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FROM WELLINGTON TO QUEBEC: ATTRACTING HOLLYWOOD AND REGULATING CULTURAL WORKERS

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INTRODUCTION

The nature of work arrangements in the film industry and the professional characteristics of cultural workers involved in film production impact the legal qualification of these workers. They highlight the difficult task of classifying actual work arrangements in one specific legal category: either an “employment relationship” or a “contract for services relationship”. If adequate legal frameworks are not in place to capture the reality of those work arrangements properly, the legal qualification may lead to uncertainty detrimental to workers’ access to collective representation. This uncertainty opens the door to work conflicts and contestations of different types. This paper builds a dialogue between two disciplines, legal analysis and cultural labour analysis, by comparing two locally embedded case studies: the “Hobbit law” in New Zealand and the “Spiderwick Case” in Quebec (Canada). In both cases, particular mechanisms of policymaking and legislation are integral to the development and smooth functioning of local labour markets – from tax credits to the provision of collective bargaining tools for freelance cultural workers. However, as we will show, the nature of these cases and the labour disputes therein led to vastly differing outcomes for the status of cultural workers and their working conditions. This comparative approach illustrates the continued importance of local and regional regulations governing the employment of film workers even as local industries may tailor these regulations in order to attract and appease Hollywood producers. The interdisciplinary dialogue underpinning this comparison is crucial, we argue, for understanding the different strategies that local industries use to legislate for the uncertain employment status of cultural workers.

PART ONE: COMBINING CULTURAL LABOUR AND LEGAL ANALYSIS

The field of cultural labour studies has grown considerably in recent years, a field which draws on scholarship from the sociology of work, cultural studies and political economy (indicative authors include McRobbie, 1998; Banks, 2007; Conor, 2014; Gill, 2007; Hesmondhalgh and Baker, 2011). As Gill and Pratt (2008: 14) state, “a number of relatively stable features of this kind of work”, that is, the production of media and cultural goods, have been identified:

A preponderance of temporary, intermittent and precarious jobs; long hours and bulimic patterns of working; the collapse or erasure of boundaries between work and play, poor pay, high levels of mobility; passionate attachment to the work and to the identity of the creative labourer; an attitudinal mindset that is a blend of bohemianism and entrepreneurialism; informal work environments and distinctive forms of sociality; and profound experiences of insecurity and anxiety about finding work, earning enough money and ‘keeping up’ in rapidly changing fields (Ibid).

Empirical investigations of cultural labour have examined local, regional and transnational forms of cultural production. Studies of cultural work are also often premised on the assumption that this work is post-Fordist, flexible, mobile and often lacking histories of industrial organization, especially when it comes to wholly new forms of virtual or digital labour. Cultural work is frequently classed as “atypical” or “non-standard” (by the International Labour Organisation, 2014 for example). Atypical work is defined in opposition with typical work, i.e. work done under a contract of employment of indeterminate duration, on a full-time basis, for one unique employer, under his or her control and often on their work premises (Vallée, 2005, Cranford et al., 2005). For unions, this atypical nature of work might constitute a challenge as it can be difficult, under general labour relations regimes, to capture, retain and represent the interests and needs of cultural workers. But, as our specific cases illustrate, film production industries are populated by a number of strong unions and guilds that represent their largely freelance membership and, in many cases, have done so for decades (see for example Gray and

Seeber, 1996). What has not been given significant attention in cultural labour literature, however, is a consideration of legislation and jurisprudence itself – that is, analysis of the legal frameworks and mechanisms that may support cultural workers and the unions and other organizations that represent them and, conversely, may also undermine the status of cultural workers and their collectives. Broader analysis of precarious employment (Standing, 2011, Vosko, 2007, for example) has highlighted the ways in which forms of collective organization are now being seriously tested as the boundaries of employment relationships shift and dissolve. Legal and social mechanisms to support precarious and unstable cultural workers are absolutely crucial, and yet in many places and spaces, they have been subject to rapid change and, in some cases, to direct attack and erosion.

