

Canadian Artists and Producers
Professional Relations Tribunal



Tribunal canadien des relations
professionnelles artistes-producteurs

CANADA

Ottawa, April 8, 2002

File No.: 1330-01-003

Decision No. 38

**In the matter of a complaint
filed by Mr. Patrick Christopher against
the Canadian Actors' Equity Association and Ms. Susan Wallace**

Decision of the Tribunal:

The preliminary objection regarding the constitutional jurisdiction of the Tribunal is upheld. The complaint is dismissed for lack of jurisdiction.

Place of hearing: Ottawa, Ontario

Date of hearing: March 7, 2002

Quorum: David P. Silcox, Chairperson
Marie Sénécal-Tremblay, member
John M. Moreau, member

Reasons for decision

1330-01-003: In the matter of a complaint filed by Mr. Patrick Christopher against the Canadian Actors' Equity Association and Ms. Susan Wallace

Background

[1] This decision concerns a preliminary objection raised in a complaint submitted to the Canadian Artists and Producers Professional Relations Tribunal pursuant to section 53 of the *Status of the Artist Act* ("the *Act*") by Mr. Patrick Christopher ("Christopher"), a former member of the Canadian Actors' Equity Association ("Equity"), against Equity and Ms. Susan Wallace, the association's Executive Director ("the Respondents").

[2] Equity is an artists' association that has been certified by the Tribunal to represent performers in the live performing arts, as defined in *Canadian Actors' Equity Association*, 1996 CAPPRT 010.

[3] Christopher is the Artistic Director of Shakespeare by the Sea ("SBTS"), a local theatre company in Halifax, Nova Scotia. Christopher was the subject of a formal complaint brought by an actor formerly employed by SBTS and by Equity in its own right, pursuant to Equity's Constitution and By-laws. This complaint alleged that Christopher had breached Equity's rules regarding the professional conduct of its members.

[4] Following a hearing of this formal complaint, Christopher was expelled from Equity, the hearing committee concluding that Christopher had indeed breached the association's Constitution and By-laws. Christopher appealed this decision to Equity's National Council, but the appeal was dismissed.

[5] Christopher alleges that the Respondents have applied Equity's Constitution and By-laws in relation to the formal complaint in a manner contrary to the principles of natural justice and have, in doing so, breached section 35 of the *Act* respecting an artists' association's duty of fair representation, and section 51(d) of the *Act* respecting an artists' association's obligation not to apply its standards of discipline to an artist in a discriminatory manner. As a preliminary objection, the Respondents argue that the Tribunal does not have the required constitutional jurisdiction to entertain the complaint.

[6] The Tribunal advised the parties that it wished to decide the preliminary objection on the basis of written representations unless the parties provided a compelling reason to justify an oral hearing. The Tribunal provided the parties with an opportunity to file additional written submissions respecting the preliminary objection. Neither party requested an oral hearing and both declined to file additional submissions. Accordingly, the Tribunal proceeded with the analysis of the constitutional question on the basis of the initial material filed by the parties.

[7] As the preliminary objection involved a constitutional question, the Respondents provided notice of the objection to the Attorney General of Canada and the attorney general of each province in accordance with section 57 of the *Federal Court Act* (R.S.C.

1985, c. F-7). The Tribunal advised the attorneys general that it intended to decide this matter on the basis of written submissions and requested that all submissions, if any, be filed on or before February 26, 2002. No submissions were received from the attorneys general.

Arguments for the Respondents

[8] The Respondents submit that, although Equity is an association certified under the *Act* to represent artists in their professional relations with producers who are subject to the *Act*, the complainant was not, at any relevant time, engaged by such a producer.

[9] The Respondents further submit that the material events that form the subject matter of the complaint are all part of an internal Equity process. In addition, as Equity is a voluntary association operating by virtue of a contract of membership having no connection to any federal power listed under section 91 of the *Constitution Act, 1867*, U.K. 30 & 31 Victoria, c.3, its activities are therefore under exclusive provincial jurisdiction. As well, the events that led to the decision to expel Christopher from Equity all took place within the artistic season of SBTS, a local theatre company. Accordingly, there can be no federal regulation of SBTS's operation, organization or employment relations.

[10] According to the Respondents, the only apparent basis for the complaint being heard by the Tribunal is the connection stemming from Equity's certification under the *Act*. They argue that this certification is not sufficient to give rise to federal jurisdiction over the present complaint, as Equity and SBTS do not fall under the legislative authority of Parliament.

