

Canadian Artists and Producers  
Professional Relations Tribunal



CANADA

Tribunal canadien des relations  
professionnelles artistes-producteurs

Ottawa, February 15, 2001

File: 1310-96-0026A

Decision No. 034

**In the matter of an application for certification filed by the federation  
of the Association des professionnelles et des professionnels de la vidéo  
du Québec (APVQ) and the Syndicat des techniciens du cinéma et de la  
vidéo du Québec (STCVQ)**

*Interim decision of the Tribunal:*

The Tribunal declares that Francine Bousquet and all the lawyers at the law firm of Sauvé et Roy are disqualified from representing the APASQ in its application for certification of the federation of the APVQ and the STCVQ.

*Place of hearing:* Ottawa, Ontario

*Date of hearing:* February 15, 2001

*Decision rendered with Reasons to follow.*

*Quorum :* Robert Bouchard, Chairperson  
David P. Silcox, Member  
Moka Case, Member

## *Reasons for decision*

1310-96-0026A: In the matter of an application for certification filed by the federation of the Association des professionnelles et des professionnels de la vidéo du Québec (APVQ) and the Syndicat des techniciens du cinéma et de la vidéo du Québec (STCVQ).

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### *Background*

[1] This decision concerns a request made by the federation of the Association des professionnelles et des professionnels de la vidéo du Québec (“APVQ”) and the Syndicat des techniciens du cinéma et de la vidéo du Québec (“STCVQ”) (hereinafter “APVQ-STCVQ” or “the federation”) for an order declaring that Francine Bousquet and all the lawyers of the law firm Sauvé et Roy are disqualified from appearing in this matter.

### *Submissions of the parties*

#### *The federation*

[2] The federation submits that Ms. Bousquet and the law firm Sauvé et Roy have a conflict of interest regarding their representation of the intervenor, the Association des professionnels des arts de la scène du Québec (CSN) (“APASQ”). This assertion is based on the fact that between 1996 and 1999, Ms. Bousquet and Sauvé et Roy represented the APVQ in its original application for certification. The APVQ continued to be represented by Sauvé et Roy until 1999. Ms. Bousquet worked as a lawyer at Sauvé et Roy from 1989 to 1997, and since then she has been working as a labour relations adviser for the Fédération nationale des communications (“the FNC”). From 1997 to 1999, Ms. Bousquet worked on the APVQ file in her capacity as a labour relations advisor. During that time, Sauvé et Roy continued to represent the APVQ.

[3] In 1999, the APVQ transferred its file to the firm of Boivin Payette and terminated the mandates of Sauvé et Roy and Ms. Bousquet. Subsequently, in 2000, the APVQ together with the STCVQ as a federation filed an amended application for certification.

#### *APASQ, Ms. Bousquet and Sauvé et Roy*

[4] Éric Lévesque, of the firm Sauvé et Roy, responded on behalf of the APASQ, Ms. Bousquet and Sauvé et Roy. In his submission, neither Sauvé et Roy nor Ms. Bousquet have acted as counsel for the APVQ or for the federation before the Tribunal, nor are they in possession of any confidential information concerning the APVQ or the federation in this case. He maintains that, although Sauvé et Roy and Ms. Bousquet had acted as agents for the APVQ in the past, they were never agents for the federation; therefore, no previous relationship exists between them and the federation. The APASQ’s interests are not adverse to the federation’s interests; there is therefore no “matter” between the parties. The only issue that might arise between them is that of a jurisdictional overlap.

*The federation's reply*

[5] In its reply, the federation submits that there is no basis for the contention by Sauvé et Roy that it has never represented the federation and that there is therefore no conflict of interest: although the APVQ has formed a federation with the STCVQ, it is still a separate entity and is directly affected by the conflict of interest.

*The issues*

[6] The federation's application raises the following two issues:

- (a) does the Tribunal have jurisdiction to order that a party's representative be disqualified on the basis of a conflict of interest?
- (b) if so, is there a conflict of interest in this case?

*Status of the Artist Act*

[7] The relevant provisions are as follows:

- 17.** The Tribunal may, in relation to any proceeding before it,
- (a) on application or of its own motion, summon and enforce the attendance of any person whose testimony is necessary, in the opinion of the Tribunal, and compel the person to give oral or written evidence on oath and to produce any documents or things that the Tribunal considers necessary for the full investigation and consideration of any matter within its jurisdiction;
  - (b) administer oaths and solemn affirmations;
  - (c) accept any evidence and information that it sees fit, on oath, by affidavit or otherwise, whether or not the evidence is admissible in a court of law;
  - (d) examine any evidence that is submitted to the Tribunal respecting the membership of any artist in an artists' association that is seeking certification;
  - (e) examine documents pertaining to the constitution, articles of association or by-laws of an artists' association;
  - (f) make any examination of records and any inquiries that it considers necessary;
  - (g) require a producer or an artists' association to post in appropriate places and keep posted a notice concerning any matter relating to the proceeding that the Tribunal considers necessary to bring to the attention of artists;
  - (h) order, at any time before the conclusion of the proceeding, that
    - (i) a representation vote or an additional representation vote be taken among artists affected by the proceeding, whether or not a representation vote is provided for elsewhere in this Part, in any case where the Tribunal considers that the vote would assist it to decide any question that has arisen or is likely to arise in the proceeding, and
    - (ii) the ballots cast in that representation vote be sealed in ballot boxes and counted only as directed by the Tribunal;
  - (i) authorize any person to do anything that the Tribunal may do under paragraphs (a) to (h), and to report to the Tribunal thereon;

- (j) adjourn or postpone the proceeding;
- (k) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;
- (l) amend or permit the amendment of any document filed;
- (m) add any person to the proceeding at any stage thereof;
- (n) set requirements for public notice in respect of any application made under this Part;
- (o) award costs; and
- (p) decide any question that arises in the proceeding, including whether
  - (i) a person is a producer or an artist,
  - (ii) an artist is a member of, or is represented by, an artists' association,
  - (iii) an organization constitutes an association of producers, an artists' association, or a federation of artists' associations,
  - (iv) a group of artists constitutes a sector suitable for bargaining,
  - (v) a scale agreement has been entered into or is in force, and the dates that it comes into force and expires, and
  - (vi) any person or organization is a party to or is bound by a scale agreement.

