COURT FILE NO.: 07-CV-325277PD2
DATE: 2007-01-30

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Canadian Film and Television Production Association	John F. Rook, Q.C., James Knight and Julia Schatz, for the Applicant
Applicant	
- and -	
Alliance of Canadian Cinema, Television and Radio Artists, Stephen Waddell, in his capacity as national executive director of ACTRA and Richard Hardacre in his capacity as national president of ACTRA and as a representative of ACTRA members	Paul J. J. Cavalluzzo and Jeffrey M. Andrew, for the Respondents
Respondents	

Pepall J.

REASONS FOR DECISION

[1] The applicant, the Canadian Film and Television Production Association ("CFTPA"), is a not-for-profit trade association representing approximately 400 film and television producers across Canada, approximately 200 of which are located in Ontario. Its members engage artists and other key creative personnel in the film, television and interactive media industries. The respondent, Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA"), is a national organization that represents approximately 21,000 performing artists working in English language recorded media, including feature films, television, radio, digital media, corporate

videos and commercials. The respondent, Stephen Waddell is the national executive director of ACTRA and the respondent, Richard Hardacre, is the elected national president of ACTRA. CFTPA and ACTRA have had a bargaining relationship for over 40 years.

[2] CFTPA brings this application requesting an order that an arbitrator be appointed pursuant to the provisions of the Independent Production Agreement (the "IPA" or "Agreement") between CFTPA and ACTRA and injunctive relief including an order that ACTRA and its members be enjoined from effecting an unlawful withdrawal of services until they are in a legal position to do so in accordance with the terms of the Agreement, an order restraining ACTRA from unlawfully entering into continuation letters with CFTPA members, and an order suspending the continuation letters already executed between ACTRA and CFTPA members.[1]

The Agreement

[3] The parties and CFTPA's Quebec-based sister organization, l'Association des producteurs de films et de télévision du Québec ("APFTQ"), entered into the current Agreement effective January 1, 2004. It has an expiry date of December 31, 2006, but until the parties are entitled to legally terminate the terms of the IPA pursuant to its Negotiation Protocol, its provisions remain in full force and effect. Labour relations for independent production is an area of provincial jurisdiction but the Agreement is national in scope. It covers all productions in Canada except for productions in the French language and productions in British Columbia.[2] It is a "scale agreement", that is to say it provides for minimum terms and conditions under which a performer may be engaged by a producer who adheres to the Agreement.

[4] According to CFTPA, the IPA ensures uniformity and consistency across the provinces adhering to it and national standards are key to producers and performers given the high degree of mobility in the industry. It also permits one set of negotiations instead of eight or nine which

[1] This reflects the order requested in the factum rather than the larger scope of relief set out in the notice of application.

[2] French language productions are subject to negotiations between Union des Artistes and APFTQ. British Columbia productions are subject to a separate agreement with the Union of British Columbia Performers.

reduces costs. ACTRA also sees national bargaining processes as having value.[3] Both parties agree that they are bound by the IPA.[4]

[5] The IPA has never been determined to be or not to be a collective agreement within the meaning of the *Labour Relations Act* or other industrial relations statutes. CFTPA says it is not a collective agreement and ACTRA says it is. In a similar vein, ACTRA says it is a trade union and its members are employees and CFTPA says ACTRA is not a trade union and its members are independent contractors and not employees. Under the Agreement, ACTRA and CFTPA recognize the other as the exclusive bargaining agent of performers (a person who is engaged to appear on-camera or whose voice is heard off-camera) and identified producers respectively.

[6] The Agreement states that it "constitutes the entire agreement between the parties pertaining to the subject matter and supercedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, of the parties with respect to productions produced pursuant hereto. No supplement, modification, waiver or termination of the Agreement shall be binding unless executed in writing by the parties to be bound."