[11] In the absence of a connection to a federal undertaking, the Respondents maintain that "the regulation of the employment contract or other forms of private contract falls exclusively to the provincial legislature" and that, "consequently, an attempt to extend the reach of the legislation to cover private contracting relationships such as the one that exists among members of Equity is *ultra vires* Parliament." In support of their argument, the Respondents rely on the Canada Labour Relations Board decision in *Finn et al. v. Canadian Brotherhood of Railway, Transport and General Workers* (1982) 47 di 49.

Arguments for the Complainant

[12] In his answer to the Respondent's objection, Christopher argues that the absence of legislation similar to the *Status of the Artist Act* in Nova Scotia provides the Tribunal with the discretion to accept jurisdiction over this complaint. In his view "it is generally accepted practice to consider [Equity's] jurisdiction as federal rather than provincial."

[13] Christopher also maintains that the Canada Labour Relations Board's decision in *Finn, supra*, is not applicable to the present case as it originates from a different tribunal and stems from a complaint made by a member against a union rather than against a voluntary organization as in the present case.

[14] Christopher further submits that one purpose of the certification process under the *Act* must be to establish a “line of accountability to ensure that certified organizations [...] are implementing their [constitution], by-laws and agreements fairly.” This line of accountability stands as the only deterrent against the arbitrary application of an organization’s rules against its members, and that, were the Respondents’ preliminary objection to be upheld, he would be without recourse in the present case.

Issue

[15] The preliminary objection raises the following question:

1. Can the federal Parliament enact legislation that governs the relationship between an artists’ association and one of its members, regardless of whether the artist is engaged by a producer subject to the *Act*?

Legislation

[16] The following provisions of the *Act* are relevant to the present circumstances:

6. [...]

(2) This Part applies

(a) to the following organizations that engage one or more artists to provide an artistic production, namely,

(i) government institutions listed in Schedule I to the *Access to Information Act* or the schedule to the *Privacy Act*, or prescribed by regulation, and

(ii) broadcasting undertakings, including a distribution or programming undertaking, under the jurisdiction of the Canadian Radio-television and Telecommunications Commission; and

[...]

18. The Tribunal shall take into account

(a) in deciding any question under this Part, the applicable principles of labour law, and

[...]

35. An artists' association that is certified in respect of a sector, or a representative thereof, shall not act in a manner that is arbitrary, discriminatory

or in bad faith in the representation of any of the artists in the sector in relation to their rights under the scale agreement that is applicable to them.

51. No certified artists' association or person acting on behalf of such an association shall

[...]

(d) take disciplinary action against or impose any form of penalty on an artist by applying the standards of discipline of the association to that artist in a discriminatory manner;

[...]

53. [...]

(3) The Tribunal shall hear a complaint made under subsection (1), unless the Tribunal is of the opinion that the complaint

[...]

(b) is not within the Tribunal's jurisdiction, or could be referred by the complainant to an arbitrator or arbitration board, pursuant to a scale agreement.

[17] The following provisions of the *Constitution Act, 1867*, U.K. 30&31 Victoria, c.3 (the "*Constitution Act*"), are relevant to the present circumstances:

**VI. Distribution of Legislative Powers
Powers of the Parliament**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; [...]

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that it to say

[...]

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

[...]

13. Property and Civil Rights in the Province.

Analysis and Conclusion

[18] In interpreting any question that arises under Part II of the *Act*, the Tribunal is guided by the applicable principles of labour law (paragraph 18(a) of the *Act*). An essential component of federal labour law is Parliament's legislative authority in this area of law. In this respect, the Tribunal endorses the statements of the Canada Labour Relations Board, as it was then, in *Finn et al. v. Canadian Brotherhood of Railway, Transport and General Workers* (1982), 47 di 49, at pp. 63-64:

Labour relations practitioners are by nature practical persons and the niceties of constitutional law have not normally altered their goals in collective bargaining structures. (...) Labour boards sometimes assume jurisdiction when there is no one opposing the certification. (...)

