Submission to the Minister's Advisory Committee on Status of the Artist

by

Gwen Gray, Q.C.
Chairperson
Saskatchewan Labour Relations Board

As Chairperson of the Saskatchewan Labour Relations Board, I take great interest in the work of the Minister's Advisory Committee on the Status of the Artist. Since 1945, employees in Saskatchewan have been entitled to bargain collectively through trade unions of their own choosing and to have that right respected and enforced by the Labour Relations Board acting under the provisions of *The Trade Union Act.* Although *The Trade Union Act* contains a broad definition of "employee," it does not apply to persons who are truly independent contractors. Our Board decided, for instance, that musicians performing at the Casino were not subject to the provisions of *The Trade Union Act.*[1]

As a labour relations administrator, I have watched with interest the establishment of the Canadian Artists and Producers Professional Relations Tribunal ("CAPPRT") in the federal sphere. The federal *Status of the Artist Act*[2] was a significant legislative development for artists in that it provided a statutory framework for artists and producers to engage in collective bargaining of scale agreements.

Prior to this enactment, artists' associations who possessed sufficient bargaining power were able to establish scale agreements through voluntary negotiations with certain producers. Your report has noted the difficulties that arise from the voluntary recognition model of collective bargaining – first, it is voluntary and cannot be compelled by a statutory tribunal; second, it leaves the artists open to *Competition Act* and restraint of trade complaints; and third, it is only successful where artists have sufficient raw bargaining power. Currently, in Saskatchewan, artists do not enjoy the benefits of compulsory collective bargaining.

In framing a response to your Committee's progress report, I am reminded that the complexities of collective bargaining are generally not well understood. It may be helpful if I outline the basic model for regulating labour relations in Canada. The model includes the following elements:

(1) A certification process for determining employee support for a trade union and for requiring an employer to bargain collectively with the trade union chosen by employees;

---

[1] See Regina Musicians Association, Local 446 of A.F. of M. v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R. 273, LRB File No. 012-97.
[2] S.C.1992, c. S-19.6.

(2) Regulation of the economic weapons associated with the negotiation of collective agreements;

(3) Regulation of employer and trade union conduct in relation to the collective bargaining relationship and the representation of employees by the trade union; and

(4) Regulation of the dispute resolution mechanisms required to be used during the term of a collective agreement.

In all Canadian jurisdictions, labour relations boards are assigned statutory responsibility for implementing collective bargaining legislation. Labour relations boards hold hearings, conduct votes, and issue orders. Some boards assist parties in the negotiation of collective bargaining agreements,[3] but these tasks are generally assigned to professional conciliators and mediators in the labour departments.

All labour statutes in Canada are based on the principle of "free collective bargaining" – that is, parties to a collective bargaining relationship are entitled to use their economic power – through the use of strikes, lock-outs and hiring of replacement workers – to achieve their collective bargaining goals. Labour relations boards do not play a significant role in the collective bargaining process or the process of enforcing collective bargaining agreements. In relation to the negotiation of collective agreements, our general task is to ensure that parties "play by the rules" that are set out in the relevant labour relations statutes.

Under all labour relations legislation in Canada, unions and employers are required to resolve differences concerning the interpretation and application of the provisions of collective agreements through binding arbitration. Most collective agreements, including those that are arrived at on a voluntary basis, include provisions for the arbitration of these disputes.

The arbitration process is also based on the principle of free collective bargaining. Parties are free to choose their own arbitrators and arbitration processes. When the parties are unable to agree on an arbitrator, they have access to default mechanisms, either through their agreement or through the relevant legislation, which generally permit the Minister of Labour or the Chair of the labour relations board to appoint an arbitrator for them. Arbitrators generally are experienced labour relations experts (lawyers, law professors, HR experts). There are very few legislative examples in Canada where government provides an arbitration office staffed by professional arbitrators to hear and determine collective agreement grievances.

In commenting then on your Committee's proposals for Fair Compensation/Collective Bargaining, I do so in light of this generally accepted model of collective bargaining. It has been the dominant model of regulating labour relations in North America in the post-WWII era and has been successful in encouraging and supporting collective bargaining.

---

[3] In Saskatchewan, the Board has the statutory power to impose a first collective agreement.

I also want to caution the Committee to carefully consider its recommendations in light of the existing legal framework governing collective bargaining. It is a complex system of rights and obligations. Lack of attention to the detail of labour relations law can result in some serious and unintended consequences. For instance, in *The Status of the Artist Act*, the following provision was included in s. 6(c):

> 6. *The Government of Saskatchewan undertakes, as far as it considers it reasonable and appropriate to do so, to do the following:*
>
> *(c) to respect, honour and in good faith abide by scale agreements of relevant artists' associations representing the interests of artists engaged by the government;*

I appreciate that the broad purpose of this provision is to encourage government to voluntarily recognize artists' associations and to apply the terms of scale agreements to artists who are engaged by government. However, the wording of this provision may not accomplish this result. Prior to the enactment, if government entered into voluntary agreements with artists' associations, it would be legally bound to honour the terms of the collective agreements and the artists' associations could enforce the terms of the agreements through the grievance and arbitration provisions contained in the agreement.