[7] Under Article B701 which is found in Part B of the Agreement, the parties agree to refer their disputes to arbitration. That article states,

> "Any differences between the Parties to this Agreement arising from the interpretation, application, administration, or alleged violation of the provisions of Articles B3 to B6 inclusive, or as otherwise provided for in this Agreement, shall be referred to final and binding arbitration. The Arbitrator shall be jointly selected by the relevant Producer's Association and ACTRA, and if the Parties fail to agree within twenty-one (21) days from the date of referral to arbitration, the Arbitrator shall be appointed by the federal Minister of Labour. The arbitration procedure shall be governed in all respects by the provisions of Appendix 11."

[8] Appendix 2 is entitled "Negotiation Protocol" and provides that it shall be in effect following the expiry of the term of the IPA. It expressly states that the terms of the Negotiation

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[3] Q105 of Mr. Waddell's cross-examination taken January 11, 2007. Recognition of the value of a national bargaining structure is also seen in reasons of OLRB member B. C. Armstrong in *Burns Meats Ltd* [1984] OLRB Rep August 1049 at 1058.

[4] Q72 of Mr. Waddell's cross-examination conducted on January 17, 2007.

Protocol govern the negotiations of the parties for the renewal of the Agreement. It was first negotiated into the IPA in 1995. As part of the Negotiation Protocol, the parties agree that:

- while bargaining continues and until the right to strike or to lock out has accrued pursuant to the Protocol, the terms and conditions of the IPA continue (Section 5);

- where a Party considers that reasonable efforts to enter into a new Agreement have been made, that Party may request the assistance of a conciliation officer. Written notice is to be given of the desire to obtain such assistance and shall contain the names of three potential conciliation officers. The responding Party may accept the appointment of one of the three or suggest alternatives. The first Party may then accept one of the alternative names or request the federal Minister of Labour to appoint a conciliation officer "as per section 71 of the *Canada Labour Code* R.S.C. 1985, c.L-2, as amended". The Parties agree to cooperate with the conciliation officer and to make every reasonable effort to enter into a new agreement. After the parties have met with the conciliation officer, and have made every reasonable effort to enter into a new agreement without success, either Party shall have the right to request a report from the conciliation officer (Section 6);

- ACTRA shall not declare or authorize a strike and CFTPA shall not declare or cause a lockout until the term of the Agreement has expired and until 15 days have elapsed from the date the report of the conciliation officer was sent to the Parties and the federal Minister of Labour (Sections 7.1 and 7.2);

- there shall be no strike against any producer nor any lockout by any producer on whose behalf the Associations have been authorized to negotiate, unless there is a strike against all producers or a lockout by all producers on whose behalf the Associations have been authorized to negotiate (Section 7.3);

- ACTRA may call a strike in compliance with the terms of the Protocol notwithstanding that ACTRA may not have complied with the statutory provisions of any labour legislation in any of the provinces or territories of Canada and further agree that ACTRA and its members may strike so long as the provisions of the Protocol have been adhered to. A comparable provision addresses a lockout by CFTPA (Sections 7.4 and 7.5);

- either party shall have the right to enforce the provisions of the Protocol either by reference to arbitration as set out in Appendix 11, or by application to any labour relations board or similar statutory tribunal in any province or territory. The Parties agree that a breach of the terms and conditions of the Protocol shall be a breach of the statutory duty to bargain in good faith in any jurisdiction, and such labour relations board or other statutory tribunal shall be

entitled to order what action any Party should take or refrain from taking in order to force compliance with the Protocol (Section 8).

[9] Appendix 11 is entitled "Dispute Resolution Mechanism". It contains "a complete set of provisions governing the arbitration procedure" in relation to disputes arising from the Negotiation Protocol and Part B of the Agreement.[5] It describes the extensive powers of the arbitrator to decide matters referred to her or him including deciding whether a person is a member of a trade union and whether a collective agreement has been entered into or is in operation. The arbitrator may make interim decisions and make orders "requiring compliance with provisions" of Appendix 11. Such orders may be enforced through registration with a court of competent jurisdiction. The arbitrator's decision is final and binding upon the Parties and may be judicially reviewed by a court of competent jurisdiction if the arbitrator has violated the rules of natural justice or if the arbitrator has committed a jurisdictional error.