To discuss the legal status of cultural workers and their organizations presents particular challenges, not least because of the need to build analytical bridges across disciplines which requires navigating and clarifying the diverse range of terms used in both cultural labour studies and legal analysis. A variety of terms and formulations have been used to describe the work conducted in the production of art and culture and the divisions within that work. Indicative terms include cultural work and workers (Banks, 2007), creative labour (Hesmondhalgh and Baker, 2011), artists (Choko, 2015), “below-the-line” technicians or crew versus “above-the-line”ⁱ creatives (Scott, 2005, Miller et al., 2005). For our purposes, we use the terms artists and cultural workers and, within our case studies, we refer specifically to film workers. In addition, when considering applicable legal frameworks to these workers, an additional difficulty consists of grasping these realities within the limited legal categories available, i.e. employee or independent contractorⁱⁱ. And the legal qualification is crucial since it determines the access the worker has to certain legal frameworks and his or her eventual inclusion or exclusion from certain protections under labour law regulation. Part two of this paper deals more specifically with these legal qualifications.

Studies of cultural labour often utilize interviews and ethnographic observation as well as analysis of labour market data, funding and tax credit policy and so on. The studies we are comparing here are also informed by this previous work and combine a cultural labour

framework with legal analysis. Doing so offers a more finely-grained analysis of legislative frameworks themselves – those that determine how labour laws in relation to film workers are drafted, enacted and fought. The legal analysis we rely on in our comparison, which can be qualified as a positivist legal method, encompasses research using two essential sources from which emanate legal norms: the legislation and the jurisprudence, and a third source, which is complementary to the first two: the legal literature. Here, we use the legal method to first reveal what the law says in both jurisdictions in order to compare them in our subsequent analysis. We then combine the legal method with a cultural labour analysis of our chosen cases; we do this to transcend the positivist approach so as to bring to light not only what the law invokes, but also how it operates and the differing material effects the legislation has on the status of cultural workers. In the next section, we develop our legal analysis for both cases, drawing on a discussion of the employment case law itself.

PART TWO. THE LEGAL STATUS OF CULTURAL WORKERS AND COLLECTIVE REPRESENTATION

In both Quebec and New Zealand jurisdictions, the legal status of “employee” gives the worker access to protective labour legislation allowing for collective representation and minimal standards. In New Zealand, this protection derives from the *Employment Relations Act 2000* (ERA). Enacted in 2000, it modernized the labour legislation in New Zealand. In Quebec, while minimal standards are provided for in the *Act Respecting Labour Standards* (CQLR, c. N-1.1), collective representation is facilitated by the *Labour Code* (CQLR, c. C-27), which establishes the general labour relations regime. This regime is similar to those of other provincial and federal jurisdictions in Canada, as they were all deeply influenced by the Wagner Act Model from the United States (*National Labor Relations Act*, 29 U.S.C. § 151-169 (1935)).

Both Quebec and New Zealand labour legislation oppose the status of “employee” to the one of “independent contractor”, attributed to workers who are not delivering services under a “contract of employment” (Quebec) or a “contract of services” (New Zealand), but rather work on their own account, such as exploiting their own business and offering their

services. This latter contractual relationship is referred to as a “contract for services”. Comparable legal tests were developed in both jurisdictions to determine, in specific situations, whether a worker must be considered an employee or an independent contractor. In situations of atypical work, this qualification may be difficult. In particular, because the reality of self-employment is heterogeneous (D’Amours, 2006), it poses a challenge to legal tests as developed in past decades. As Cranford et al., (2005: 4) put it:

“Self-employed workers have an ambiguous status. Traditionally, self-employment has been equated with entrepreneurship. Legally, it is considered a form of independent contracting and thus outside the ambit of labour protection and collective bargaining. But the evidence suggests that many of the self-employed, especially those who do not employ other workers, are much more like employees than they are like entrepreneurs. There is controversy over where to draw the line between employees and entrepreneurs when it comes to labour protection for the self-employed.”

The basis underlying the qualification is that priority is given to factual circumstances, which need to be analyzed and carefully considered in each case, rather than on the written stipulations of the parties involved in the contractual relationship under review (*Bryson v. Three Foot Six Ltd*, [2005] NZSC 34 for New Zealand; *67112 Ontario Ltd. v. Sagaz Industries Canada inc.* [2001] 2 S.C.R. 983 for Quebec). In New Zealand, such written stipulations are considered one element amongst others. In deciding the legal qualification of a worker, two tests were developed: the control and integration test and the fundamental test (*Three Foot Six*, para.10). These tests lead one to take into consideration, along with the written contract between the parties, if any, elements such as the intention of the parties, the industry practice, the control exercised over the work, the integration of the workers to the business of the work provider, the process established for remuneration, the participation of the worker in relation to the work provider’s profits or losses, the worker’s investment in his or her own plant and equipment, the dependency on a unique work provider on the part of the worker, and the requirement of training (*Three Foot Six*, para.7-14). In Quebec, several tests have been developed over the years, but the element of control remains a

determining factor in qualifying the contractual relationship of the parties (Fudge, Tucker and Vosko, 2003). In evaluating the level of control over the worker, one has to also consider “whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks” (Sagaz Industries, para.47).

