretative baggage that this entails, also seems to us to unduly complicate the determination of a person’s status as an artist.

The UDA suggests modifying the definition of artist to be more in line with the approach used in the Quebec Act.

In addition, it would be appropriate to make some changes to section 18.

Paragraph (a), which provides that the CIRB shall take into account “in deciding any question under this Part, the applicable principles of labour law,” should clarify that this determination must be adapted as needed according to the purpose and specificities of the SAA.

[9] Quebec Act, s. 1.1.
[10] Quebec Act, s. 1.

With respect to paragraph (b), the UDA believes that the first factor to consider "in determining whether an independent contractor is a professional", i.e., "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" (emphasis added) is unduly binding. In our view, the two components of this factor (the display or presentation of work before an audience for remuneration; and the recognition from other artists) should be independent factors that individually recognize the professional status of the artist, rather than conditions that must both be satisfied.

b) Exclusion of employees

Section 9(3)(b) provides that the SAA *"*does not apply, in respect of work undertaken in the course of employment to . . . employees, within the meaning of Part I of the *Canada Labour Code,* including those determined to be employees by the Board, and members of a bargaining unit that is certified by the Board".

The UDA believes that, while it is justified for a person who is already in a bargaining unit certified under Part I of the *Canada Labour Code* to be excluded from the SAA—in order to avoid disputes over the determination of that person's terms and conditions of engagement—it is not necessary when an artist who could potentially have the status of an employee under Part I of the *Code* is *not* covered by a certified bargaining unit.

There is no risk of conflict between two separate collective agreements. In addition, in order to encourage as much collective bargaining of artists' terms and conditions of engagement as possible, it would be wise to allow as many artists as possible to use the SAA mechanism, as long as they do not already have collective bargaining representation.

This is the solution adopted by the Quebec Act.[11] Incidentally, in *Alliance québécoise des techniciens de l'image et du son (AQTIS) c. Association des producteurs de théâtre privé du Québec (APTP)*,[12] the Quebec Court of Appeal ruled that artists can simultaneously have artist status under the Quebec Act and employee status under another law.

The UDA therefore recommends that the exclusion of section 9(3)(b) be limited to the case of an employee who is member of a certified bargaining unit.

c) Professional categories

The third paragraph of section 6(2)(b) of the SAA refers to a "professional category prescribed by regulation" and provides that persons in those categories who "contribute to the creation" of certain types of art are artists, to the extent that they are professional independent contractors.

The *Status of the Artist Act Professional Category Regulations*[13] established five professional categories. These regulations have never been updated since 1999. However, several other types of occupations have been observed on television and film sets, to cite two notable examples, over the years.

The professional categories discussed here correspond to the occupations in section 1.2 of

[11] Quebec Act, s. 5.
[12] 2012 QCCA 1524.
[13] SOR/99-191.

the Quebec Act. Section 1.2 itself lists four groups of occupations, which overlap to a large extent with the four categories in the *Status of the Artist Act Professional Category Regulations*. However, several items listed in section 1.2 are not found in the *Regulations*.

A priori, regulations allow for more flexibility for updating the relevant concepts than when they are directly enshrined in legislation, as is the case in section 1.2 of the Quebec Act. The UDA therefore believes that the SAA's approach is appropriate, but that the *Regulations*, which—may we remind you—date from 1999, should be updated.

However, an important feature of section 1.2 of the Quebec Act, which is not present in the SAA, is that it gives the Administrative Labour Tribunal ("the ALT") the power to determine that a particular occupation is "analogous" to the occupations provided for in the Act. Therefore, if there is a dispute about whether a particular occupation is part of the negotiating sector, the ALT can rule on the matter and is not bound by an absence of legislative (or policy) guidance.

The UDA believes that it would be very useful to provide the CIRB with similar authority over "professional categories" as set out in the *Regulations*.

d) Digital and multimedia productions

Multimedia is not specifically mentioned in section 6(2)(b) of the SAA. Nevertheless, it seems obvious to us that multimedia productions fall under the scope of the act. In the *Writers Guild of Canada* case, the Tribunal deemed it had the power to include multimedia productions in the definition of an industry.[14] We believe it would be useful to remove any ambiguity by explicitly adding multimedia to the artistic fields listed in section 6.

The SAA does not refer to the media supports of the works it covers. This suggests that the law applies regardless of the medium used, including digital media. The Tribunal decided that the law applies to all artistic productions of a broadcasting undertaking—which refers to the organization and not the activity, according to the Tribunal's jurisprudence[15]—so that the publication of a work on the website of a broadcasting undertaking, for example, would be covered.[16]

The UDA believes that it would be useful for the SAA to explicitly state for any artistic production that may be deployed in different media that the law applies "regardless of the medium", like what is found in the definitions of "film",[17] "advertising film"[18] and "video-clip"[19] in the Quebec Act.

3. Government financial support for producers

Currently, a producer who is not bound by a scale agreement and who is not a member of a producers' association can receive government funding without any obligation to guarantee minimum terms and conditions of engagement to the artists they hire.

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[14] 1996 CAPPRT 016, at para. 30.
[15] *Ibid*, at para. 27.
[16] *Periodical Writers Association of Canada*, 1996 CAPPRT 014, at para. 29.
[17] Quebec Act, s. 2.
[18] Quebec Act, Schedule I.
[19] *Ibid*.

The UDA believes that the federal government must take the necessary steps to ensure that producers who receive government funding guarantee minimum terms and conditions of engagement. This could be done by making funding conditional on the signature of a scale agreement with the certified artists' association for the sector in question, or that certain minimum terms and conditions of engagement be applied, for example by reference to an existing scale agreement.

4. Collective bargaining

a) Arbitration of disputes for a first scale agreement

Negotiating a first collective agreement is often a very difficult process. To facilitate the implementation of a first agreement, the Quebec Act provides for the possibility of holding arbitration on the matters in dispute for the first collective agreement at the request of one of the parties.[20]

This very important mechanism is not available under the SAA, which is limited to providing a mediator to assist the parties in reaching a scale agreement.[21] This is still not enough. In the event of an impasse, the mediator obviously has no power to impose a scale agreement. On the other hand, an impasse may occur even if both parties fulfill their obligation to negotiate in good faith.[22]

To avoid such impasses, the SAA must incorporate an arbitration mechanism for the first scale agreement at the request of one of the parties, in the same way as the Quebec Act does.

b) Negotiation of copyright-related issues

The Supreme Court confirmed in *Canadian Artists' Representation v. National Gallery of Canada*[23] that the SAA allows for collective bargaining in a scale agreement on copyright issues (such as setting minimum fees for the provision of copyrights for existing works).

The UDA believes that it would be appropriate to codify in the SAA the principles established in this ruling.

5. The sale of the producer's business or the modification of its legal structure

There is no provision in the SAA specifying that a purchaser or successor of a producer remains bound by the certifications, scale agreements and artists' contracts to which the producer was a party, or that such certifications, scale agreements and contracts remain in effect regardless of any change in the legal structure of the producer.

To secure the rights of artists, it is imperative to add this kind of provision to the SAA. Section 26.2 of the Quebec Act is an example of this.

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[20] Quebec Act, ss. 33 and 33.

[21] SAA, s. 45.

[22] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 102.

[23] 2014 SCC 42.

The UDA recommends that Section 44 of the *Canada Labour Code* be used as a model and adapted to the context of the SAA to specify that certifications, scale agreements and artists' contracts be protected in the event of a business sale or a change in the legal structure of the producer.