

Canadian Artists and Producers  
Professional Relations Tribunal



CANADA

Tribunal canadien des relations  
professionnelles artistes-producteurs

Ottawa, August 15, 2001

File No.: 1310-96-0026A

Decision No. 035

**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 federal producers' preliminary objection is dismissed.  
The federation's request for payment of its costs is dismissed.

*Place of hearing:* Ottawa, Ontario

*Date:* June 8, 2001

*Quorum:* Robert Bouchard, presiding member  
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 deals with a preliminary objection raised by the National Film Board (“NFB”), the Canadian Broadcasting Corporation (“CBC”), Cogeco Radio-Télévision Inc. (“CRTI”) (hereinafter, “federal producers”) and the Syndicat général du cinéma et de la télévision (“SGCT”) in the context of an application for certification filed by the federation of the Association des professionnelles et des professionnels de la vidéo du Québec and the Syndicat des techniciens du cinéma et de la vidéo du Québec (hereinafter, “the federation”).

[2] The federation has applied to be certified to represent a sector in the province of Quebec composed of:

all professional independent contractors engaged by a producer subject to the *Status of the Artist Act* who practise professions that contribute directly to the creative aspects of the production, in all languages, in all audiovisual productions, in all forms and in all mediums, including film, television, video, multimedia and the recording of commercials. These functions include:

(1) camera work, lighting and sound design, in particular the following positions: assistant director, first assistant director, second assistant director, third assistant director, director of photography, camera operator, cameraman (including steady-cam, baby-boom, and camera operated through a specialized system [C.O.S.S.]), assistant cameraman, first assistant cameraman, second assistant cameraman, video assist operator, still photographer, lighting director, chief lighting technician, chief electrician, electrician, lighting console operator, motorized projector operator, sound man, boom man, sound assistant, sound technician, sound effects technician, key grip, grip, rigger, computer graphics designer, computer graphics special effects technician;

(2) costume, coiffure and make-up design, in particular the following positions: make-up designer, supervising make-up artist, make-up artist, make-up assistant, special effects make-up artist, prosthetic make-up technician, prosthetic make-up assistant, hair stylist designer, assistant hair stylist, hair dresser, assistant hair dresser, wig-maker, assistant wig-maker, hairpiece technician, costume designer, costumer, assistant costumer, specialized costume technician, costume technician, wardrobe mistress, assistant wardrobe mistress, wardrobe assistant, dresser, propsman specialist, cutter, seamstress, puppet designer, puppet handler, transportation co-ordinator; but excluding art directors and production designers;

(3) set design, in particular the following positions: art co-ordinator, assistant art director, set designer, assistant set designer, set co-ordinator, set technician, set decorator, propsman specialist, props designer, propsman crewleader, studio propsman, location propsman, props assistant, chief studio stagehand, studio stagehand, head painter, painter, scenic painter, assistant painter, sculptor-molder, draughtsman, head carpenter, carpenter, assistant carpenter, studio special effects

technician, assistant studio special effects technician, weapons specialist, transportation co-ordinator;

(4) editing and continuity, in particular the following positions: production co-ordinator, floor director–excluding dubbing directors–, production assistant, floor manager, location manager, logistics manager, assistant logistics manager, script-clerk, script assistant, production secretary, production assistant, assistant co-ordinator, safety co-ordinator, transportation co-ordinator, driver, caterer, technical director, assistant technical director, switcher, ISO switcher, image controller (CCU), videotape operator, slow motion operator, cue prompter operator, video credits designer, video projectionist (including giant screen and video wall), key video grip, video grip, editor, off-line editor, in-line editor, sound editor, sound mixer, assistant editor, videographer, airwave transmission operator, satellite transmission operator, microwave transmission operator.

[3] At the federation's request, a pre-hearing conference was held in Montréal on April 2, 2001, at which the federal producers raised some preliminary objections to the application for certification. Their main objection, supported by the SGCT, was that none of the 123 occupations listed in the sector sought by the federation are practised by independent contractors. They argue that these occupations are carried out exclusively by persons who work in an employer-employee relationship.

[4] It was agreed that the federal producers and the SGCT would file their preliminary objections in writing and that the federation would be provided with an opportunity to present its arguments. The producers would then be given an opportunity to respond and the federation a right of reply. Based on these written submissions, the Tribunal would render a decision on the admissibility of the objection.

[5] The producers' written representations also raised subsidiary objections. Upon review, the Tribunal has determined that these subsidiary issues should be dealt with when it considers the merits of the federation's application for certification. Therefore, this decision will deal only with the main objection.

## ***Submissions of the parties***

### *The federal producers*

[6] The federal producers argue that the members of the federation are not artists within the meaning of the *Status of the Artist Act* (the "Act") because they do not practice their profession as independent contractors. According to them, all of the occupations listed in the application for certification are carried out within the framework of a relationship of legal subordination between employer and employee and not as part of a business relationship. Given that the *Act* only governs the certification of independent contractors, they argue the Tribunal cannot grant the federation's application for certification. Consequently, the federal producers' position is that the Tribunal must determine the nature of the usual relationship between the producer and the members of the federation when they exercise their profession. Further, this determination must be completed for each profession listed in the sector sought by the federation.