[10] Both parties' historical approach to the IPA and its characterization have been marked by inconsistencies. ACTRA states that at no point has it agreed that the IPA Appendices either replace or supercede statutory requirements in respect of labour relations. It argues that the Negotiation Protocol has gaps in that it fails to recognize the need to go through the conciliation process in each Canadian jurisdiction where this is required as a precursor to a strike or lockout. It submits that CFTPA conducted itself as though the provincial labour statutes were applicable. In 1999, CFTPA filed applications with the OLRB that ACTRA was threatening an unlawful strike, was bargaining in bad faith, and was interfering with the administration of CFTPA as an employer's organization contrary to the *Labour Relations Act*, 1995. In the application, CFTPA stated that it had negotiated a collective agreement with ACTRA but that the IPA had never been found to be a collective agreement within the meaning of the *Ontario Labour Relations Act*. Consistent with the provisions of the Negotiation Protocol, CFTPA requested the federal Minister of Labour to appoint a conciliation officer which she did.

[5] It also covers disputes arising from Appendix 4 entitled "Preservation of Bargaining Rights".

Current Round of Negotiations

[11] On April 29, 2005, Mr. Waddell of ACTRA wrote to CFTPA stating that, "In accordance with Article E102 of the IPA, ACTRA hereby gives formal notice to CFTPA that we wish to renegotiate the terms, rates and conditions of the IPA". He suggested that the parties enter negotiations in March, 2006.

[12] In fact, discussions did not start until October 23, 2006. According to ACTRA, the delay was CFTPA's fault but this characterization is disputed by CFTPA. ACTRA states that CFTPA then tabled proposals for economic concessions and declined to provide financial information to justify its proposals. On October 24, 2006, ACTRA asked the Ontario and federal Ministers of Labour to appoint a conciliation officer pursuant to the *Labour Relations Act, 1995* and the *Canada Labour Code*. It made subsequent requests to other labour ministries in other provinces. CFTPA states that this contravened the Negotiation Protocol in that ACTRA did not first provide notice of its desire to conciliate nor did it provide CFTPA with the names of three conciliators for consideration thereby causing the parties to lose the opportunity to find the right person who was sensitive to the industry. The Negotiation Protocol also provides certain timing requirements. The parties are not entitled to strike or lock out until 15 days have passed since receipt of the conciliation report. Lastly, APFTQ is unwilling to participate in any negotiation, mediation or conciliation that is statutorily mandated, either by the federal government or by any provincial government outside of Quebec. ACTRA argues that conciliation is not mandatory under the terms of the Negotiation Protocol.

[13] Various e-mails were exchanged between Mr. Barrack of CFTPA and Mr. Waddell of ACTRA. Mr. Barrack noted that if the IPA were considered to be a collective agreement, provincial laws would have to be respected. He referred to the conciliation process in the Negotiation Protocol which he described as a consensus based document. On October 30, 2006, CFTPA wrote to the Ontario Ministry of Labour taking the position that ACTRA's request for conciliation was premature. It said that CFTPA would be filing a complaint before the Ontario Labour Relations Board ("OLRB") that ACTRA had failed to meet its obligations under the *Labour Relations Act, 1995* to bargain in good faith and in an effort to conclude a new collective

agreement. On October 31, 2006, the Ontario Ministry responded that the existence of a bad-faith bargaining complaint would not affect its obligation to appoint a conciliation officer. On November 1 and November 14, 2006, the Ontario and federal Ministers of Labour appointed Reg Pearson as conciliation officer and other officers were appointed in other provinces. On November 2, 2006, CFTPA filed its complaint under the *Labour Relations Act* with the OLRB accusing ACTRA of bad faith bargaining. On November 14, it asked to withdraw the complaint which was permitted by the OLRB over ACTRA's objection. CFTPA said that the filing of the complaint was a mistake.[6]

[14] On November 14, 2006, counsel for CFTPA advised Mr. Pearson that absent a ruling from a recognized adjudicative authority or a court, CFTPA would not be taking part in any conciliation process in Ontario. Counsel wrote that CFTPA was committed to the Negotiation Protocol and that the parties' Agreement did not contemplate a unilateral conciliation request. CFTPA wrote similar letters to conciliators appointed in other provinces.