...

**19.** (3) Any interested person may intervene in a proceeding before the Tribunal with its permission, and anyone appearing before the Tribunal may be represented by counsel or an agent.

## *Analysis and findings*

### *Jurisdiction of the Tribunal*

[8] No objection was raised regarding the Tribunal's jurisdiction to disqualify a party's representative. The Tribunal nonetheless considered this issue to satisfy itself that it does have jurisdiction to do so. Section 17 of the *Status of the Artist Act* sets out the powers of the Tribunal in relation to proceedings before it. Nothing in that provision deals with the issue raised in this case. However, subsection 19(3) states that "anyone appearing before the Tribunal may be represented by counsel or an agent". In *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Ont. Gen. Div.), the Court construed a similar provision in the Ontario *Coroners Act* as follows (at p. 544):

... [T]he coroner had jurisdiction under s. 41 to rule on issues of conflict of interest. While that provision clearly entitles a person with standing to be represented by counsel, I see no reason why it should be interpreted to include counsel who cannot act professionally.

[9] Furthermore, in *Kirsch v. Royal LePage Real Estate Services Ltd.*, [1993] B.C.C.H.R.D. no. 32, the British Columbia Council of Human Rights found that it had jurisdiction to disqualify a lawyer by reason of a conflict of interest; it held that administrative tribunals have "inherent" jurisdiction to determine the fairness of their procedures and that this jurisdiction should be exercised in the interests of justice, fairness and administrative efficiency.

[10] The Tribunal is of the view that the finding that it has jurisdiction to make a declaration of disqualification may rest on either subsection 19(3) or its ancillary jurisdiction. Based on *Booth v. Huxter* and *Kirsch v. Royal LePage Real Estate Services Ltd.*, the Tribunal concludes that it has jurisdiction to declare a representative to be disqualified by reason of a conflict of interest.

*Is there a conflict of interest?*

[11] The Supreme Court of Canada established the test for determining whether a lawyer or law firm has a disqualifying conflict of interest in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. The Court held that the confidentiality of information passing between a solicitor and his or her client is of paramount importance (at p. 1244):

[I]t is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. ...

[12] The Court adopted the “possibility of real mischief” standard. The test to determine whether a conflict of interest is such as would disqualify a lawyer from acting against a former client is as follows (at pp. 1260-1261):

Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

... In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court’s degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent

the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

[13] The Court then considered whether all the lawyers in a law firm are disqualified from representing a party against a former client of one of the lawyers in the firm (at pp. 1262-1263):

There is ... a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the “tainted” lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. ...

*A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. ...

These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. ...

[14] The Tribunal’s file indicates that two lawyers from the law firm of Sauvé et Roy, Mr. Vallée and Mr. Lavergne, handled the APVQ’s application for certification from 1996 to 1999. In light of that, there is an inference that these two lawyers and all the other lawyers at Sauvé et Roy received confidential information that is closely connected to the “matter at hand”. This inference includes Ms. Bousquet, since she was a lawyer with Sauvé et Roy during that time period. The fact that she now works for the FNC as a labour relations advisor and not as a lawyer has no effect on this finding. The principle here is that substance prevails over form.

[15] The Tribunal is of the view that the fact that the APVQ has formed a federation with the STCVQ does not alter this finding. Although the two associations have formed a federation, the APVQ is still a separate entity and can still be affected by a conflict of interest. The application for certification filed by the APVQ-STCVQ federation reproduces in part the APVQ’s original application. For these reasons, the presumption that the lawyers at Sauvé et Roy and Ms. Bousquet received confidential information still applies to the APVQ, regardless of the fact that it has formed a federation with the STCVQ.

[16] The Tribunal should draw the inference, unless satisfied, on the basis of clear and convincing evidence, that all reasonable measures have been taken to prevent confidential information from being disclosed to the lawyers at Sauvé et Roy or to Ms. Bousquet. Mr. Lévesque did not suggest that any measure of that kind had been taken. Therefore we find that all the lawyers with Sauvé et Roy, as well as Ms. Bousquet, who worked at Sauvé et Roy during the relevant time period, “receive[d] confidential information attributable to a solicitor and client relationship relevant to the matter at hand”.

[17] Accordingly, neither the lawyers at Sauvé et Roy nor Francine Bousquet may act against the APVQ. Mr. Lévesque argued that there is no “matter” between the APVQ and the APASQ. He conceded, however, that their interests might be adverse on the issue of whether there is a jurisdictional overlap. The Tribunal is of the view that this issue creates a “matter” between the federation and the APASQ and that, as a result, both the lawyers at Sauvé et Roy and Francine Bousquet are disqualified from representing the APASQ in this case.

### *Decision*

[18] The Tribunal declares that Francine Bousquet and all the lawyers in the law firm of Sauvé et Roy are disqualified from representing the APASQ in its intervention in the application for certification of the federation of the APVQ and the STCVQ.

Ottawa, 8 March 2001

“Robert Bouchard”

“David P. Silcox”

“Moka Case”