



A Status of the Artist Act For Ontario

The Writers' Union of Canada's brief to the Ontario
Ministry of Culture's Advisory Council for Arts and
Culture Status of the Artist Sub-Committee

November 2005

INTRODUCTION

The Writers' Union of Canada is a national organization representing the interests of Canadian writers, including our membership of over 1,500 professional writers of books, more than half of whom live in Ontario. Since its founding in 1973 by writers for writers, the Writers' Union, with its headquarters in Toronto, has evolved into the national voice for writers of books with a mandate to promote their common interests and foster writing in Canada. We welcome the opportunity to present our views on status of the artist legislation for the Province of Ontario to the Minister's Advisory Council for Arts and Culture.

A major goal of the Writers' Union is to improve the economic position of writers. A recently published report for the Ontario Arts Council estimates the average earnings of persons reporting earnings as writers in Ontario in 2001 as \$35,798 – approximately 52,500 writers, with median earnings of \$30,017¹. This report concludes that self-employed artists earn approximately 40% less than employed artists², suggesting that the median earnings for Ontario's 9,700 self-employed writers may be approximately \$18,000, although the real figure is likely considerably less since some artists with additional jobs will have reported their main occupation as something else, e.g. a writer who is also a cab driver. A 1998 study reported earnings of self-employed writers that were a good deal less: an average of \$11,480 net professional income for Canadian freelance book and periodical writers, with Ontario-based members of the Writers' Union reporting earnings of \$13,820, slightly higher than the national average of \$12,820 for Writers' Union members.³

Interviews by respondents of a 2002 survey carried out for the Department of Canadian Heritage elicited the view from more than half of them that the economic circumstances of self-employed artists in Canada had not improved since 1995 and almost all of them (94%) believed that it is impossible for most self-employed artists in Canada today to earn a living unless they supplement their art with other work.⁴

A comprehensive, well-crafted Ontario *Status of the Artist Act* will recognize the vital role of artists (which we will refer to interchangeably as “creators”) and their organizations in the Province of Ontario. It will provide:

¹ *A Statistical Profile of Artists in Ontario, based on the 2001 census*, prepared by Hill Strategies Research Inc. for the Ontario Arts Council, March 2005, pages 6-7

² *A Statistical Profile of Artists in Ontario*, page 24

³ Survey published in *Quill and Quire*, September 1999

⁴ *Evaluation of the Provisions and Operations of the Status of the Artist Act*, prepared for the Department of Canadian Heritage in 2002 by PRA Inc.

- a labour relations regime for self-employed artists and producers, including certification of artists' organizations and mandatory collective bargaining for minimum terms agreements with producers;
- income tax relief for artists;
- protection of artists from insolvencies of producers;
- legal aid for artists' issues; and
- welfare of senior artists.

WHY A STATUS OF THE ARTIST ACT?

The abysmal working and living conditions of writers and other artists have long been widely recognized. In 1989 a federal cabinet minister told a Parliamentary Standing Committee on Communications and Culture that little had changed since the 1951 report of the Royal Commission on National Development in the Arts, Letters and Sciences (the "Massey Report") stating that:

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.⁵

The Honourable Marcel Masse told the Standing Committee that the 1982 report of the federal Applebaum-Hébert Cultural Policy Review Committee had concluded that 30 years following the Massey Report, "despite their overwhelming contribution to Canadian life, artists' living conditions were virtually unchanged...." He went on to say: "The socio-economic situation of professional artists in Canada is, to put it bluntly, grim."⁶ And he quoted these memorable words from the Applebaum-Hébert Committee: "The income of many, if not most of these artists classifies them as highly specialized, working poor."⁷ The same can still be said about the lot of most artists today in 2005, although Canada today does have its international stars including a number of Ontario-based writers, among them Margaret Atwood, Alice Munro, Michael Ondaatje, Rohinton Mistry, Anne Michaels and Jane Urquhart.

In 1980 Canada became a signatory to the UNESCO Recommendation Concerning the Status of the Artist. Among the guiding principles set out in this document were recognition of the essential role of art in the life and development of the individual and society and of the consequent obligation of member states to protect and assist artists and their freedom of creation by taking

⁵ The Honourable Marcel Masse in a presentation to the Standing Committee on Communications and Culture, November 7, 1989, quoting from the Massey Report.

