

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, October 20, 2003

File: 1350-03-012

Decision N° 046

**In the matter of the application for review of Decision No. 041
(Federation consisting 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)) (now known as the
Alliance québécoise des techniciens de l'image et du son (AQTIS))**

Decision of the Tribunal:

The application for review is granted.

Date of hearing: September 15, 2003

Quorum: David P.Silcox, Presiding Member
Marie Senécal-Tremblay, Member
Moka Case, Member

Reasons for decision

1350-03-012: In the matter of the application for review of Decision No. 041 (Federation consisting 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)) (now known as the Alliance québécoise des techniciens de l'image et du son (AQTIS))

Background

[1] This decision concerns the application for review made to the Canadian Artists and Producers Professional Relations Tribunal (hereinafter the “Tribunal”) under subsection 20(1) of the *Status of the Artist Act*, S.C. 1992, c. 33 (hereinafter the “Act”), by the applicant, the Federation consisting 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 (now known as the Alliance québécoise des techniciens de l'image et du son (AQTIS)) (hereinafter the “Federation”) on June 30, 2003. A panel of the Tribunal convened on September 15, 2003 and considered this application on the basis of written submissions.

[2] The application seeks to review the certification granted on March 4, 2003 in Decision No. 041 to represent the following sector:

... all professional independent contractors engaged by a producer subject to the *Status of the Artist Act* to perform the function of assistant director, first assistant director, director of photography, camera operator, cameraman (including steady-cam, baby-boom, and camera operated through a specialized system [C.O.S.S.]), lighting director, sound man, sound effects technician, computer graphics designer, computer graphics special effects technician, 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, hairstylist designer, supervising hairstylist, hairdresser, wig-maker, costume designer, costumer, puppet designer, assistant art director, set designer, props designer, propsman crewleader, head painter, scenic painter, sculptor-molder, draughtsman, studio special effects technician, floor director or manager (excluding dubbing directors), production assistant, location manager, script-clerk, editor, off-line editor, in-line editor, sound editor, sound mixer, in all audiovisual productions shot primarily in the province of Québec, in any language, in all forms and in all mediums, including film, television, video, multimedia and the recording of commercials.

[3] The Federation is asking the Tribunal to review its decision in order to add to the sector it represents independent contractors who perform the artistic function of still photographer. These independent contractors were included in

the application for certification that was originally submitted by the Federation and in the public notice published as part of the certification process.

[4] Participants who took part in the application for certification process were asked to submit their comments on the application for review. No objection was received concerning the inclusion of still photographers in the Federation's sector

[5] In Decision No. 041, the Tribunal stated that it had already recognized the work of photographers in three earlier applications for certification, namely, in Decision No. 012 concerning the Canadian Association of Photographers and Illustrators in Communications (hereinafter "CAPIC"), in Decision No. 021 concerning the Regroupement des artistes en arts visuels du Québec (hereinafter "RAAVQ") and in Decision No. 029 concerning the Canadian Artists' Representation / Le Front des artistes canadiens. In paragraph 324 of Decision No. 041, the Tribunal found that in "the absence of any evidence to the effect that the work of the still photographer must be included in a sector separate from those that have already been granted by the Tribunal, we must necessarily find that the work of the still photographer cannot be the subject of the certification sought by the Federation in the present case."

[6] In its application for review, the Federation submits that the Tribunal breached the rules of natural justice by referring for the first time in its decision to the three certification cases mentioned above as constituting an obstacle to the certification of still photographers. The Federation asserts that this issue had never been raised before in the proceedings or the hearings and that it has accordingly been deprived of its right to be heard on this subject.

[7] The Federation also submits that the Tribunal erred when it excluded extensive evidence and concluded that no evidence had been adduced concerning the inclusion of still photographers in the bargaining sector, and that this was prejudicial to the artists performing the function of still photographer.

Submissions

[8] In support of its application for review and in order to establish that the work of a still photographer is distinct and should belong to a sector separate from those already granted by the Tribunal, the Federation argues that:

- the artistic function of a still photographer is completely different from the artistic functions of a "fine art photographer" and of a "commercial photographer" covered by the certifications granted earlier;

- a still photographer is part of the same bargaining sector as the other audiovisual production artists, in view of the nature of his or her work and in light of the history of negotiations with producers; and
- artists performing the function of still photographer would suffer serious harm if they were excluded from the certification and the Federation's bargaining sector.

