

**SUPREME COURT OF CANADA**

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| **Citation:** Canadian Artists’ Representation *v.* National Gallery of Canada, 2014 SCC 42, [2014] 2 S.C.R. 197 | **Date:** 20140612**Docket:** 35353 |

Between:

Canadian Artists’ Representation/Front des artistes canadiens and

Regroupement des artistes en arts visuels du Québec

Appellants

and

National Gallery of Canada

Respondent

- and -

Writers Guild of Canada, Canadian Screenwriters Collection Society,

Société du droit de reproduction des auteurs, compositeurs et

éditeurs du Canada and SODRAC 2003 Inc.

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

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| **Reasons for Judgment:**(paras. 1 to 31) | Rothstein J. (McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver and Wagner JJ. concurring) |

Appeal heard and judgment rendered: May 14, 2014

Reasons delivered: June 12, 2014

carfac *v.* national gallery of canada, 2014 SCC 42, [2014] S.C.R. 197

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**Indexed as: Canadian Artists’ Representation *v.* National Gallery of Canada**

2014 SCC 42

File No.: 35353.

Hearing and judgment: May 14, 2014.

Reasons delivered: June 12, 2014.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

on appeal from the federal court of appeal

 *Culture and entertainment law — Status of the artist — Copyright — Collective bargaining — Duty to bargain in good faith — Whether artists’ associations are precluded from bargaining minimum fees for use of existing artistic works in agreements negotiated under Status of the Artist Act — Whether allowing scale agreements imposing minimum fees for provision of copyrights for existing works conflicts with Copyright Act — Whether Tribunal’s finding that National Gallery of Canada failed to bargain in good faith was reasonable — Standard of review — Status of the Artist Act, S.C. 1992, c. 33 — Copyright Act, R.S.C. 1985, c. C‑42.*

 The *Status of the Artist Act* (“*SAA*”) governs professional relations between artists and certain federal government institutions that engage artists to provide an artistic production. The *SAA* provides for the certification of associations charged with representing the interests of an identified sector of artists and negotiating with institutions in order to conclude scale agreements that set out the “minimum terms and conditions for the provision of artists’ services and other related matters”. In 2003, CARFAC and RAAV, certified artists’ associations for Canadian visual artists, jointly commenced negotiating a scale agreement with the National Gallery of Canada (“NGC”). Those negotiations went on for four years, until the NGC obtained a legal opinion upon which it relied to refuse to include in the scale agreement minimum fees for the licensing or assignment of the copyright in existing artistic works. Negotiations broke down due to the NGC’s position on this issue. CARFAC and RAAV filed a complaint with the Canadian Artists and Producers Professional Relations Tribunal that the NGC had failed to bargain in good faith.

 The Tribunal concluded that the licensing or assignment of the copyright in existing works can be subject to binding minimum fees set forth in scale agreements negotiated pursuant to the *SAA*, provided that those agreements do not bind collective societies established under the *Copyright Act*. It also held that the NGC had failed to bargain in good faith by adopting an uncompromising position based solely on one legal opinion, a position that it should have known would not be accepted by CARFAC/RAAV. The majority in the Federal Court of Appeal allowed the NGC’s application for judicial review, holding that allowing scale agreements to impose minimum fees for existing works would conflict with the *Copyright Act*. In light of this finding, the appellate court concluded that the NGC had not failed to bargain in good faith.

 *Held*: The appeal should be allowed.

 The Tribunal’s conclusion was reasonable. Its interpretation of the *SAA* was not contrary to the plain meaning of that Act. There was no reason for the Federal Court of Appeal to overturn the Tribunal’s conclusion that minimum fees for the provision of artists’ copyrights for existing works are eligible for inclusion in scale agreements. Moreover, to conclude that such minimum fees are excluded from scale agreements would result in the *SAA* having a limited impact on the achievement of Parliament’s express recognition that artists should be compensated for the use of their works, including the public lending of those works.