⁶ Masse to the Standing Committee on Communications and Culture, November 7, 1989, Minutes of Proceedings and Evidence, Second Session, 34th Parliament, Issue No. 2 at 2:7

⁷ Masse to the Standing Committee on Communications and Culture on November 7, 1989, quoting from the Applebaum-Hébert Report, page 4

...all necessary steps to stimulate artistic creation and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission, and to improve their status by acknowledging their right to enjoy the fruits of their work.... Member States, should ensure, that artists have the freedom and the right to establish trade unions and professional organizations of their choosing and to become members of such organizations, and if they so wish, and should make it possible for organizations representing artists to participate in the formulation of cultural policies and employment policies, including the professional training of artists and in the determination of artists' conditions of work.⁸

In 1986 in Canada, the Siren-Gélinas report in 1986 proposed changes to Canada's tax and copyright laws which would provide artists with greater financial security. One of its most important and innovative recommendations was legislation that would recognize artists' organizations as collective bargaining agents for self-employed artists. By 1988 Quebec had enacted two acts on the status of the artist, establishing two different regimes for certification of artists' organizations and collective bargaining in various artistic fields. A year later, in 1989, the Parliamentary Standing Committee on Culture and Communications referred to above unanimously recommended enactment of federal status of the artist legislation that would deal with professional relations between federal producers and self-employed artists. This led in 1992 to the passing of the federal *Status of the Artist Act*, which came into force in 1993, although its substantive provisions governing labour relations between federal producers and self-employed artists did not become operational until 1995. Certification of an artists' organization under the *Status of the Artist Act* exempts it from the restraint of trade provisions of the *Competition Act*, which do not apply to the collective bargaining of trade unions but did apply to artists' professional organizations.

Saskatchewan's *The Status of the Artist Act* was passed in 2002 but, without a labour relations regime, does little or nothing to improve the lot of Saskatchewan's artists. It enunciates many important principles and reflects good intentions, including the possibility of a report to the government on labour relations and collective bargaining.

The Writers' Union of Canada was certified as an artists' organization under the federal *Status of the Artist Act* in 1998. However, our members and other writers within our jurisdiction do all or almost all of their work for publication by producers who are not covered by the *Status of the Artist Act* because they are not federal producers, in other words, not federal government institutions or broadcasting undertakings under the jurisdiction of the Canadian Radio-television Commission. Indeed, most cultural work in Canada falls under provincial jurisdiction, and the labour relations regime under the federal *Status of the Artist Act* is consequently of little value to most writers of books. Nor are Ontario writers protected by existing provincial labour legislation, which deals only with traditional employee/employer relations.

⁸ UNESCO Resolution, Belgrade, October 27, 1980

WHAT SHOULD BE IN A STATUS OF THE ARTIST ACT FOR ONTARIO?

A labour relations regime for self-employed artists and producers

We urge that you recommend a labour relations regime that will provide for certification of professional artists' organizations and mandatory collective bargaining for minimum terms agreements with publishers and other producers, sometimes also referred to as "scale agreements" or "framework agreements".

The Writers' Union has a recommended trade book contract and provides other information to writers to assist them in their negotiations with publishers. Contracts cover a multitude of points that may become important in the relationship between author and publisher such as: When should the writer be paid? What should the minimum royalty be? What is the difference between e-book rights and multimedia rights? What information should go in a royalty statement? When should rights revert? What will happen if the publisher fails to pay or goes out of business?

Some publishers meet most of the Writers' Union's recommended minimum standards and occasionally exceed them for a few authors. Other writers are unprotected in the negotiation process and forced to settle for much less. Individuals often have little bargaining power on their own, and even those who do have some clout frequently do not understand or anticipate the need for certain protections in their contracts.

Most of Canada's largest publishers and both national publishers' associations are located in Ontario. Over the years, the Writers' Union has endeavoured to negotiate with both publishers' associations and individual Ontario publishers to establish a code of practice and minimum terms agreement without success. We have no ability to bring publishers to the table. In the 1970s when we were successful in bringing the two national book publishers' associations to the table, we were unable to reach agreement on the contents of a code of practice for book publishers before a lawyer for the publishers advised that our negotiations were in breach of the competition laws.