[9] The Federation also submitted ten solemn declarations made by still photographers certifying:

- that they are members of the STCVQ or the APVQ or of both associations;
- that the artistic function of a still photographer is a specific function;
- that it is essential that a still photographer be fully cognizant of the filming methods and the rules governing the operation of the set for various reasons, including discretion and the choice and use of tools, and of specific techniques to prevent interference with other aspects of the production (image, sound and lighting);
- that the still photographer is a full member of the film crew; and
- that they would like the STCVQ and the APVQ to continue to represent them in the negotiations of their conditions of engagement with the federal producers.

[10] CAPIC, which is certified by the Tribunal to represent commercial photographers, sent a letter to the Tribunal indicating that it did not wish to represent photographers when they work as still photographers. CAPIC also stated in its letter that different artistic practices were involved and that these photographers had in the past been represented by the APVQ and the STCVQ.

Issues

[11] The application for review raises three issues:

- (a) Did the Tribunal breach the rules of natural justice, in particular the right to be heard?
- (b) Did the Tribunal err when it excluded extensive evidence in finding that no evidence had been adduced concerning the inclusion of still photographers in the bargaining sector?

- (c) Was the Tribunal's analysis concerning the occupation of the sector reasonable?

Analysis and conclusion

Did the Tribunal breach the rules of natural justice, in particular the right to be heard?

[12] The relevant provisions of the *Status of the Artist Act* are as follows:

19. (4) The Tribunal may take notice of facts that may be judicially noticed and, subject to subsection (5), of any other generally recognized facts and any information that is within its specialized knowledge.

19. (5) The Tribunal shall notify the parties and any intervenor in the proceeding before it of its intention to take notice of any facts or information, other than facts that may be judicially noticed, and afford them an opportunity to make representations with respect thereto.

[13] In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, Justice L'Heureux-Dubé acknowledged at pages 677-678 that there is a right to procedural fairness before administrative tribunals, which includes the right to be heard, but that the legislative framework must be considered in order to determine whether it changes this right. Subsection 19(4) of the *Act* permits the Tribunal to take notice of facts that may be judicially noticed, and under subsection 19(5) it does not have to inform the parties of its intention to do so.

[14] The Tribunal may accordingly take notice of legislation, regulations, its jurisprudence, well-known and indisputable facts and take them into consideration in its decisions and, under subsection 19(5) of the *Act*, it does not have to inform the parties and the intervenors concerning this kind of taking of notice. Consequently, the Tribunal is of the opinion that the Federation was not deprived of its right to be heard and that there was no breach of the rules of natural justice.

Did the Tribunal err when it excluded extensive evidence in finding that no evidence had been adduced concerning the inclusion of still photographers in the bargaining sector?

[15] In the course of the certification proceedings, the Federation filed solemn declarations made by two of its members: Alain Tremblay, who has been a still photographer since 1995, and Jackie Fritz, who has over twelve years' experience as a still photographer. In addition to describing the duties they perform, they stated the following:

- they usually provide their professional services as still photographers;
- they are members of the APVQ or the STCVQ or of both; and
- their services contribute directly to the production of the film, television program or audiovisual work.

[16] In the documentary evidence that was filed, we find the following brief description of the position of still photographer:

[TRANSLATION]

The position of *still photographer* has a special character because it is not one of the positions the results of which contribute to the production of a film. In fact, a still photographer must essentially produce a set of photographs that will be useful in promoting the film. Thus, the person who holds this position works independently. Moreover, he or she must be sure to obtain the co-operation of all the people on the set and do his or her work as discreetly as possible so as not to disturb the work of those people. (Emphasis added.)

[17] The Federation introduced into evidence a copy of the collective agreement concluded between the APVQ and the producers falling within the legislative jurisdiction of Quebec, which includes still photographers.