[15] Bargaining occurred on November 14, November 28 and 29, 2006. On December 7, 2006 CFTPA advised ACTRA that it was in violation of the Negotiation Protocol and that CFTPA was proceeding with the enforcement mechanism found in Article 8. CFTPA put forward two alternatives: agree on an arbitrator or CFTPA would apply to every labour board in the country. CFTPA proposed Mr. Rick MacDowell or Bill Kaplan as an arbitrator pursuant to Article 8 of the Negotiation Protocol. Mr. MacDowell, a former chair of the OLRB, had been accepted by the parties in the past as an arbitrator under the IPA and was named as an acceptable individual under the IPA to provide assistance to the parties in respect of disputes under other unrelated sections of the Agreement. On December 8, 2006, ACTRA rejected the request as conciliators had been appointed. It made a complaint to the OLRB that CFTPA had violated the *Labour Relations Act* by failing to bargain in good faith particularly with respect to its obstruction of the conciliation process. CFTPA replied by stating that the OLRB did not have jurisdiction to deal with ACTRA's complaint; it was without merit and ACTRA had violated the Negotiation Protocol. CFTPA advised the OLRB that it was prepared for it to take jurisdiction over the issues in dispute pursuant to the Negotiation Protocol.

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[6] Q37 of cross-examination of Mr. Barrack of CFTPA conducted on January 17, 2007.

[16] On December 8, relying on Article 8 of the Negotiation Protocol, CFTPA applied to various labour relations boards across the country, including the OLRB, asking them to assume jurisdiction regarding issues related to the enforcement of the Negotiation Protocol. On December 11, the federal Minister of Labour issued a no board report meaning that the federal conciliator had reported and that once 21 days had elapsed, the parties would be in a legal position to strike or lock out.[7]

[17] That same day, ACTRA wrote to the various labour boards in response to CFTPA's letter. ACTRA stated that the boards did not have jurisdiction at this time and that the Negotiation Protocol did not come into effect until December 31, 2006, if at all. In addition, the "interpretation issue should probably be the subject of a grievance under the collective agreement in operation." In that regard, ACTRA's counsel referred to the Grievance and Arbitration Procedure provisions of the IPA. She wrote, "Under clause A1004(b), the Arbitrator appointed to hear the difference has exclusive jurisdiction to exercise the powers conferred upon him or her by the IPA but also to determine all questions of fact and law that arise in any matter before him or her." She went on to write that the matter raised by CFTPA was a matter that fell under the IPA and was subject to the dispute resolution mechanisms under the IPA. Furthermore, the interpretation of the Negotiation Protocol fell outside the jurisdiction of provincial labour boards as,

(a) any interpretation of the IPA was subject to the Grievance and Arbitration procedure under the IPA,

(b) the Negotiation Protocol was not in effect, if at all, until December 31, 2006 and the Negotiation Protocol remained in effect following the expiry of the term of the IPA.

Lastly, she stated that Article 8 of the Negotiation Protocol permitted the parties to enforce the provisions of the Negotiation Protocol by reference to arbitration "which in ACTRA's view is

[7] Although CFTPA states that the federal Minister of Labour did not hold any conciliation meeting. See para. 37 of affidavit of Mr. Barrack sworn January 8, 2007.

the appropriate mechanism for interpretation of the parties' obligations". No labour board responded affirmatively to CFTPA's request to assume jurisdiction with respect to enforcement of the Negotiation Protocol.