A labour relations component in an Ontario *Status of the Artist Act* would exempt the artists and producers from competition laws on restraint of trade and would give artists' organizations such as the Writers' Union standing as exclusive bargaining agent to negotiate minimum terms agreements with individual publishers or producers or groups of producers. This would mean that individual authors, although free to negotiate better terms, would at least be assured of guaranteed minimum terms and basic protections including contributions by producers to artists' pension plans.

In recommending a labour relations regime, we ask that you take note of the problems with the existing federal *Status of the Artist Act* and the Quebec status of the artist legislation governing writers, which contain nothing to ensure that a first contract will be reached. Federal legislation provides for the possibility of mediation and of pressure tactics such as cessation of work, which would be totally inappropriate and ineffective in the case of a writer or other artist engaged in solitary work. We believe that there must

be mandatory collective bargaining and, if an artists' organization and the producer or group of producers fail to reach a voluntary agreement within a stipulated time frame, binding arbitration.

Income tax relief for artists

The cultural sector is large and growing. At 5% to 8%, this sector has the third largest workforce in Canada, and at its core are the creators who produce the intellectual property on which cultural industries are built. Over 50,000 persons, constituting almost 1% of the overall Ontario workforce, reported earnings as artists.⁹ A financial profile of the average Canadian writer, composer and artist can be summed up succinctly as a low-income, self-employed creator, frequently with a greatly fluctuating income – more graphically, Applebaum-Hébert's "highly specialized working poor".

Creative work is a product of the intellect and the imagination. A creator frequently puts in years of labour and often years of sacrifice, incurring debt, doing without, to produce a single book. Most writers cobble together their incomes from various sources: writing, teaching, editing, or driving a cab. Still, on average, book royalties and advances account for approximately one-third of a writer's income. It is this royalty income earned from publications that causes the great income fluctuations that lead to unfair taxation.

A book often takes years to write, but the bulk of the income generated by that book usually arrives in one fell swoop, over one or two tax years. So when the payoff finally comes, that income is taxed as if it were earned entirely within the comparatively short period of one or two taxation years. To make matters worse, for most authors, there is little in the way of substantial expenses to write off against such income.

While recognizing that Ontario taxation is interlinked with federal taxation, we urge you to consider the following measures for provincial income tax relief:

- a copyright-income deduction for creators;
- exemption of grants from taxation;
- a limited back-averaging plan for creators' professional income;
- Ontario tax credits or rebates for creators; and
- tax deferral for creators.

A copyright-income deduction for creators. A deduction for income from copyright sources would remove the income swings for most creators. A deduction of this sort, for income up to \$30,000 annually, has been available in Quebec since 1995, where it works to encourage, rather than penalize, those who try to make a living from their creations. A similar deduction in Ireland has no upper limit. In Quebec the deduction is available to writers, filmmakers, composers and others who create copyright material that generates income. Since copyright is clearly defined under the *Copyright Act*, such a provision is easy to administer.

⁹ *A Statistical Profile of Artists in Ontario*, page 4

Exemption of grants from taxation. One of the most confusing inequities has been taxation policy with respect to subsistence grants from the Canada Council for self-employed writers and artists. The maximum value of a Canada Council grant is only \$20,000. They are called “subsistence” grants because they are intended to provide a minimal living allowance for an artist, on which he or she can survive for several months while working on a particular project. Only self-employed creators may apply. However, what the Government gives with one hand, it takes with the other. By tax time, a grant has usually been exhausted, by rent, food and the expense of other necessities of life during the period of the grant. A creator may have to borrow money to pay his or her taxes. On the other hand, if a grant arrives early in the year, before the beginning of the period it is designed to offset, too often one third or more of the grant is lost to taxes immediately. In essence, taxing grants undermines their purpose, which is to provide minimal living allowances. While acknowledging that here is an issue on which the federal and provincial governments would have to work in concert, we submit, as we have on numerous occasions submitted to the federal government, that these grants should be tax-exempt. We also submit that grants to artists under the aegis of the Ontario government or its agencies should not be taxed, including the Writers’ Reserve program to assist writers with new works.

A limited back-averaging plan for creators’ professional income. We have proposed that back-averaging of income be reinstated for writers and other artists, but assume that provincial tax relief of this nature would have to be tied to a similar initiative from the federal government. We urge you to encourage the Ontario government to make this recommendation to the federal government.