 The collective bargaining conducted by artists’ associations in respect of scale agreements covering the licensing or assignment of copyrights to existing artistic works does not contradict any provision of the *Copyright Act*. Establishing a minimum fee for the use of existing works does not affect any of the rights conferred on copyright holders under s. 3 of the *Copyright Act* nor do the scale agreements bind collective societies governed by that same Act.

 The Tribunal extensively canvassed the law regarding good faith bargaining and closely examined the evidence put forth by the parties on the issue. It concluded that the NGC had failed to bargain in good faith. On a reasonableness review, it is not for this Court to reweigh the evidence considered by the Tribunal. In view of the findings of fact of the Tribunal, it cannot be said that its decision was unreasonable.

**Cases Cited**

 **Referred to:** *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Euro‑Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

**Statutes and Regulations Cited**

*Copyright Act*, R.S.C. 1985, c. C‑42, ss. 2 “collective society”, 3, 13(4), 70.1, 70.13, 70.15.

*Jobs, Growth and Long‑term Prosperity Act*, S.C. 2012, c. 19, s. 532.

*Status of the Artist Act*, S.C. 1992, c. 33, ss. 2(*e*), 5 “artists’ association”, “producer”, “scale agreement”, 6(2), 7, 9(3), 25 to 27, 32, 33(1), 44.

**Authors Cited**

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

 APPEAL from a judgment of the Federal Court of Appeal (Noël, Pelletier and Trudel JJ.A.), 2013 FCA 64, 443 N.R. 121, 54 Admin. L.R. (5th) 1, [2013] F.C.J. No. 261 (QL), 2013 CarswellNat 507, setting aside a decision of the Canadian Artists and Producers Professional Relations Tribunal, 2012 CAPPRT 053 (http://decisia.lexum.com/cirb‑ccri/saa‑lsa/en/item/8107/index.do), [2012] C.A.P.P.R.T.D. No. 1 (QL), 2012 CarswellNat 4332. Appeal allowed.

 *David Yazbeck*, *Michael Fisher* and *Wassim Garzouzi*, for the appellants.

 *Guy P. Dancosse*, *Q.C.*, *Sophie Roy‑Lafleur* and *Guy Régimbald*, for the respondent.

 *Joshua S. Phillips* and *Karen Ensslen*, for the interveners the Writers Guild of Canada and the Canadian Screenwriters Collection Society.

 *Colette Matteau*, for the interveners Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada and SODRAC 2003 Inc.