[18] On December 12, 2006, CFTPA wrote to Mr. Pearson stating that the *Labour Relations Act* relating to the conciliation process had no application. It asked the Ontario Minister of Labour to refer the question of jurisdiction to the OLRB under section 115(1) of the *Labour Relations Act* and asked ACTRA to join in such a request. ACTRA refused asserting it was a delay tactic. On December 13, 2006, Mr. Pearson convened a conciliation meeting and on December 14, 2006, ACTRA requested a no board report. Mr. Pearson provided such a report on December 15, 2006. He did not refer the issue of jurisdiction to the OLRB as requested and CFTPA did not request judicial review of that decision. On December 14, 2006, CFTPA sought the intervention of the federal Minister of Labour to appoint an arbitrator pursuant to Article B701 of the IPA. Counsel for ACTRA opposed the request on December 18, 2006. She advised that ACTRA had filed an unfair labour practice complaint with the OLRB and CFTPA had replied.[8] She stated that the issue of the parties' good faith was before the OLRB and would be adjudicated there unless the matter was resolved. She requested that the federal Ministry decline to take any steps so as to avoid a multiplicity of proceedings and because there was no jurisdiction under the *Canada Labour Code* to force an arbitration on these issues. On December 22, 2006, on a urgent basis, ACTRA sought leave to withdraw its unfair labour practice complaint which was granted by the OLRB over CFTPA's objection. ACTRA states that it had concluded it was unnecessary as the right to strike would arise in one week. The OLRB said that if CFTPA had issues it wished to have adjudicated it could pursue its own application. ACTRA did not advise the federal Minister that it had withdrawn its application.

[19] On December 29, 2006, the federal Ministry of Labour advised that it refused to appoint an arbitrator. By the end of December, the parties had migrated from an expression of concern about a multiplicity of proceedings by ACTRA's counsel to no proceedings at all.

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[8] This presumably referred to the December 8, 2006 ACTRA complaint.

[20] On January 1, 2007, ACTRA took the position that it was in a legal strike position based on the "no board" reports issued by the Ontario and federal Ministers of Labour. Its members voted 97.6% in favour of a strike. It commenced the strike in Ontario, Saskatchewan and Manitoba on January 8, 2007 and in Quebec on January 10, 2007. On January 8, 2007, CFTPA again asked ACTRA to agree to the appointment of an arbitrator without success. The court application was commenced on January 8, 2007. Up to that point, the parties had met on October 24, November 14, 28 and 29 and December 8, 13-15 and 18-20, 2006 and January 3-7, 2007.

[21] Continuation agreements, also known as interim or safe harbour agreements, had been used by the parties since 1995 with a view to promoting stability during bargaining. In the past, the agreements continued the engagement of performers on the same terms as provided for in the IPA and new IPA rates would be paid retroactively once settled. This time, the parties were unable to agree on the terms of a continuation agreement. ACTRA proposed a continuation agreement for CFTPA's review. It required producers to increase general fees by 5%, insurance benefits by 1%, and retirement benefits by 1% while the IPA was being renegotiated. CFTPA told ACTRA that such an agreement was unacceptable. It says that ACTRA's proposal had the effect of imposing ACTRA's demands for fee and benefits increases unilaterally and that its actions are contrary to the Negotiation Protocol. ACTRA has proceeded with these terms in any event and has negotiated agreements directly with individual producers which CFTPA says is also contrary to the Negotiation Protocol. Although ACTRA is on strike, there has been no withdrawal of services. All current productions are continuing.

Positions of the Parties

[22] The applicant applies for an order that an arbitrator be appointed as provided for in the IPA and pursuant to the *Arbitrations Act, 1991* to determine if ACTRA has breached the IPA. It states that ACTRA has and that differences arising from an alleged violation of the IPA may be referred to arbitration. CFTPA states that ACTRA has failed to follow the conciliation process established in the Protocol and is claiming it is entitled to strike in certain provinces when it is not. ACTRA is striking some producers and not all in contravention of the requirements of the

Protocol that any strike be against all producers. It has also directly negotiated with CFTPA members to enter into continuation agreements, also contrary to the provisions of the Protocol. CFTPA's position is that performers are not employees and therefore it resists bringing an application before the OLRB when it disputes the OLRB's jurisdiction. The applicant seeks injunctive relief restraining ACTRA and its members from striking until such time as the arbitrator determines their entitlement to do so, restraining ACTRA from unlawfully entering into continuation letters with CFTPA members and an order suspending the continuation agreements entered into by ACTRA and various producers. CFTPA states that through its conduct in these negotiations, ACTRA is attempting to create conditions of instability that will ground its lobbying efforts to bring into force *Status of the Artist* legislation in Ontario and other jurisdictions. Such legislation exists in Quebec and federally and provides performers with certain statutory protections enjoyed by employees. Amongst other things, it gives collective bargaining rights to independent artists.