In film production, the organization of work is such that the line between an employment relationship and a contractual (New Zealand) or service (Quebec) relationship can be hard to draw. Indeed, film production is project-based. This industry is “diverse, complex, multi-sector and multi-occupation” (De Bruin and Dupuis, 2004: 59). As a consequence, artists involved in film production work for different work providers simultaneously, on a fixed-term basis, which is often short, and without any certitude to be re-engaged by the same work provider once the project is done (Pichette, 1984; The Conference Board of Canada, 2010). In addition, the work is done in different locations and with different teams.

In the task of legally qualifying workers involved in film productions, both jurisdictions faced similar ambivalence, but have eventually taken very different stances, which led to opposite consequences in the actual protection granted to these workers. In Quebec, the question was indirectly dealt with in 1982, when an artists’ association not legally recognised under the *Canada Labour Code* (R.S.C. 1985, c. L-2, “CLC”), i.e. the Union des artistes (UDA), tried to get a certification to represent freelancers hired by Radio-Canada (a national broadcaster). The litigation did not involve workers in film production per se. Rather, it involved workers in radio and television production, but its outcome impacted film production as well. Indeed, the administrative tribunal refused to grant the certification application because it came to the conclusion that the artists included in the application were employees rather than independent contractors. As such, they were considered as falling within the scope of the existing CLC. Hence, they could be regrouped in existing bargaining units, for which other unions already detained bargaining rights under the CLC, as nothing prevented regular employees and “freelancer employees” from being reunited. At the same time, the tribunal declared that the UDA could not get any bargaining

rights while representing independent contractors, as they were excluded from the labour relations legislation (*Union des artistes et al.* and *Société Radio-Canada* [1982] 44 D.L. 19). UDA faced a dilemma. Either it could continue representing its members outside of the scope of the existing labour regimes, which meant doing so without any legally binding obligations on its counterparts to actually recognize its legitimacy and bargaining power, or it could encourage its members to leave for other unions representing “employees” in order to fall under the protection of a labour relations regime. Because UDA’s members defined themselves as “freelancers”, in contrast with “employees” (and regardless of legal tests and qualifications), and because they had been organized inside UDA for many years already, they chose to pressure the government to adopt a specific labour relations regime for artists (along with several other existing artists’ associations at the time). The idea was to clarify the legal status of artists, to avoid further ambiguity (not only in relation to labour issues, but also with respect to taxes), and to provide them with a specific labour relations regime designed for independent contractors. It resulted in the adoption, in 1987, of an innovative piece of legislation, the *Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists* (CQLR, c. S-32.1, “APS”). The APS provides a labour relations regime for artists *as* independent contractors, and grants their associations the legal right to represent them. It applies equally to several cultural industries, namely stage, multimedia, making of films (for any type of screen), recording of audio discs or other modes of sound recording, dubbing and recording of commercial advertisements (APS, section 1).

In New Zealand, a different path was taken. In 2000, a new piece of legislation entered into force, the *Employment Relations Act 2000* (ERA). This legislation did not address specifically the question of film production workers. It was open for courts to decide whether or not it would protect these workers by recognizing them as “employees”. However, the industry practice was to consider these workers as independent contractors, due to the “project-based, intermittent nature of screen productions and the transferable skills of industry practitioners, almost all of whom work on several projects for several different producers during the course of the year depending on their skill base and availability of work” (Three Foot Six, para.11). As a consequence, these workers would have been excluded from the

protection of this labour legislation. In contrast to this conclusion, when the issue was raised in front of the Supreme Court of New Zealand in 2005 in the case *Three Foot Six*, it was decided that regardless of the industry practice, single factual circumstances could lead to the protection of the legislation, the worker being qualified as an “employee”. As a result, the decision allowed for a worker to address a request to the Employment Court in order to be declared an employee within the meaning of the ERA to benefit from its application (ERA, Section 187 (1) f)), notwithstanding the terminology used in his or her contract, following the industry practice, with his or her work provider. This conclusion from the Supreme Court represented good news as it now sent the signal that cultural workers could, depending on their circumstances, benefit from the labour protections under the legislation. At the same time, it was not a strong victory as it remained a burden on each worker to obtain such protection by proving in the context of judicial litigation that even though he or she was treated as an independent contractor by his or her employer, in reality he or she should benefit from the protections under the labour regulation granted to employees.