 The judgment of the Court was delivered by

1. Rothstein J. — This appeal raises the issue of the scope of collective bargaining permitted by an Act specific to the artistic sector, and the relationship of that Act with the *Copyright Act*, R.S.C. 1985, c. C-42.
2. Background and History
3. The *Status of the Artist Act*, S.C. 1992, c. 33 (“*SAA*”), was enacted “to establish a framework to govern professional relations between artists and producers” (s. 7), “producers” being limited to certain federal government institutions and broadcasting undertakings that engage artists to provide an artistic production (ss. 5 “producer” and 6(2)(*a*)). The *SAA* provides for the certification of “artists’ associations” to represent the professional and socio-economic interests of an identified sector of artists (ss. 5 “artists’ association” and 25 to 27). Certified artists’ associations negotiate “scale agreements” with a producer or association of producers that set out the “minimum terms and conditions for the provision of artists’ services and other related matters” (s. 5 “scale agreement”). Once signed, scale agreements bind all artists in the identified sector — whether or not they are formal members of the artists’ association — in their dealings with that producer or association of producers, with the exception of work undertaken by defined employees in the course of employment (ss. 9(3), 33(1) and 44). At all relevant times for this appeal, the Canadian Artists and Producers Professional Relations Tribunal (“Tribunal”) was the administrative tribunal charged with applying and enforcing the *SAA* (in 2012, this responsibility was transferred to the Canada Industrial Relations Board pursuant to the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, s. 532). Nearly 180 scale agreements have been negotiated by artists’ associations certified by the Tribunal, many of them containing matters related to copyright.
4. The *Copyright Act* contains several provisions that are relevant to the present appeal. Section 2 defines a “collective society” (sometimes referred to as a “copyright collective”) as a society, association or corporation that carries on the business of collective administration of copyright for the benefit of artists (among others) who assign, grant a licence, or otherwise authorize the society to act on their behalf with respect to their copyrights so assigned or authorized. Collective societies must either operate a licensing scheme for a repertoire of artists’ works whereby the society determines the conditions under which it will authorize the use of such works, or collect and distribute royalties payable under the *Copyright Act* by users of such works. The Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (“SODRAC”), an intervener in this case, is a collective society within the meaning of the *Copyright Act*.
5. Copyrights assigned or exclusively licensed to the collective society must comply with the *Copyright Act* requirement that such assignments or exclusive licences be in writing and signed by the copyright holder or his or her agent (s. 13(4)). Collective societies may set tariffs for the use of such copyrights (ss. 70.1 and 70.13). The Copyright Board is responsible for certifying these tariffs (s. 70.15).
6. The Canadian Artists’ Representation/Front des artistes canadiens (“CARFAC”) and Regroupement des artistes en arts visuels du Québec (“RAAV”) are, respectively, the certified artists’ associations for Canadian visual artists outside and within Quebec. In 2003, they jointly commenced negotiating an *SAA* scale agreement with the National Gallery of Canada (“NGC”). Among the list of items which CARFAC/RAAV sought to bargain was the establishment of minimum fees payable by the NGC for the use of existing works of visual artists. The NGC expressed reservations about including such minimum fees in the scale agreement, stating that it would be seeking legal advice on this issue. Over the next four years, the NGC nevertheless proceeded to negotiate a draft scale agreement that included existing works.
7. In 2007, the NGC obtained a legal opinion upon which it relied to state that CARFAC/RAAV did not have the authority to negotiate scale agreements providing for minimum fees for the licensing or assignment of the copyright in existing works as it did not have written authorization from each artist covered by the agreement. On that basis, the NGC presented a revised draft scale agreement from which all references to existing works were removed. After some attempts to discuss the issue further, CARFAC/RAAV filed a complaint with the Tribunal that the NGC had breached s. 32 of the *SAA* by failing to bargain in good faith.
8. The Tribunal concluded that the licensing or assignment of the copyright in existing works can be subject to binding minimum fees set forth in scale agreements, and that the NGC had failed to bargain in good faith (2012 CAPPRT 053). It found that previous decisions by the Tribunal had recognized that scale agreements can include minimum fees for the use of existing works, and inclusion of copyright matters has become standard in the cultural sector. It said that the *SAA* complements and supplements the *Copyright Act*, and that artists’ associations can negotiate scale agreements under the *SAA* provided that those agreements do not bind collective societies established under the *Copyright Act* (paras. 99-104).