[23] The respondents take issue with this characterization and state that the parties' dispute is rooted in their failure to conclude a renewed IPA and in CFTPA's conduct. The respondents state that the application for the appointment of an arbitrator should be dismissed because the court lacks jurisdiction based on section 48(20) of the *Labour Relations Act, 1995*. That subsection states that the *Arbitration Act, 1991* does not apply to collective agreements and ACTRA takes the position that the IPA is a collective agreement. They also submit that CFTPA has failed to establish that an injunction should issue with respect to this labour dispute which they state is governed by section 102 of the *Courts of Justice Act*. ACTRA maintains that it has complied with the Negotiation Protocol and the statutory preconditions for calling a strike under the *Ontario Labour Relations Act*. It has taken the position that it is required to comply with the labour legislation in each province,[9] and states that the IPA and provincial labour laws are complementary.[10]

[9] Q127 of cross-examination of Mr. Waddell of ACTRA conducted on January 17, 2007.
[10] Qs 160 and 461 of cross-examination of Mr. Waddell of ACTRA conducted on January 17, 2007.

Discussion

(a) Arbitration

[24] No real issue is taken by the respondents that CFTPA and ACTRA agreed under the IPA to refer certain differences to arbitration. This is seen from the aforementioned Article B701 of the IPA and from Article 8.1 of the Negotiation Protocol which states that either party has the right to enforce the provisions of the Negotiation Protocol by reference to arbitration as set out in Appendix 11. It is also clear from a reading of the IPA that the terms and conditions of the Negotiation Protocol remain in effect after the expiry of the term of the IPA. Appendix 11 addresses the dispute resolution mechanism and delineates the powers of the arbitrator which include determining whether a member is a trade union and whether a collective agreement has been entered into and is in operation.

[25] The applicant takes the position that it is unnecessary for me to make a determination as to the existence of a collective agreement as that term is defined in the *Labour Relations Act* as the parties chose to have questions decided under the terms of the IPA including whether a collective agreement has been entered into and whether any person or organization is a party to, or bound by, a collective agreement. Furthermore, the OLRB would hold the parties to their bargain in any event: *Ontario Nurses' Assocation v. The Grey-Owen Sound Health Unit.*[11] CFTPA relies on the IPA itself and section 10(1)b of the *Arbitrations Act*, 1991 which states that the court may appoint the arbitral tribunal if a person with power to appoint the tribunal has not done so after a party has given the person seven days notice to do so.

[26] CFTPA first attempted to exercise the second option under Article 8 of the Negotiation Protocol, namely a request to the labour relations boards across the country (excluding British Columbia) asking them to take jurisdiction of the dispute. In response, ACTRA's counsel asked the OLRB not to take jurisdiction over the matter citing amongst other things, the arbitration provision in Article 8 of the Negotiation Protocol as "the appropriate mechanism for interpretation of the parties' obligations."

[11] [1979] OLRB Rep 751 (eL).

[27] As mentioned, on December 7, 2006, CFTPA proposed names of potential arbitrators to ACTRA. ACTRA, through its counsel, rejected the request and CFTPA suggested ACTRA propose a different arbitrator which it has not done. On December 14, 2006, CFTPA wrote and formally requested that the federal Minister of Labour appoint an arbitrator. ACTRA objected stating that the issue of the parties' good faith in these negotiations under the IPA was currently before the OLRB and requested that the federal Minister "decline to take any steps in this matter to avoid multiplicity of proceedings, and because there is no jurisdiction under the *Code* to force an arbitration on these issues". Four days later, ACTRA obtained leave to withdraw its proceeding before the OLRB. On December 29, 2006, the parties were advised that the federal Minister declined to appoint an arbitrator. It is conceded that ACTRA did not advise the federal Minister that it had withdrawn its OLRB application on December 22, 2006. On January 8, 2007, CFTPA again requested that ACTRA agree to an arbitrator without success.