[18] The testimony given and submissions made during the hearing that was held as part of the certification process can be summarized as follows:

- A photographer is an author within the meaning of the *Copyright Act*, S.C. 1985, c. C-42;
- Jacques Godbout testified on behalf of the National Film Board (the “NFB”), an intervenor, that [TRANSLATION] “a still photographer is not directly part of the production, in the narrow sense, of the film but is at the service of the marketing people. As far as I know, he or she does publicity.
- In the intervenor’s reply, counsel for the NFB, Mr. Piché, stated:

[TRANSLATION]

In effect, concerning the still photographer, Mr. Godbout told you that a still photographer is the person who photographs actors on a film set and those photographs will be used to produce a film. We are dealing with a work that is completely different. It is not the film.

He or she does not contribute at all to the production of the film. He or she takes a photograph and the photograph, which is in itself a work that is completely independent of the film, is the creation of a person who is, in our opinion, an artist. It is not an element of the film, unlike everything else, which is an element of the film.

[19] In brief, upon review of the evidence adduced in the certification process, the still photographer produces a set of photographs that will be useful in promoting the film.

[20] Extensive evidence was adduced by the Federation concerning a large number of professions in order to show that they fell within the scope of the *Professional Category Regulations*, SOR/99-191 (hereinafter the “*Regulations*”). As for still photographers, they are artists referred to in subparagraph 6(2)(b)(i) of the *Act*. However, in the opinion of the Tribunal, the evidence that was before it in the certification proceedings concerning, among other things, the common interests of still photographers with the other members of the bargaining sector and the history of professional relations or to show that they should belong to a sector separate from those already granted by the Tribunal, including the sector of commercial photographers, was insufficient. On a review of the evidence, the Tribunal finds that it did not exclude evidence and that its conclusion was reasonable in the instant case.

Was the Tribunal’s analysis concerning the occupation of the sector reasonable?

[21] The purpose of the *Act* is to establish and implement a system of professional relations between producers under federal jurisdiction and artists as independent contractors. To this end, under subsection 26(1) of the *Act*, the Tribunal is responsible for determining the sectors that are suitable for bargaining and certifying artists’ associations to represent each of these sectors in light of the common interests of the artists, the history of professional relations and any geographic and linguistic criteria it considers relevant. Under paragraph 28(5)(a) of the *Act*, a certified association has the exclusive authority to bargain on behalf of the artists in the sector in question.

[22] As expressed by the Tribunal in its decision 1997 CAPPRT 026, at paragraph 23, concerning an application for review filed by the Conseil des métiers d’art du Québec:

... the framework governing professional relations between producers under federal jurisdiction and artists cannot be effective if there is a multiplicity of certified artists' associations in the same area. For this reason, the Tribunal endeavours to certify the artists' association that it considers the most representative of each artistic sector, 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.

[23] In Decision No. 041, the Tribunal concluded that three of its earlier decisions, especially the decision concerning CAPIC, created sectors that generally included the work of still photographers.

Conclusion regarding the sector

[24] In its decision 1996 CAPPRT 012, the Tribunal granted CAPIC a bargaining sector for the whole of Canada “composed of commercial photographers and commercial illustrators.” At paragraph 13, the Tribunal pointed out that:

CAPIC made it clear that it is only seeking to represent photographers and illustrators whose work is sold to clients who use these works for commercial purposes. These purposes include the promoting, advertising, and marketing in visual form of ideas, causes, concerns, entities (corporate or otherwise), products, goods and services. (Emphasis added.)

[25] Subsequently, in decision 1997 CAPPRT 021, the Tribunal granted RAAVQ a bargaining sector that also included photographers and that reads as follows:

... a sector composed of all professional independent contractors in the field of visual arts in Quebec who are authors of original artistic works of research or expression, either in single copy or a limited number of copies, that are commissioned or distributed by a producer subject to the *Status of the Artist Act* and expressed in the form of painting, sculpture, engraving, drawing, illustration, photography, textile art, installation, performance art, video art or any other form of expression of the same nature, excluding:

- a) independent contractors working in the fields of arts and crafts, film and audio-visual media;
- b) commercial photographers and commercial illustrators covered by the certification granted by the Canadian Artists and Producers Professional Relations Tribunal to the Canadian Association of Photographers and Illustrators in Communications on April 26, 1996 and in accordance with the terms of the agreement concluded between the Regroupement des artistes en arts visuels du Québec and the Canadian Association of Photographers and Illustrators in Communications on March 20, 1997; ...

