

# ACTRA Commercial Agreement BULLETIN



## Want a legal opinion on the status of the NCA?

Dear members, friends, and allies,

To begin, we apologize for being a little quiet over the past week. Our friends and partners at the Association of Canadian Advertisers (ACA) were working through their process to ratify the renewal National Commercial Agreement (NCA). We were respecting that process.

We are very pleased to share that on May 2nd, the ACA's Board of Directors ratified the agreement.

Hurray!

That is a very big event.

And so, beginning today, we will start circulating regular Bulletins to provide you with information about our renewal agreement. Please take a few minutes to catch up on the issues; and please do what you can to share what you learn.



In today's Bulletin, we want to provide you with a legal opinion, below, which was prepared by ACTRA's lawyers.



This opinion takes you into some of the difficult disputes we have been having over the past year with one of the parties to this agreement. It is a lot to take in. But it's also a good place to start.

Please keep an eye on your inbox for future NCA Bulletins.

In solidarity,  
Your NCA Negotiating Committee

**Marie Kelly** (National Executive Director and Lead Negotiator), **Eleanor Noble** (National President and Chair of Negotiating Committee); **David Sparrow** (Past President, ACTRA National); **Sandra Beckles** (ACTRA Toronto); **David Gale** (ACTRA Toronto); **Jamaal Grant** (ACTRA Toronto); **Teneisha Collins** (ACTRA Montreal); and **Ellie Harvie** (UBCP/ACTRA).

Alternates: **Paul Dzenkiw** (UBCP/ACTRA); **Scott Farley** (ACTRA Toronto); **Keith Martin Gordey** (UBCP/ACTRA); **Ipsita Paul** (ACTRA Toronto); and **Jocelyne Zucco** (ACTRA Toronto).

Observer: **Theresa Tova** (ACTRA Toronto).



Steven M. Barrett  
Direct Line: 416.979.6422  
Fax: 416.591.7333  
sbarrett@goldblattpartners.com  
Our File No. 22-379

May 4, 2022

Marie Kelly  
National Executive Director  
ACTRA  
625 Church St. - 3rd Floor  
Toronto, Ontario  
M4Y 2G1

Dear Ms. Kelly:

**Re: Response to ICA claims concerning the renewal of the NCA**

You have asked us to review the April 29, 2022 letter from ICA counsel to Scott Knox, as well as various statements released by the ICA, claiming to justify the ICA's opt-in/opt-out proposal, claiming that the National Commercial Agreement (NCA) no longer has any legal effect, asserting that agencies are no longer bound to the terms and conditions of the NCA and that they are free to employ ACTRA talent on inferior terms and conditions to those established in the NCA.

For the reasons set out below, in our view, each of these claims or assertions is inaccurate or misleading, and not supported by applicable and longstanding legal principles.

**A. The Illegality of the ICA's Opt-in/Opt-out Proposal**

We begin with an assessment of the ICA's opt-in/opt-out proposal.

By way of background, we note that, as provided for under the NCA's Negotiations Protocol, the three parties - the ICA, the ACA and ACTRA - have been attempting to negotiate a renewal collective agreement over the past year.

For its part, over the course of bargaining, the ICA has insisted upon very significant concessions from ACTRA members, including the right of agencies to opt-in or opt-out of the NCA, work with non-union Performers whenever it suited them, and to pay significantly reduced rates to ACTRA members.

The ICA's opt-in/opt-out proposal, if accepted, would have seriously eroded the work opportunities for every category of ACTRA member (including Background, Voice, Silent, on Camera and Principal Performer).

However, it is important to recognize that the ICA opt-in/opt-out proposal would not only have gutted ACTRA's bargaining rights and longstanding collectively bargained protections for ACTRA members, but would also have undermined and destabilized longstanding relationships in the advertising industry.

In addition, under established case law, it is a longstanding and fundamental principle of labour law, and of the duty to bargain in good faith, that an employer cannot insist to the point of bargaining impasse in bargaining or seek to impose as a condition of bargaining, that a union amend and erode the scope of its union's bargaining rights -- yet this is precisely what the ICA proposal seeks to accomplish.<sup>1</sup> As a result, in our view, it is very likely that a labour board and the courts would find that the ICA opt-in/opt-out proposal amounts to be unlawful bargaining in bad faith.