[28] It is the respondents' position, however, that the IPA is a collective agreement and that ACTRA's members are employees who are subject to the Ontario *Labour Relations Act, 1995*. Furthermore, they argue that the Negotiation Protocol contains gaps and provisions which are inconsistent with labour relations legislation. For example, they state that it fails to expressly recognize the requirement to go through the conciliation process in each Canadian jurisdiction where this is required as a precursor to a strike or lockout and suggests instead that the federal minister alone has supervisory jurisdiction over the conciliation process.

[29] The respondents state that the *Rights of Labour Act* defines a collective bargaining agreement as "an agreement between an employer and a trade union setting forth terms and conditions of employment" and provides that "a collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of this *Act* or of the *Labour Relations Act*". As section 48(20) of the *Labour Relations Act* provides that the *Arbitration Act, 1991* does not apply to arbitrations under collective agreements, the court has no jurisdiction to appoint an arbitrator under the *Arbitration Act, 1991*. Section 2(1) of the *Arbitration Act, 1991* states that it applies to an arbitration conducted under an arbitration agreement unless the application of the *Act* is excluded by law.

[30] Like counsel for CFTPA but for different reasons, on behalf of ACTRA, Mr. Cavalluzzo in argument submitted that the court should decline to make a determination of whether the IPA is a collective agreement. He stated that I should dismiss the application or stand it down until the OLRB, which has extensive expertise in the area, has made a determination. It is ACTRA's position that pursuant to the *Labour Relations Act*, 1995, the OLRB has exclusive jurisdiction to exercise the powers conferred upon it by or under the *Act* and to determine all questions of fact or law that arise in any matter before it.

[31] There is currently no proceeding relating to these parties before the OLRB or other labour board.

[32] The Supreme Court of Canada has repeatedly noted the deference accorded to the decisions and jurisdiction of labour boards given their expertise and specialization. In addressing a privitive clause, Dickson J. (as he then was) stated in *CUPE, Local 963 v. New Brunswick Liquor Corp,*[12]

> "The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area."

See also *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057,*[13] *I.L.W.U. Local 514 v. Prince Rupert Grain Ltd.,*[14] *Royal Oak Mines Inc. v. Canada Labour Relations Board,*[15] and *AG Canada v. Public Service Alliance of Canada.*[16]

[33] That said, in this case, the parties by agreement have fashioned their own remedy. Indeed, they expressly stipulated that an arbitrator had the power to determine whether a collective agreement has been entered into. There has never been an adjudication of that issue

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[12] [1979] 2 S.C.R. 227.
[13] [1990] 1 S.C.R. 1298.
[14] (1996) 135 D.L.R. (4th) 385.
[15] (1996), 133 D.L.R. (4th) 129.
[16] (1993) 101 D.L.R. (4th) 673.

and it is not obvious to me that the *Labour Relations Act* and other labour statutes are applicable as submitted by ACTRA. In the face of the very express provisions in the IPA, I am hard pressed to accept that I should dismiss the application or "stand it down" as suggested by Mr. Cavalluzzo. The parties expressly turned their minds to the issue of dispute resolution and gave the arbitrator the power to decide whether a collective agreement had been entered into. It seems to me that I should give effect to the parties' consensual dispute resolution process and that an arbitrator should be appointed. In section 17, the *Arbitration Act, 1991* provides that the arbitrator may rule on his or her own jurisdiction to conduct the arbitration. Furthermore, as recently as December 11, 2006, ACTRA took the position that the arbitration provision in Article 8 of the Negotiation Protocol was the appropriate mechanism for interpretation of the parties' obligations. In spite of efforts to appoint an arbitrator, CFTPA has been unsuccessful.

[34] In the face of all of these circumstances, I accept CFTPA's request for an order that an arbitrator be appointed. I am persuaded that the parties agreed to the appointment of an arbitrator and that they should be held to their agreement in this regard. That said, this decision should not be interpreted as necessarily precluding the jurisdiction of the labour boards across the country. If the IPA is determined to be a collective agreement and the performers are considered to be employees, a very different scenario may be applicable.[17]

[35] No evidence nor submissions were advanced as to who should be appointed as arbitrator. If the parties are unable to agree on an arbitrator or to agree on a process to select an arbitrator, they are to reattend before me at a 9:30 a.m. appointment to be scheduled on request.