But the dictates of judicial decision-makers must remain the Board's final guide. We said this in an earlier decision in the following terms:

"Members of labour relations boards, whether they be full time or part time, and whether they be on a tripartite board or a non-representational board, like this Board, are not appointed because of their competence in the field of constitutional law. Notwithstanding this some considerable expertise is developed in some cases. (...) What the Boards frequently seek to find is a 'practical' and 'functional' solution. In this respect the nature of the judgment may be more labour relations oriented than activity focused as in the courts. This is not to say the Boards do not follow the judicial decisions. They do even if they disagree or find it makes little labour relations sense."
(Northern Telecom Canada Limited, *supra*, pp. 76-77; and 150)

[19] Both sections 35 and 51(d) of the *Act* are provisions that govern the relationship between an artists' association and its members. The Respondents argue that because a connection between Christopher and a producer subject to the *Act* does not exist, the Tribunal lacks jurisdiction over the complaint.

[20] Case law indicates that voluntary associations such as trade unions and artists' associations come within the provincial sphere of authority pursuant to subsection 92(13) of the *Constitution Act 3-* property and civil rights. Provincial authority is generally accepted to flow from the fact that the organizational foundation for voluntary associations rests on the contractual bonds between its members (see *Orchard v. Tunney*, [1957] S.C.R. 436) and that it is generally accepted in Canadian constitutional law that "the law of contracts is mainly within provincial power under property and civil rights in the province" (see Hogg, P.W., *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough: Carswell, 1997) at p. 21-21). Accordingly, as the Respondents have asserted, Equity is an organization that ordinarily comes under provincial jurisdiction and a federal agency such as the Tribunal does not have the *prima facie* authority to intervene in its internal affairs.

[21] Federal Parliament does, however, have authority to legislate in the sphere of labour relations where the legislation regulates the relationship between an individual and a federal undertaking. In order to qualify as a federal undertaking, an operation must come within one of the class of subjects assigned to the federal sphere by section 91 of the *Constitution Act*.

[22] There is no doubt that the federal Parliament has exclusive authority to regulate labour relations in the federal public sector (see *Canada (Attorney General) v. St. Hubert Base Teachers' Assn.*, [1983] 1 S.C.R. 498). Accordingly, the *Act* can govern labour relations between federal departments and agencies and artists, as indicated in subparagraph 6(2)(a)(i). Federal Parliament also has jurisdiction over broadcasting undertakings, as identified in subparagraph 6(2)(a)(ii) of the *Act*, by virtue of Parliament's power over peace, order and good government (see the opening words of section 91 of the *Constitution Act*) and its power over interprovincial undertakings pursuant to section 92(10)(a) of the *Constitution Act*.

[23] Parliament's jurisdiction to regulate in the field of labour relations has been interpreted to include legislation that oversees the relationship between unions and their members. As the Federal Court of Appeal in *International Longshoremen's and Warehousemen's Union, Local 502 v. Terrance John Matus and Canada Labour Relations Board* [1982] 2 F.C. 549 (F.C.A.) stated at paragraph 6:

(...) The authority of Parliament in the field of labour relations is not limited to the direct determination of the conditions of work of persons employed in connection with federal undertakings; it extends to the enactment of legislation appropriate to establish "a system of collective bargaining and statutory provisions for settlement of disputes in labour relations". (...). Trade unions are a necessary element of such a system. For that reason, the Parliament of Canada has, in my opinion, the authority to legislate so as to ensure that persons employed in connection with federal undertakings are not unjustly deprived of their right to join the union of their choice. (...)

[24] Parliament's authority in the field of labour relations, in terms of internal union affairs, depends on the existence of a connection between an employee, member of the union, and a federal undertaking. In determining the federal Parliament's authority to enact legislation governing the relationship between unions and their members, the then Canada Labour Relations Board stated in *Finn et al., supra* at pp. 67-68:

(...) Parliament's competence to legislate as it has in sections 185(f) and (g) is dependent upon the union's status as a bargaining agent for the employee employed upon or in connection with a federal work, undertaking or business, not an independent authority to regulate the internal union affairs of unions *per se*.

[25] Accordingly, without a nexus to a federal undertaking, it is our view that Parliament is without authority to enact legislation governing the relationship between unions and their members. This reasoning would apply equally to artists' associations and their members under the *Act* as Parliament cannot legislate over matters that do not come within its constitutional jurisdiction. Once the issue is raised, the question that the Tribunal must determine is whether a nexus between Christopher and a federal

undertaking exists with respect to either section 35 or section 51(d) of the *Act*, providing it with jurisdiction over the present complaint.