9. With respect to s. 32 of the *SAA*, which requires artists’ associations and producers to bargain in good faith, the Tribunal concluded that the NGC failed this duty by presenting a revised draft scale agreement which excluded all matters related to the use of existing artistic works “without prior notice” (para. 147) — in contravention of its established negotiating practice with CARFAC/RAAV — without reasonable alternatives, and based solely on one legal opinion. The NGC’s position on minimum fees for the use of existing works was uncompromising, and one that the NGC should have known would not be accepted by CARFAC/RAAV. Applying this Court’s decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 (“*Royal Oak Mines*”), the Tribunal concluded that the NGC had violated s. 32 of the *SAA* by failing to bargain in good faith (paras. 147-52). It ordered the NGC to comply with the *SAA*, establish a bargaining schedule with CARFAC/RAAV and provide monthly reports to the Tribunal (paras. 171-73).
10. The majority in the Federal Court of Appeal allowed the NGC’s application for judicial review. Applying the standard of review of correctness, the majority held that allowing scale agreements to impose minimum fees for existing works would conflict with the *Copyright Act* because only copyright holders can establish limits on how their copyright is exercised (2013 FCA 64, 443 N.R. 121, at para. 101). It found that there was no assignment in writing of copyright to CARFAC/RAAV by the artists in their sectors as required by s. 13(4) of the *Copyright Act*, meaning CARFAC/RAAV cannot impose any limits on how those artists exercise their copyrights (para. 111). In contrast, scale agreements can pertain to contracts for commissioned works as no copyright exists at the time an artist signs such a contract. Further, licensing or assigning the copyright in an existing work is simply a transfer of property; it is not a service or “other related matte[r]” as required by the definition of “scale agreement” in the *SAA* (paras. 102-8). As a result, minimum fees for the use of existing works cannot be included in scale agreements. In light of that finding, the majority concluded that the NGC had not failed to bargain in good faith (para. 115).
11. Pelletier J.A., writing in dissent, would have dismissed the application for judicial review. Applying the standard of review of reasonableness, he concluded that scale agreements can include minimum fees for the use of existing works. Granting a producer the right to use an existing work is analogous to the service provided by hotels and car rental agencies by allowing others to use their property (para. 83). The Tribunal’s interpretation of “provision of services” was therefore reasonable (para. 86). Negotiating minimum fees for the use of existing works does not make an artists’ association the agent of the artist for the purpose of granting licences to producers (para. 85). The choice of whether or not to grant a licence to a producer remains in the hands of the copyright holder and not the artists’ association. Scale agreements do not apply to works for which the copyright has been assigned to a collective society such as SODRAC, but rather only where the artist alone has the right to grant licences to use his or her work. Accordingly, there is no conflict between the *SAA* and the *Copyright Act* (para. 87).
12. Pelletier J.A. also concluded that it was reasonable for the Tribunal to find that the NGC had failed to bargain in good faith. The NGC had taken a rigid stance that it knew CARFAC/RAAV could never accept, based solely on one legal opinion and despite the fact that it had spent four years negotiating such fees. The industry standard had been to include copyright matters in scale agreements. Applying *Royal Oak Mines*, Pelletier J.A. concluded that an objective assessment of the circumstances supported the Tribunal’s finding that the NGC had failed to bargain in good faith (paras. 71-76).
13. Analysis
14. I would allow the appeal and dismiss the application for judicial review.
	1. Standard of Review
15. Reasonableness is the presumptive standard of review when a tribunal is interpreting its home statute or a statute closely connected to its function and with which it will have particular familiarity. The *SAA* applies to, among other things, “authors of artistic . . . works within the meaning of the *Copyright Act*”, requiring the Tribunal to interpret and apply that statute (*SAA*, s. 6(2)(*b*)(i)). None of the exceptions to this presumption of reasonableness apply. No constitutional questions are at issue. The appeal raises no true question of jurisdiction, particularly in light of this Court’s caution to interpret this category of questions narrowly when a tribunal is interpreting its home statute or statutes closely connected to its function (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34). No issue is at stake that is of central importance to the legal system as a whole and that is not within the Tribunal’s area of expertise. Finally, all parties, interveners and the Tribunal do not dispute that scale agreements under the *SAA* do not apply to collective societies governed by the *Copyright Act*. Accordingly, there is no serious question as to the jurisdictional lines between the Tribunal and the Copyright Board. The applicable standard of review is reasonableness.