Ontario tax credits or rebates for creators. The use of credits could give Ontario some leeway to depart from federal tax policy and provide tax relief to writers and other artists, for example, to provide some tax relief through a credit with respect to a grant.

Tax deferral for creators. The Siren-Gélinas Report in 1982 suggested that artists should have the right to set aside part of their artistic income in an “Artist Account”, on which they could defer the payment of taxes. In Sweden, writers and other artists are able to defer taxes by putting part of their income in a special bank account and paying tax on withdrawals. This should also be considered as an additional way to smooth out the fluctuations in an artist’s income, even if not implemented in concert with federal taxation and only applicable on the Ontario portion of tax.

Protection of artists from insolvencies of producers

The opening chapter of the report of the Royal Commission on Book Publishing, commissioned by the Ontario Government in 1970 had this to say:

...it is the climate for authorship that must concern this Commission in the end....¹⁰

¹⁰ *Canadian Publishers and Canadian Publishing*, Report of the Ontario Royal Commission on Book Publishing, December 1, 1972, page 10

...We have heard of authors whose books have been published and sold but whose royalties remain unpaid – on the excuse that the publisher’s working capital was tied up in unsold inventories and in other accounts payable. Do not these publishers recognize that royalties are not a production expense but a selling expense, incurred at the moment books are sold and therefore covered by moneys already received by the publisher and held in trust by him for transmittal to his authors on the due dates? Publishers who do not have the money to pay royalties that have been earned are guilty of conversion.¹¹

These words written over 30 years ago could as well be written today. For royalties to be delayed past the date specified by contract is not unusual. Sometime royalties are not paid at all. There have been a number of instances during the past 30 years where Ontario-based publishers have collapsed and have not paid the royalties owing to their authors, though in a few instances the federal or provincial government has provided some limited financial help for authors who have lost expected royalty income. Authors are unsecured creditors without any priority and the loss of royalty income from a book that has taken years to write is devastating, although the author’s greater loss may be with respect to anticipated future earnings from a book or a number of books that may never find another publisher.

Although bankruptcy and insolvency fall within federal jurisdiction, the provinces have jurisdiction with respect to property and civil rights. We recommend that Ontario consider several mechanisms that would provide safety nets for affected published writers, photographers and visual artists:

- an author’s lien on inventory;
- a mandatory compensation pool or insurance coverage to be maintained by publishers; and
- treatment of authors as employees.

An author’s lien on inventory. We propose that consideration be given to amending Ontario’s *Personal Property Security Act* to provide that an author who is the owner of copyright, or who was the first owner of copyright, in a work that has been published shall be deemed to have a security interest, whether or not registered, in the physical copies incorporating that work to the extent required to pay the author all royalties due or accrued with respect to all past sales of such copies and royalties on any unsold copies, which shall be deemed to have been sold at the publisher’s list price, and this security interest shall be deemed have been perfected as of the date of author’s grant to the publisher.

A mandatory compensation pool or insurance coverage to be maintained by publishers. We propose that mandatory insurance coverage or a compensation fund be maintained by publishers to ensure payment of authors’ royalties be paid in the event of a publisher’s

¹¹ *Canadian Publishers and Canadian Publishing*, page 11

bankruptcy or insolvency. The travel industry in Ontario provides one model. Under an Ontario government regulation, a compensation fund is administered by the Travel Industry Council of Ontario (TICO). This fund, financed by the travel agents, provides reimbursement of money paid to a registered travel agent for services not provided because of a travel agent's bankruptcy or insolvency.

Treatment of authors as employees. Although self-employed artists who provide works or are engaged to provide services to producers, they are in a similar relationship of dependency for their livelihood, for example, a book author who has published several works, all with the same publisher. However, in case of a publisher's insolvency, artists are in a much less advantageous position than employees, who are treated as preferred creditors with respect to their unpaid wages up to a certain amount. We have submitted to federal legislators that authors should also be treated as preferred creditors with respect to their royalties. Bankruptcy and insolvency fall under federal legislation, but we note that the directors of an Ontario corporation are liable to employees for debts resulting from up to six months' unpaid wages.¹² We propose that consideration be placing similar responsibility on the directors for all royalties or fees payable to self-employed writers or other artists that are past due or have accrued.