Request for Injunctive Relief

[36] In its factum, the applicant has particularized the relief it is now requesting with respect to injunctive relief. It states that while an arbitrator is being appointed, ACTRA should be ordered to refrain from unlawfully entering into continuation letters with CFTPA members, letters already signed should be suspended, and ACTRA should be ordered to refrain from

[17] See for example *The American League and the National League of Professional Baseball Clubs and the Toronto Blue Jays Baseball Club* [1995] OLRB Rep April 540 and *National Basketball Association* [1995] OLRB Rep November 1389.

striking until such time as the arbitrator determines whether it is in a legal position to do so. The applicant states that ACTRA has failed to follow the conciliation process established in the Negotiation Protocol and is claiming it is entitled to strike. It has negotiated and entered into continuation agreements contrary to the provisions of the IPA. CFTPA says that ACTRA's behaviour in this regard should be restrained.

[37] ACTRA states that the request for an injunction should be dismissed for the following reasons: the court has no jurisdiction to make any determination as to whether the strike is unlawful as this is a matter for the OLRB; CFTPA cannot seek an injunction under section 101 of the *Courts of Justice Act* as the matter concerns a labour dispute and therefore is governed by section 102 of the *Courts of Justice Act*; CFTPA has failed to make out a strong prima facie case; it has not established irreparable harm; and the balance of convenience favours ACTRA. ACTRA argues that if it is enjoined from concluding continuation agreements with individual producers, this would lead to irreparable harm as the injunction would "chill" the industry by preventing the continuation of existing productions and the commencement of more productions.

[38] In my view, it is unnecessary to address each argument in turn as based on the record before me and at this time, the applicant has failed to establish irreparable harm. The evidence discloses, and it is undisputed, that there has been no withdrawal of services by ACTRA. All existing productions are continuing. Furthermore, I am not persuaded that the concerns relating to the continuation agreements do not sound in damages. In addition, while courts should avoid taking a narrow view of irreparable harm, I am of the opinion that there is insufficient evidence upon which to base the granting of injunctive relief. Much of the evidence in support consists of bald assertions, speculation and suggestions of harm that are rather amorphous in nature or lacking in detail or specificity. For instance, Mr. Barrack of CFTPA deposes that he has been advised by representatives from Sony Pictures and Walt Disney Motion Pictures Group that they have declined to film certain sequels in Montreal and Toronto respectively "for fear of a strike or lockout" and that filming will "likely be shifted" to certain US states. This is wholly insufficient

to ground the granting of an injunction which is, of course, an extraordinary remedy. As noted by Justice Anderson in *Trailmobile Canada Ltd. v. Merrill*,[18]

> "This motion founders on the requirement to show prospective irreparable injury. The plaintiff's material contains the customary bald assertion as to such injury. Such an assertion is really a conclusion and is valueless save to the extent that it is buttressed by evidentiary facts, which, in my view, are lacking."

I also observe that the applicant is not seeking to deprive ACTRA of the right to strike. Rather, it seeks to have ACTRA comply with the Negotiation Protocol before it exercises its right to strike. The applicant's request for injunctive relief is dismissed.

Conclusion

[39] In conclusion, CFTPA's request for the appointment of an arbitrator is granted and its request for injunctive relief is refused. If the parties are unable to agree on costs, they may make written submissions.

D. Pepall J.

Pepall J.

Released: January 30, 2007

[18] [1983] O.J. No. 1123.

COURT FILE NO.: 07-CV-325277PD2
DATE: 2007-01-30

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Canadian Film and Television Production Association

- and –

Alliance of Canadian Cinema, Television and Radio Artists, Stephen Waddell, in his capacity as national executive director of ACTRA and Richard Hardacre in his capacity as national president of ACTRA and as a representative of ACTRA members

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REASONS FOR DECISION

PEPALL J

Released: January 30, 2007