Section 35 of the Act

[26] Section 35 of the *Act* governs the relationship between an artists' association and the artists it represents by virtue of its certification with the Tribunal, often referred to as the "duty of fair representation". It states:

35. An artists' association that is certified in respect of a sector, or a representative thereof, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the artists in the sector in relation to their rights under the scale agreement that is applicable to them.

[27] The corresponding provision under the *Canada Labour Code* (R.S.C. 1985, c. L-2) is section 37. In interpreting an earlier version of that section, the Supreme Court of Canada described a union's duty of fair representation as follows in *Canadian Merchant Guild* [1984] 1 S.C.R. 509 at p. 527:

The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

[28] This passage refers to the duty that a union owes to the employees of a bargaining unit. However, as stated above, paragraph 18(a) directs the Tribunal to take into account the applicable principles of labour law when determining any question under Part II of the *Act*. Accordingly, this description of the duty of fair representation applies likewise to artists' associations and artists in the bargaining sector that the association has been certified to represent.

[29] As section 35 of the *Act* stipulates, the duty owed by an artists' association to an artist must involve rights under a scale agreement applicable to him or her. This provision has a nexus to a federal undertaking built into it: the existence of a scale agreement enforceable under the *Act*. In order to be enforceable under the *Act*, one of the parties to a scale agreement must be a producer subject to the *Act*.

[30] The Tribunal did not receive any evidence to the effect that Christopher was subject to a scale agreement binding Equity and a producer under federal jurisdiction at the time the impugned events took place. Consequently, the Tribunal must conclude that it lacks jurisdiction to adjudicate the complaint under this section.

Section 51(d) of the Act

[31] Section 51(d) provides the Tribunal with the power to oversee the internal affairs of artists' associations; however, this power is restricted in that it can be invoked only for the purpose of ensuring that artists' associations do not act in a "discriminatory manner" when applying their rules of discipline to one of their members. It states:

51. No certified artists' association or person acting on behalf of such an association shall

[...]

(d) take disciplinary action against or impose any form of penalty on an artist by applying the standards of discipline of the association to that artist in a discriminatory manner;

[...]

[32] Section 51(d) grants the Tribunal jurisdiction over a complaint if it is in the presence of "a certified artists' association" and an "artist". However, as noted above, Parliament's authority to legislate over matters of this nature is contingent upon a connection to a federal undertaking, in the present matter – a producer subject to the *Act*.

[33] By not explicitly requiring a nexus to a federal undertaking, section 51(d) of the *Act* appears to exceed Parliament's jurisdiction in the field of labour relations. The principles of statutory interpretation, specifically the constitutional law doctrine of "reading down" are of assistance in interpreting this provision. Professor Hogg in *Constitutional Law of Canada, supra*, defines the doctrine as follows at pp. 15-23 and 15-24:

The "reading down" doctrine requires that, whenever possible, a statute is to be interpreted as being within the power of the enacting legislative body. What this means in practice is that general language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation). It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning; it then stipulates that the limited meaning be selected. (...) Reading down is sometimes said to depend upon a presumption of constitutionality: the enacting legislative body is presumed to have meant to enact provisions which do not transgress the limits of its constitutional powers; general language which appears to transgress the limits must therefore be "read down" so that it is confined within the limits.

[34] The requirement that a complainant pursuant to section 51(d) have a nexus to a producer under federal jurisdiction is consistent with the above-noted doctrine. This requirement is further supported by paragraph 6(2)(a) of the *Act* which states that Part II of the *Act*, dealing with professional relations, applies to federal government departments and agencies and broadcasting undertakings under the jurisdiction of the Canadian Radio-television and Telecommunications Commission.

[35] In the instant matter, there is no evidence of a nexus between Christopher and a producer subjection to the *Act*. Accordingly, in the absence of such evidence the Tribunal has no alternative but to conclude that it is without constitutional jurisdiction to adjudicate the complaint under section 51(d) of the *Act* as well.

Decision

[36] For these reasons, the Tribunal upholds the preliminary objection and dismisses the complaint for lack of jurisdiction, in accordance with paragraph 53(3)(b) of the *Act* which states that the Tribunal shall not hear a complaint if it is not within its jurisdiction.

Ottawa, April 8, 2002

David P. Silcox

Marie Sénécal-Tremblay

John M. Moreau