[26] The Tribunal is of the view that its analysis in Decision No. 041 is reasonable and that the sectors that it has already certified, especially that granted to CAPIC, generally include the work of a still photographer.

[27] However, after considering all the new evidence submitted by the Federation and the comments made by CAPIC, the Tribunal is satisfied that still photographers in Quebec have more common interests with and have in the past been represented by the Federation and, in the case of Quebec, should be included in the sector represented by the Federation.

[28] Since the Tribunal has a duty to avoid overlapping between certified sectors, it must exclude from the definition of new sectors those that it has already

defined. Accordingly, the Tribunal is of the opinion that it must amend CAPIC's sector to remove the still photographers represented by the Federation.

[29] The Tribunal has already interpreted subsection 20(1) of the *Act*, which provides that: "The Tribunal may uphold, rescind or *amend* any determination or order made by it, and may re-hear any application before making a decision" [emphasis added], as conferring the necessary legislative authority on the Tribunal to amend any of its decisions (see, for example: *UDA/APASQ*, 1998 CAPPRT 025; *Conseil des métiers d'art du Québec*, 1998 CAPPRT 026, and *Writers' Union of Canada*, 2002 CAPPRT 039).

[30] This power was also confirmed by the Federal Court of Canada in its decision in *Latrémouille v. Canada (Canada Labour Relations Board)* (1985), 17 D.L.R. (4th) 709, 57 N.R. 188 (F.C.A.). In that decision, the Court confirmed that the CLRB (now the Canada Industrial Relations Board) may exercise its power to review and amend orders contained in section 18 of the *Canada Labour Code* (the wording of which is similar to that of subsection 20(1) of the *Act*) on its own initiative – that is to say that it is not necessary for a request to be made by a party in order to trigger the review process. Since the CLRB acts in the public interest, it is not necessary for it to wait until a request is made if it feels that one of its decisions needs to be reviewed.

[31] In the letter that it sent to the Tribunal, CAPIC stated that it did not wish to represent photographers when they work as still photographers. However, since CAPIC did not express its views concerning a diminution of its sector, the Tribunal gave it an opportunity to make other written submissions before it rendered its decision. CAPIC did not make any further submissions.

Decision

[32] For these reasons, the application for review to include still photographers in the sector represented by the Federation is granted. The Tribunal amends CAPIC's sector description to exclude the photographers from it when they work as still photographers in Quebec.

[33] As a result, the sector represented by the Federation will include all professional independent contractors engaged by a producer subject to the *Status of the Artist Act* to perform the function of assistant director, first assistant director, director of photography, camera operator, cameraman (including steady-cam, baby-boom, and camera operated through a specialized system [C.O.S.S.]), still photographer, lighting director, sound man, sound effects technician, computer graphics designer, computer graphics special effects technician, 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, hairstylist designer, supervising hairstylist, hairdresser, wig-maker,

costume designer, costumer, puppet designer, assistant art director, set designer, props designer, propsman crewleader, head painter, scenic painter, sculptor-molder, draughtsman, studio special effects technician, floor director or manager (excluding dubbing directors), production assistant, location manager, script-clerk, editor, off-line editor, in-line editor, sound editor, sound mixer, in all audiovisual productions shot primarily in the province of Québec, in any language, in all forms and in all mediums, including film, television, video, multimedia and the recording of commercials.

[34] A new certification order will be issued to reflect this decision.

[35] Henceforth, the sector represented by CAPIC shall include commercial photographers and commercial illustrators, excluding still photographers covered by the certification granted to the Federation consisting 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) (now known as the Alliance québécoise des techniciens et du son (AQTIS)).

[36] A new certification order will be issued to reflect this decision.

Ottawa, October 20, 2003

“David Silcox”

“Marie Senécal-Tremblay”

“Moka Case”