*The SGCT*

[7] The SGCT maintains that all of the occupations described in the federation's application for certification are carried out at the NFB by persons who are employees and not independent contractors, notwithstanding the form of their contract with the NFB. According to the SGCT, this issue has already been decided by the Federal Court of Appeal in *SGCT v. The Queen*, [1978] 1 F.C. 346 (C.A.). In light of the fact that nothing has changed at the NFB since the decision was rendered, the SGCT submits that the issue is *res judicata* and that the application for certification is inadmissible.

*The federation's arguments*

[8] The federation submits that the preliminary objection raises an issue which is premature when considering the merits of an application for certification. At this stage, the Tribunal's jurisdiction is limited to the two following issues: the definition of the sector that is suitable for bargaining and the representativity of the artists' association.

[9] In the federation's opinion, its application for certification would only affect federal producers if they engage the services of independent contractors to carry out the occupations listed in the proposed sector. If the federal producers only hire employees to carry out these tasks, this application for certification would not affect them at all.

*The federal producers' answer*

[10] In their answer, the producers argue that the Tribunal has the power and the duty to make sure that the sector sought includes independent "artists", within the meaning of the *Act*, prior to certifying the applicant association. In their view, this issue falls squarely within the Tribunal's jurisdiction.

*The federation's reply*

[11] In its reply, the federation again asserts its position that the federal producers' objection is premature. Among other things, it maintains that the appropriate time in the certification process to decide the question of the status of each member of the artists' association, in order to determine whether he or she is included in the bargaining sector, is when it determines the representativity of the artists' association, when this representativity is challenged. Since the federal producers are excluded from this debate under subsection 27(2) of the *Act*, the federation asks the Tribunal to dismiss the objection.

[12] In addition to asserting that the objection is premature, the federation claims that the issue raised by the federal producers is dilatory. In their view, the purpose of the objection is to delay the certification process. Consequently, it asks the Tribunal to avail itself of its power pursuant to paragraph 17(o) of the *Act* and to render an order awarding costs in favour of the federation.

**Issues**

[13] This matter raises the following issues:

- a) Prior to certifying an artists' association for a given sector, is the Tribunal required to examine the usual relationship existing between each member of the association and the producer in order to ensure that there are "artists" in each of the occupations listed in the proposed sector?
- b) Should the Tribunal award costs to the federation?

### ***Status of the Artist Act***

[14] The answer to the first question in the paragraph above derives from the legislative scheme created by the *Act*. The following provisions apply:

5. In this Part,

"artist" means an independent contractor described in paragraph 6(2)(b).

"artists' association" means any organization, or a branch or local thereof, that has among its objectives the management or promotion of the professional and socio-economic interests of artists who are members of the organization, and includes a federation of artists' associations.

[. . .]

25. (1) An artists' association may, if duly authorized by its members, apply to the Tribunal in writing for certification in respect of one or more sectors [. . .]

(2) An application for certification must include the membership list of the artists' association, a certified copy of its by-laws, and any other information required by the Tribunal.

(3) The Tribunal shall give public notice of any application for certification in respect of any sector without delay, indicating any period in which another application may be made by any other artists' association, notwithstanding subsection (1), for certification in respect of that sector or any part of it.

(4) No application for certification in respect of a sector may be made, except with the consent of the Tribunal, after expiration of the period indicated by the Tribunal in any public notice given pursuant to subsection (3).

26. (1) After the application period referred to in subsection 25(3) has expired, the Tribunal shall determine the sector or sectors that are suitable for bargaining, taking into account

- (a) the common interests of the artists in respect of whom the application was made;

- (b) the history of professional relations among those artists, their associations and producers concerning bargaining, scale agreements and any other agreements respecting the terms of engagement of artists; and
- (c) any geographic and linguistic criteria that the Tribunal considers relevant.

(2) Notwithstanding subsection 19(3), only the artists in respect of whom the application was made, artists' associations and producers may intervene as of right on the issue of determining the sector that is suitable for bargaining.

(3) The Tribunal shall give the artists' association concerned and any intervenors notice of its determination under subsection (1) without delay, and that determination is deemed to be interlocutory, notwithstanding section 21.

27. (1) After determining the sector pursuant to subsection 26(1), the Tribunal shall determine the representativity of the artists' association, as of the date of filing of the application for certification or as of any other date that the Tribunal considers appropriate.

(2) Notwithstanding subsection 19(3), only artists in respect of whom the application was made and artists' associations may intervene as of right on the issue of determining the representativity of an artists' association.