## **B. Validity of the Renewal NCA**

We turn now to the ICA's claim that the renewal NCA between ACTRA and the ACA is somehow not an actual or lawful agreement.

Again, by way of background, we note that as the April 26 strike/lockout deadline approached, the ICA advised ACTRA that it was no longer bargaining jointly with the ACA, and that ACTRA should therefore bargain separately with the ACA.

As we understand it, the ICA made it clear to ACTRA that it was not prepared to continue bargaining unless ACTRA first agreed as a precondition to its opt-in/opt-out proposal (the illegality of which has been discussed above). On April 25<sup>th</sup>, hours before the lockout deadline, ACTRA advised the ICA that while it could not agree to this illegal precondition, ACTRA remained at the hotel and willing to continue negotiations. Later that night, the ICA's counsel sent an email advising that the ICA's position had not changed, and bargaining was done for the night. On April 26<sup>th</sup> while waiting for an update from the ICA, ACTRA was forwarded a general communication from the ICA advising as follows: "[T]he NCA has now expired and is no longer in effect. Even so, our industry wishes to continue to employ ACTRA performers if possible and will offer rates and terms that are feasible in accordance with client contracts."

As a result, in order to bring some stability to the advertising industry, maintain national standards, and ensure continuing access to ACTRA talent and performers, ACTRA and the ACA continued to negotiate with a view to renewing the NCA.

On April 26, ACTRA and the ACA successfully reached an agreement to renew the NCA until May 31, 2023. Under the renewal NCA, the terms and conditions of the previous NCA are

---

<sup>1</sup> We note in passing that under paragraph 6 of the Negotiations Protocol set out in the NCA, to which ICA agreed and by which ICA is bound, all parties (including the ICA) agreed to "bargain in good faith and make every reasonable effort to enter into a new Agreement."

continued, together with a 2% increase in all minimum fees and rates. As we understand it, ACTRA and the ACA agreed to a one-year renewal in order to provide the opportunity, in a stable environment, to work on simplifying and modernizing the NCA over the next year.

However, contrary to the claims made by the ICA and its counsel, in our view, there can be no serious issue concerning the ongoing validity and applicability of the National Commercial Agreement (NCA). It is an agreement continuing in effect the pre-existing nationally applicable terms and conditions of employment (with a 2% increase to minimum fees and rates).

Moreover, in our view, any agency that has previously adhered to the NCA has, by the act of adherence, voluntarily recognized ACTRA as the exclusive bargaining agent for performers retained and employed by that agency and has recognized that ACTRA has bargaining rights to negotiate the terms and conditions of employment for any performers that the agency uses.

As a corollary to this basic and fundamental labour law principle, once an agency adheres to the NCA, it agrees that it will not employ non-ACTRA performers and will not pay lower non-union rates.

Significantly, this principle is also reflected in Article 104 of the NCA, which provides that “[t]he Engagers also recognize ACTRA as a trade union representing Performers with respect to all minimum rates and working conditions provided for in this Agreement”.

The ICA and its counsel have also asserted that there is something misleading in ACTRA and the ACA advising that they have reached a renewal NCA agreement, based on the suggestion that since ICA is not party to the renewal agreement, it cannot be an agreement. While the ICA may desire to wish away the ACTRA/ACA renewal NCA (and while as is the case with any contract there may be disagreement between the parties over its effect or meaning), it is abundantly clear that ACTRA and the ACA have, indeed, entered into an agreement. Nor is there anything misleading or improper in ACTRA and ACA having entered into an agreement, when it became apparent to them that the ICA was not prepared to be a party to a renewal agreement that did not contain its opt-in/opt-out proposal.<sup>2</sup>

**C. ACTRA’s Bargaining Rights, and the obligation of the ICA and adhering agencies to bargain in good faith, continue after the April 26 strike/lockout deadline**

Contrary to the ICA’s suggestion and that of its legal counsel, neither bargaining rights nor the obligation to bargain a renewal collective agreement expire at the end-date of the NCA.

---

<sup>2</sup> To more aptly reformulate the colourful Beatles analogy contained in ICA counsel’s letter, if George and Ringo were to leave the Beatles because they thought John or Paul should be paid less, or because they wanted the Beatles to start playing disco music, John and Paul would have every right to continue to play and make their kind of music together, and to do so as the Beatles.