	1. Scale Agreements Can Include Existing Works
16. In order to determine whether scale agreements negotiated under the *SAA* can include minimum fees for the use of existing works, it is necessary to address the interpretation of the *SAA* and whether it conflicts with the *Copyright Act*.
	* 1. “Provision of Artists’ Services” Includes the Use of Existing Works
17. The first question to consider is whether it was reasonable for the Tribunal to conclude that the “provision of artists’ services” referred to in the definition of “scale agreement” in the *SAA* includes the provision of existing artistic works.
18. I agree with Pelletier J.A. that there is no reason to overturn the Tribunal’s conclusion on this issue. The Tribunal’s interpretation of “provision of artists’ services” is not contrary to its plain meaning. Indeed, the analogy presented by Pelletier J.A. of the service provided by hotels and car rental agencies for the use of their property is persuasive. Furthermore, nothing in the *SAA* supports treating commissioned works differently from existing works.
19. The definition of the artists who are bound by the *SAA* has three broad categories, the first of which includes “authors of artistic . . . works within the meaning of the *Copyright Act*” (*SAA*, s. 6(2)(*b*)(i)). In order to be an author of an artistic work within the meaning of the *Copyright Act*, an artist must have already produced the artistic work of which he or she is the author. If the *SAA* was not intended to apply to the provision of existing artistic works, this branch of the definition would be meaningless. It would not make sense for the *SAA* to apply to artists on the basis of their creation of such works, yet not permit scale agreements negotiated under the *SAA* to apply to those same works. Although not conclusive, the reference in s. 6(2)(*b*)(i) to authors of works within the meaning of the *Copyright Act* provides a strong indication that scale agreements were intended to apply to existing artistic works.
20. To conclude that the provision of existing works is excluded from scale agreements authorized by the *SAA* would result in that Act having a limited impact, at least with respect to visual artists, on the achievement of Parliament’s express recognition that artists should “be compensated for the use of their works, including the public lending of them” (*SAA*, s. 2(*e*)). Fees for the use of *existing* works are the *central* issue for visual artists seeking compensation for their work, not an ancillary matter. The NGC acknowledged that it rarely commissions works, doing so “perhaps once every five years”. Installation, lectures, and tours are ancillary services that are not only unlikely to provide a source of income sufficient to properly compensate artists for their work, but are services that can all be provided by persons other than the creator of the artistic work. Indeed, while they may qualify as “related matters” under the definition of “scale agreement” in s. 5, they may not often qualify as “artistic production[s]” in the sense of s. 6(2)(*a*) of the *SAA*, and would then not constitute a primary artistic service that can be included in scale agreements in their own right.
21. For these reasons, the Tribunal’s conclusion that “provision of artists’ services” includes assigning or licensing a copyright was reasonable. As a result, minimum fees for the provision of artists’ copyrights for existing works are eligible for inclusion in scale agreements negotiated pursuant to the *SAA*.
	* 1. The *SAA* and the *Copyright Act* Do Not Conflict
22. The second question to be addressed is whether the above conclusion — that “provision of artists’ services” includes the provision of copyrights for existing works — results in a conflict with the *Copyright Act*.
23. In drafting the *SAA*, Parliament is presumed to have knowledge of the *Copyright Act* and to have intended that the two statutes not conflict (R. Sullivan, *Sullivan on the* *Construction of Statutes* (5th ed. 2008), at pp. 205 and 325). The *SAA*’s explicit reference to the *Copyright Act* in s. 6(2)(*b*)(i) supports that presumption. In the absence of evidence of conflict or that one of these laws is intended to provide an exhaustive declaration of the applicable law, the two statutes must be read together in a manner that allows them to work in a complementary fashion.
24. The collective bargaining conducted by artists’ associations such as CARFAC/RAAV under the *SAA* in respect of scale agreements covering existing artistic works does not contradict any provision of the *Copyright Act*. Artists’ associations are simply bargaining agents. They have not taken or granted, and do not purport to have taken or granted, any assignment or exclusive licence, or any property interest, in any artist’s copyright (see *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20, at paras. 26-28). For this reason, s. 13(4) of the *Copyright Act*, which requires assignments and grants of exclusive licences of copyrights to be in writing, is not applicable.