## ***Analysis and conclusions***

### *Main objection*

[15] Pursuant to the *Act*, only artists' associations may be certified. Section 5 of the *Act* provides that an entity is considered an "artists' association" if it is an "organization [. . .] that has among its objectives the management or promotion of the professional and socio-economic interests of artists who are members of the organization [. . .]". The definition of "artist" is limited to independent contractors determined to be professionals working in the artistic environments identified in paragraph 6(2)(b) of the *Act*.

[16] The *Act* provides for a mechanism that allows the Tribunal to ensure that the applicant, that is, the entity that is asking to be certified, constitutes an “artists’ association” that may file an application for certification: according to subsection 25(2) of the *Act*, any application for certification must include the membership list of the artists’ association, a certified copy of its by-laws, and any other information required by the Tribunal. The Tribunal’s policy is to require the filing of the applicant’s by-laws. In addition, pursuant to subsection 25(1) of the *Act*, the applicant must be duly authorized by its members to apply to the Tribunal for certification in respect of the sector(s) sought. The Tribunal reviews these documents to determine whether the applicant constitutes an organization; whether it has among its objectives the management or promotion of the professional and socio-economic interests of artists who are members; whether its by-laws meet the requirements set out in section 23 of the *Act* by, among others, establishing membership criteria for artists whose interests it promotes; the number of members it has; and whether it has been duly authorized by its members to file an application for certification.

[17] This legislative scheme does not require that the Tribunal determine, at the application for certification stage, the usual relationship between the producer(s) and the applicant’s different members when they exercise their profession. If the objection had been that the applicant had not met one or more of the above-specified requirements, or that its documents were forged or fraudulent, the objection would have been relevant. However, an objection to the effect that the Tribunal has a duty to determine the usual relationship between the producer(s) and each of the applicant’s different members when they exercise their profession is not relevant in light of the legislative scheme of the *Act*.

[18] In fact, such a requirement appears to go completely against the fundamental principles underlying the *Act*. When the Tribunal certifies an artists’ association, this does not mean that all persons working in a given artistic field will be affected by the certification. It stands to reason that artists engaged in an employer-employee relationship are excluded. However, it is important to bear in mind that there is nothing preventing someone from being an employee and working in the artistic world as an independent contractor at the same time: *Union des artistes*, 1996 CAPPRT 017, at para. 24. One must recognize that a person’s status—either as an employee or an independent contractor— can change. It appears to ensue from the case law that the Tribunal recognizes this fact and that this is why it has established a policy of defining sectors composed of “independent contractors” exercising one or more given artistic professions. Thus, the sector is limited to “artists” within the meaning of the *Act*, while being flexible enough to recognize that a person may exercise his or her profession in different ways.

[19] However, if a question were raised as to whether an eventual scale agreement between the federation and a producer would apply to a particular artist, the issue could be dealt with under section 41 of the *Act*. See *Union des Artistes and Télé-Métropole Inc.*, 1997 CAPPRT 022.

[20] In addition, by proceeding in the manner requested by the federal producers, the Tribunal may well undermine the purposes of the *Act* since their objection concerns only *members* of the federation. However, the federation has not only asked for certification of the artists included in the proposed sector *who are its members*; it is requesting certification for *all* the artists working in the sector sought, whether they are members or not. In accordance with its policy, the Tribunal continues “to certify the artists’

association that it considers the most representative of each artistic sector, by granting to this association the exclusive authority to bargain on behalf of all the artists in the sector, whether or not they are members of the association”: *Conseil des métiers d’art du Québec*, 1998 CAPPRT 026, at para. 23.

[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.

[22] With respect to the SGCT’s objection that the issue is *res judicata*, one must note, first, that the Federal Court of Appeal’s decision, on which the SGCT relies, dates back to 1978; second, that the decision did not concern the Tribunal; and finally, that when the decision was rendered, there was no law in Canada that gave artists access to collective bargaining (either at the federal level or in Quebec). In addition, Le Dain J. wrote as follows in paragraph 14 of that decision:

[. . .] Undoubtedly the Board has the authority under paragraph 10(1)(d) of the *National Film Act* to enter into contracts for personal services with independent contractors, or “freelancers” [. . .] as they are apparently called, but notwithstanding the form which such an engagement takes it may be open in a particular case to show on all the circumstances that the relationship is in fact one of employment. [. . .]

### *Costs*

[23] Paragraph 17(o) of the *Act* clearly gives the Tribunal express authority to award costs. However, the *Act* also provides, at paragraph 18(a), that the Tribunal must take into consideration the applicable principles of labour law.

[24] Historically, labour boards have been reluctant to award costs. This practice usually constitutes a punitive measure that, in addition, often creates the impression that some parties are winners and others are losers. Such an approach could be harmful to good labour relations and damage the future relationship between the parties.

[25] 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.

[26] In the case at bar, the Tribunal finds that such circumstances do not exist.



***Decision***

For these reasons, the federal producers' preliminary objection is dismissed. The federation's request for payment of its costs is also dismissed.

Ottawa, August 15, 2001

"Robert Bouchard"

"David P. Silcox"

"Moka Case"