Under s. 6(c), however, government may ignore the terms of a scale agreement that it has entered into with an artists' association in circumstances where it does not find it "reasonable and appropriate" to respect the agreement. Collective bargaining rights of artists could be diluted under this provision. In the world of labour relations, collective agreements are viewed as sacrosanct and are not generally subject to unilateral changes of this nature, nor are they routinely set aside or altered by legislation. The wording of s. 6(c) sets an unusual precedent in labour relations.

There are three broad comments that I wish to make with respect to the recommendations put forth by your Committee in its Progress Report under the topic Fair Compensation/Collective Bargaining. First, the tasks that are assigned by the Committee to the quasi-judicial tribunal can be accomplished by methods other than the establishment of a quasi-judicial tribunal. Second, the task of supporting the interpretation and implementation of voluntary collective agreements encroaches on the rights of parties to a collective agreement to determine their own dispute resolution mechanisms. Third, the recommendations will not practically assist artists in achieving collective bargaining. I will deal with each point in more detail.

1. The tasks that are assigned by the Committee to the quasi-judicial tribunal can be accomplished by methods other than the establishment of a quasi-judicial tribunal

Quasi-judicial tribunals[4] are created by legislation. Specified powers are assigned to the tribunal to enable it to implement the legislative policy set out in the particular legislation. In our case, *The Trade Union Act* sets out the mechanisms for establishing the Labour Relations Board (s. 4) and the powers of the Board (s. 5). The powers are extensive and include a mechanism of enforcement through the courts.

Quasi-judicial tribunals are required to operate in accordance with the rules of natural justice and they function in a court-like manner, hearing representations from interested parties. CAPPRT as a quasi-judicial tribunal with extensive powers to regulate labour relations for artists and producers.

(a) Your Committee proposes that a quasi-judicial tribunal be established to provide support to ensure compliance with the terms of a single engagement contract between artist and producer.

If you envisage the tribunal as having powers to interpret, apply and enforce the terms of a single engagement contract, then legislation would need to be passed granting the tribunal power to hear and determine disputes arising under the engagement contract and power to enforce the findings of the tribunal. You would need to decide if the legislation will establish the tribunal process as the exclusive method for determining such disputes (thereby eliminating access to the courts and any contractual methods) or as a concurrent method of resolving such disputes.

This model of contract enforcement is used to some extent under *The Labour Standards Act* in relation to non-payment of wages (see ss. 61 to 63 attached). Such a tribunal process could be one component of a minimum standards law for artists.

If it is intended that the tribunal would have the legislative authority to ensure compliance with the terms of a single engagement contract, then there is an obvious need for the establishment of a quasi-judicial tribunal.

However, if it is intended that the tribunal would simply play a role in encouraging the parties to comply with the terms of the single engagement contract, there is no need to establish a quasi-judicial tribunal as it will not be exercising any statutory powers in relation to the contract. The "support" role could be provided through the offices of the department (contract compliance officer, etc.). Such an officer would act on the basis of moral persuasion alone and I would doubt that this method would be a successful method of encouraging compliance.

---

[4] "Quasi-judicial authority" as used in the Progress Report is a term that is not regularly used to describe a quasi-judicial tribunal. I assume that by using the term, you are referring to a quasi-judicial tribunal.

(b) A quasi-judicial tribunal is not required to support the interpretation and implementation of voluntary collective agreements. Voluntary collective agreements contain their own dispute resolution mechanisms (generally grievance and arbitration provisions). Parties to such agreements have mechanisms for selecting arbitrators to hear and determine their disputes. *The Arbitration Act* would apply should there be a gap in the contractual scheme. CYR could offer grievance mediation services although such services are already available through the Labour Relations and Mediation Division, Saskatchewan Labour and the Mediation Services Division, Saskatchewan Justice. Generally, grievance mediation services are provided to parties on a strictly voluntary basis. Saskatchewan Labour does not charge fees for its services. Currently, any of the artists' associations and producers, who have entered into voluntary recognition agreements, can access the grievance mediation services offered by Saskatchewan Labour.

In making the recommendation that the tribunal provide "support in the interpretation and implementation of voluntary collective agreements," the Committee may intend that the quasi-judicial tribunal actually provide arbitration services to artists' associations and producers who have entered into voluntary recognition agreements. If so, this is a novel area and would require a great deal of thought. For instance, how could you ensure the expertise of tribunal members? Does it set a precedent in other areas of labour law? What powers would be assigned to the tribunal? Why would it provide a better system of dispute resolution than the current method? Does it infringe on the rights of parties to chose their own arbitrators and arbitration processes?

To understand the complexity of the arbitration model, you may wish to refer to ss. 25 to 26.3 of *The Trade Union Act,* which I have attached to this document.

(c) A quasi-judicial tribunal is not required to encourage parties to engage in voluntary collective bargaining. As indicated above, voluntary collective bargaining comes about when the members of an artists' association have sufficient raw strength to demand and obtain collective bargaining agreements with producers. There is no real magic to the process. A tribunal operating without legal authority to require producers to engage in collective bargaining with an artists' association would have no real ability to establish broader collective bargaining rights for artists. It is also an unusual role for an administrative tribunal to be involved in the promotion and organization of collective bargaining.