Legal Aid for Artists' Issues

Writers and other artists sometimes experience serious problems related to their business affairs, for example, unpaid royalties or disputed rights, for which they need legal advice. Very few writers or other artists can afford even to consult a lawyer on business problems, let alone to commence legal proceedings if appropriate. We understand that the guidelines of the *Ontario Legal Aid Plan* do not permit legal aid certificates to be issued to artists for their business problems.

The Welfare of Senior Artists

While subsisting on meagre incomes, Ontario artists have created a spectacular body of work that the country and the Province of Ontario can point to with pride. Ontario writers win international prizes and their works are translated and read around the world. Ontario artists in other disciplines have similar accomplishments, as do other Canadian writers and artists, many of whom publish or deal with publishers and other producers located in Ontario. And yet creators' incomes remain abysmally low and many have no access to social benefits or pension plans.

If poverty is the rule for most artists in this country then it is doubly true for senior artists. Many know about the tragic career of Gwendolyn MacEwen, but what is not widely known is that there are many senior artists who have made a significant contribution to culture in this country who are facing similar desperate financial situations.

The Writers' Union urges the Advisory Council to recognize the contribution of these artists by:

¹² *Business Corporations Act*, R.S.O. 1990, section 131

- providing income support measures to artists through their careers to reduce the levels of poverty being experienced by artists, particularly by senior artists whose creative years or best productive years may be behind them, and
- reviewing current provincially funded housing programs to ensure that they meet the needs of our senior artists.

Most significantly, if a labour relations regime is established for artists and producers, it seems that it will become practicable for organizations like ours to establish private pension plans under existing Ontario pensions benefits legislation, as was suggested by Ontario's report on the Status of the Artist in 1992.¹³

CONCLUSION

The Writers' Union of Canada appreciates the work being done by the Minister's Advisory Council for Arts and Culture – Status of the Artist Sub-Committee. We welcome the opportunity to participate in this important review and will be pleased to discuss any of our proposals further.

The federal *Status of the Artist Act* has had limited impact on the socio-economic conditions of artists, partly because some larger artists' organizations already had collective agreements in place on a voluntary basis, but largely because most work in the cultural sector falls within provincial jurisdiction.

We ask that in creating Status of the Artist legislation for Ontario you recognize that Ontario has a particular responsibility to writers and other artists throughout Canada. We speak particularly about book writers only because this is the sector within which our members work. To the extent appropriate, we intend our observations and recommendations to be more generally applicable. We also of the view that a labour relations regime that would benefit organizations such as ours should be established in such a way that it does not permit producers to resile from national agreements that already exist with other artists' organizations such as the Writers Guild of Canada with independent producers across the whole of Canada.

Ontario is the acknowledged heart of the Canadian book publishing industry. In 1972, Ontario Government established a Royal Commission to examine and report on the publishing industry in Ontario and throughout Canada. It is obvious that many steps taken in Ontario intended to improve the lot of writers resident in Ontario will have a substantial spillover effect, not only as a model to other provinces, but also because a labour relations regime implemented in Ontario will likely be extended to writers outside Ontario who are dealing with publishers in Ontario and will generally raise the bar for contract standards for all writers and publishers in Canada.

We call upon the Advisory Council to make recommendations that will result in a well-crafted *Status of the Artist Act* in Ontario that will recognize the significant contribution

¹³ *The Status of the Artist in Ontario, Summary of Consultations*, September 1992, page 61

of writers and other artists to the culture and economy of Ontario and their need, not just to barely survive, but to be compensated fairly for this contribution. To reiterate our previous concerns, we urge that such legislation include effective measures dealing with:

- a labour relations regime for self-employed artists and producers, including certification of artists' organizations and mandatory collective bargaining for minimum terms agreements with producers, with binding arbitration if necessary;
- income tax relief measures for artists, including a deduction of copyright income from provincial taxable income;
- protection of artists from insolvencies of producers, including an author's lien and an insurance or compensation scheme for royalties;
- legal aid for artists' issues; and
- welfare of senior artists.

Fair treatment of Ontario's writers and other artists will ensure our ability to continue to create for the benefit of all citizens of Ontario and beyond.

RESPECTFULLY SUBMITTED BY THE WRITERS' UNION OF CANADA
200 - 90 Richmond Street East, Toronto M5C 1P1

November 26, 2005