Rather, it is trite law that bargaining rights survive the expiry of any collective agreement, and the obligation to bargain renewal agreements in good faith is by its very nature an ongoing obligation and persists where the parties are in a lawful position to strike or lockout, and even where a strike or lockout takes place.

Indeed, the NCA Negotiations Protocol itself reflects and is consistent with this basic understanding. Indeed, the very purpose of the Negotiations Protocol is, as reflected in paragraph 1 of the Protocol, to “govern the process of collective bargaining for the renewal of this National Commercial Agreement”. It can hardly be the case that the obligation to bargain in good faith for the renewal of the NCA somehow means that the ICA is free to treat that obligation as being at an end once the current NCA expires, and the parties are in a strike/lockout position. Indeed, the very notion or possibility of strike or lockout action is in relation to one side or the other imposing pressure for the purpose of entering into a renewal agreement. However, there is no basis in law, and certainly not in the NCA itself, for the ICA’s suggestion that its underlying and ongoing recognition of ACTRA’s bargaining rights, and its good faith bargaining obligation, has now somehow expired.

It may be that the basis for ICA’s view that its obligations (and those of agencies) have now expired turns on its belief that the NCA is not a collective agreement, but rather what it refers to as a commercial agreement. We simply note that a collective agreement is defined under the Labour Relations Act of Ontario (and similar definitions apply across the country) in very broad terms as follows: “an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment....”

In our view, there can be little doubt that against this definition, the NCA is a collective agreement.

#### **D. Agencies can only employ ACTRA members if they adhere to the terms of the NCA**

The ICA has also made the extraordinary assertion that agencies that do not agree to the terms of the renewal NCA are free to employ ACTRA members on whatever terms the agency determines to be feasible, and that ACTRA members will continue to be available to agencies that have not or do not agree to be bound by the terms of the renewal NCA.

This is simply not accurate. Rather, as has always been the case, ACTRA performers will only work for agencies that adhere to the NCA terms and conditions, and non-adhering agencies will not be able to use ACTRA talent on inferior non-union terms and conditions.<sup>3</sup>

---

<sup>3</sup> As Article 3001 provides: “Engagers who wish to engage ACTRA Performers in the production of their commercials for television or radio shall sign a Letter of Adherence on their own letterhead and forward the original signed copy to the National Executive Director of ACTRA.”

Indeed, consistent with ACTRA's past practice, past practice in the advertising industry, and the longstanding and continuing terms of the NCA, any agency that attempts to work non-union including by not adhering to and honouring the terms of the renewal NCA risks being declared an Unfair Engager, in which case ACTRA members will not perform work for that agency.<sup>4</sup> This is separate and apart from the terms of the ACTRA Constitution and bylaws which prevent ACTRA members from working for non-union agencies.

Moreover, as discussed above, where an agency has previously adhered to the NCA, it has recognized that ACTRA has the exclusive right to represent performers, and to negotiate their terms and conditions of employment. This obligation does not expire when the parties are in a position to strike or lockout. And, in the absence of a strike or lockout, or a lawful alteration of terms and conditions of employment consistent with the obligation to bargain in good faith – none of which has occurred or applies here - an agency continues to be bound to only employ ACTRA members, and to do so only on pre-existing negotiated terms and conditions.

Finally, contrary to the ICA counsel's assertion, it is hardly bad faith for ACTRA and the ACA to agree to renew the terms and conditions of the NCA, and to continue to insist that only agencies adhering to the terms of the NCA can employ ACTRA talent. Far from this being improper, insisting that workers can only be employed on collectively bargained terms and conditions, and precluding employers from being able to undercut those terms and conditions, is a standard and normative feature of labour relations and collective bargaining.

Yours very truly,



Steven M. Barrett  
SB:ph/cope 343

c.c. Simran Prihar

F:\DOCI\ACTRA\22-379\01966383.DOCX

---

<sup>4</sup> As Article 3003 provides: "Unfair Engager: Failure or refusal by any Engager to sign a Letter of Adherence shall automatically cause such Engager to forfeit all rights under this Agreement. ACTRA may declare such Engager to be an "unfair Engager," and may instruct all Performers, without injury or damage to the Performers or to ACTRA, not to work for such unfair Engager."