(d) A quasi-judicial tribunal is not required in order to set fair minimum standards, although a tribunal could be used as a mechanism of enforcing such minimum standards, as is done under *The Labour Standards Act.* Minimum standards for artists can be achieved through three basic mechanisms: (1) legislation, such as *The Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters;*[5] (2) regulations, such as the Regulations passed under *The Labour Standards Act*; or (3) through delegation of legislative power to a board similar to the Minimum Wage Board (which is not a quasi-judicial tribunal).

---

[5] R.S.Q. c. S-32.01.

2. The task of supporting the interpretation and implementation of voluntary collective agreements encroaches on the rights of parties to a collective agreement to determine their own dispute resolution mechanisms

The voluntary recognition agreements that exist in this sector of the economy are of a long-standing nature and they contain well-established dispute resolution mechanisms. I have not heard from any source that these mechanisms are not working and I would be surprised to find that was the case.

As indicated above, if government were to establish an arbitration office to hear and determine grievances arising under voluntary recognition agreements, there are serious institutional issues to address such as, who would be recruited as expert arbitrators; would they be more talented than the current roster of arbitrators; would the process be more efficient? More importantly, would the provision of arbitrators undermine free collective bargaining by requiring the parties to accept government-appointed arbitrators?

If government establishes mandatory collective bargaining for artists and producers (similar to the federal *Status of the Artist Act*) it may wish to follow the dispute resolution procedures set out in *The Trade Union Act.* The essence of these procedures are (1) arbitration is the mandatory method of settling disputes over the interpretation and application of the collective agreement; (2) strikes and lock-outs are banned during the term of the agreement; and (3) arbitrators are selected by the parties to the agreement, with a default mechanism for selection if they are unable to agree. This model preserves the parties' ownership of the process and limits government's role in determining the content of collective agreements.

3. The recommendations will not practically assist artists in achieving collective bargaining

I regret having to state this point so bluntly. However, collective bargaining is not a tea party. It is an exercise involving the use of economic power. Collective bargaining relationships do not come into existence through gentle persuasion or good intentions. They come into being either because a particular group of workers possesses considerable economic power (through an imbalance in labour demand, the use of strikes and other economic weapons) or, more common in the modern era, by unions accessing the compulsory certification mechanisms established in *The Trade Union Act.*

Simply put, it is generally not in the economic interest of producers to voluntarily agree to collective bargaining. Without a mechanism for requiring producers to engage in collective bargaining (through certification of artists' associations), it is very unlikely that a tribunal could persuade any producer to engage in collective bargaining.

To test this point, you may take a simple survey of producers and ask them if they would agree to sign voluntary recognition agreements with the artists they engage. I would be pleased to be proven wrong, but I think the response you get will prove my point.

At the same time, I do not think that establishing a mandatory system of collective bargaining for artists is a simple task. The federal and Quebec legislation provide good starting points for consultation and study. Work needs to be done to establish associations of artists and producers. Careful thought must be given to the mechanisms established to support the collective bargaining process, i.e. the type of tribunal, the expertise of its members, the representative nature of the tribunal, the independence of the tribunal from government, the need for first collective agreement powers, etc. This task is not easy but it is an essential one if the goal is to achieve broader collective bargaining rights for artists.

4. Other Matters

I would like to respond in point form to some other concerns that were raised in the Progress Report.

- Protection of National Agreements in a Provincial Collective Bargaining Statute

This can be addressed in a collective bargaining statute in a manner similar to the manner in which national agreements in the construction industry are protected under the provisions of *The Construction Industry Labour Relations Act, 1992,* s. 21 (attached).

- CAPPRT's Role

CAPPRT does not ensure contract enforcement. It operates in a manner similar to the Saskatchewan Labour Relations Board. Contract enforcement under the federal *Status of the Artist Act* is through grievance arbitration.

- Registration of Contracts

I do not understand how registration would give voluntary recognition agreements "the force of law in Saskatchewan." Without a regime of compulsory collective bargaining, the agreements would remain "voluntary agreements" subject to normal contract law, the *Competition Act* and laws related to restraint of trade.

I also cannot envisage how registration will result in social benefits for artists. The collective of data about artists' wages and working conditions may result in better awareness of the needs of artists but, without more, will not necessarily result in the establishment of pensions, health and welfare benefits normally associated with unionization.

Currently, there are no cost-recovery mechanisms (i.e. fees) charged by Saskatchewan Labour in relation to the provision of services to the labour relations community. I would hesitate to introduce cost-recovery mechanisms in the artists' sector, when, relatively speaking, artists are so poorly off compared to the average unionized worker. Government has a clear interest in encouraging successful collective bargaining, without disruptions caused by strikes and lock-outs. Fees for registering contracts seems to me to be the beginning of a slippery slope in this area and they are not balanced against the public interest in maintaining and encouraging healthy collective bargaining.

Conclusion

I welcome your invitation to discuss these matters further with your Committee.

Gwen Gray, Q.C.
Chairperson
Saskatchewan Labour Relations Board