25. An artists’ association’s function is to bargain with producers for the fixing of what is analogous to a minimum wage for any artist who may agree to provide his or her artistic work to the producer. Establishing a minimum fee for the use of existing works does not affect any of the rights conferred on copyright holders under s. 3 of the *Copyright Act*. Minimum fees may, in some circumstances, affect whether and under what conditions artists will provide a producer with the right to use their artistic works, namely preventing an artist from doing so if no producer is willing to offer him or her the minimum amount under the applicable scale agreement. Ultimately, however, the decision of whether or not to provide the right to use an artistic work remains with the copyright holder.
26. The above interpretation causes no conflict with the *Copyright Act*’s provisions regarding collective societies. As counsel for CARFAC/RAAV acknowledged at the oral hearing, minimum fees for existing works do not apply to or bind collective societies such as SODRAC. Collective societies have the power to determine tariffs for the works in which they hold the copyright, subject to the approval of the Copyright Board. However, the *SAA* and the Tribunal precedent are clear, and none of the parties to this appeal disagree: scale agreements do not bind collective societies. The *SAA* only governs the professional relations between federal governmental producers, as defined by that Act, and artists insofar as they choose to retain their copyrights.
27. Artists therefore have two options when dealing with federal governmental producers for the use of their existing works. One option is to assign or license their copyright to a collective society or appoint that society as their authorized agent. In that case, tariffs set under the *Copyright Act*, and not the *SAA* and any scale agreements for their sector, will apply to the works. The other option is to deal directly with the producer, in which case they will be bound by any applicable *SAA* scale agreements. Within this option, artists may either accept the minimum fees, terms and conditions set out in the scale agreements and model contracts, or they can attempt to negotiate higher fees or more favourable terms.
	1. Duty to Bargain in Good Faith
28. Counsel for the NGC confirmed at oral hearing that if the Court concluded that minimum fees for the use of existing works may be included in scale agreements, the NGC would be willing to negotiate such fees. As this is, in essence, the outcome sought by CARFAC/RAAV, the issue of whether the NGC failed to bargain in good faith need not be examined in depth.
29. The Tribunal focused on “the manner in which the negotiations were conducted”, though it also considered the content of the negotiations (para. 121 (emphasis added)). The Tribunal’s reasons set out in detail the facts supporting its conclusion that the NGC did not bargain in good faith (paras. 122-52). In brief, the Tribunal found that, despite raising some initial concerns in June 2003, the NGC did not seek to exclude minimum fees for existing artistic works from the draft scale agreement on the basis of its interpretation of the *Copyright Act* until October 2007.
30. In light of this history, the Tribunal noted that the NGC did not follow the parties’ established practice of exchanging draft scale agreements prior to their meetings when it presented its revised draft scale agreement immediately after the legal opinion it had obtained was first discussed (paras. 123, 136, 138-39 and 147). It concluded that “putting forward such a proposal [that excluded minimum fees for the use of existing artistic works from the scale agreement] and taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of the duty to bargain in good faith” (para. 151).
31. It appears from the reasons that the Tribunal extensively canvassed the facts and the law regarding good faith bargaining. In proceedings before this Court, the NGC raised certain facts to support its argument that it had not failed to meet its duty to bargain in good faith. The Tribunal’s reasons demonstrate that it was aware of those facts, namely that the NGC had expressed reservations about including minimum fees for the use of existing works in a negotiated scale agreement, that the NGC relied upon a legal opinion to refuse to include such minimum fees in the scale agreement, and that the NGC expressed a willingness to negotiate alternative solutions and remaining issues after presenting the revised draft scale agreement (paras. 124 and 140-42). The Tribunal nonetheless concluded that the NGC had failed to bargain in good faith.
32. On a reasonableness review, it is not for courts to reweigh the evidence considered by the tribunal (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 64, *per* Binnie J.). In view of the findings of fact of the Tribunal, it cannot be said that its decision is unreasonable.
33. Conclusion
34. The appeal is allowed and the Tribunal’s order is reinstated. Costs are awarded to the appellants CARFAC and RAAV on the appeals before this Court and the Federal Court of Appeal.

 *Appeal allowed with costs.*

 Solicitors for the appellants:  Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

 Solicitors for the respondent:  Lapointe Rosenstein Marchand Melançon, Montréal; Gowlings, Ottawa.

 Solicitors for the interveners the Writers Guild of Canada and the Canadian Screenwriters Collection Society:  Ursel Phillips Fellows Hopkinson, Toronto.

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