While having a common distinction between “employee” and “independent contractor” status in relation to labour protection, Quebec and New Zealand pursued different solutions in trying to treat artists in film production as workers with protection. On the one hand, Quebec had adopted a specific legislation for these artists, which recognised their right to collectively organize and bargain as independent contractors, hence clarifying at the same time their legal status. On the other, New Zealand had judicially opened the door to legally qualify these artists as “employees” in order to grant them the protection of the ERA. It is in light of this legal context that we now turn to the sets of events that we focus on for the remainder of our discussion.

PART THREE: HOLLYWOOD PRODUCTIONS AND LEGISLATIVE CHANGE: THE HOWS AND WHYS IN QUEBEC AND NEW ZEALAND

To present the Spiderwick and the Hobbit cases, separated by a few years and many kilometres, we will follow a chronological order, beginning in 2005 with the Spiderwick case in Quebec. In outlining and comparing these cases, a legal analysis, though essential,

would be insufficient to understand the reasons behind the choice of the specific legal solution adopted in response to strikingly similar issues. As such, we draw on cultural labour analysis in amalgamation with legal analysis. Introducing elements from cultural labour analysis allows us to better grasp the broader rationale for the legal solution adopted in each jurisdiction. Thus we pay particular attention to (a) the local industrial conditions within which both disputes arose and (b) the very different political investments that were made in the uncertainty of the employment relationships that both cases illuminated.

A. QUEBEC/SPIDERWICK

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada (IATSE) is a union representing more than 125 000 workers involved in all behind the scenes work in the entertainment industry in the USA, as well as in Canada. The *Alliance québécoise des techniciens de l'image et du son* (AQTIS) is an association representing 4500 workers involved in behind the scenes work in movie productions in Quebec.

In the aftermath of the adoption of the APS in Quebec, associations of workers in artistic productions sought legal recognition under the newly adopted legislation. During that exercise, some categories of technicians involved in movie productions failed to be recognised as “artists” because they were found to be providing services that did not fit either the “performance” or the “creative” requirements contained in the definition of an artist under section 1.1 of the legislation. As a consequence, they were excluded from the APS scope of application (*Association des producteurs de films et de vidéo du Québec* (A.P.F.V.Q.) and *Syndicat des techniciennes et techniciens du cinéma et de la vidéo du Québec* (S.T.C.V.Q.), D.T.E. 89T-747). AQTIS was still able to negotiate collective agreements with a few producers for these workers, but this was done on a voluntary basis to preserve the industrial peace (APFTQ memorandum, 2009). There was no possibility to force the producer in cases where they would refuse such negotiation, contrarily to what would happen under the APS. As a consequence, the benefit of working conditions collectively

bargained for was far from systematic. For these movie technicians, contrary to the new situation under the APS for workers able to obtain the qualification of “artist”, the uncertainty remained.

In 2005, a conflict between two rival unions representing these technicians took place (Dionne and Lesage, 2010). Some unsatisfied technicians represented by AQTIS decided to seize the opportunity of a long-term Hollywood production, the film *The Spiderwick Chronicles* (2008) shooting in Quebec, to establish a new local branch affiliated to IATSE in Quebec (IATSE local 514, 2015). IATSE sought to obtain the right to legally represent movie technicians hired to work on foreign productions shot in Quebec. To do so, it applied for certification by filing a request to the *Commission des relations de travail* (CRT), the tribunal then administering the application of the *Labour Code* of Quebec (LCQ). The reasoning was that the workers for which the representation was sought were “employees” covered by the LCQ. We can make the proposition that the duration of the work relationship, which was scheduled for several months, and the nature of the relation between the producer and the technicians, the technicians working under the producer’s control, were arguments sustaining the IATSE’s position. Both of these arguments recall the criteria for the legal qualification of an employment relationship.

Aware of the attempt of IATSE to obtain a certification for movie technicians in Quebec, AQTIS reacted promptly. A few days prior to the actual application for certification by IATSE being filed, AQTIS sent a notice to bargain to Paramount Productions (Spiderwick being a production of Paramount) under the APS. Paramount refused to negotiate pending the CRT’s decision about the certification application of IATSE for the same group of workers. AQTIS then presented to the *Commission de reconnaissance des associations d’artistes et des associations de producteurs* (CRAAAP, the tribunal overseeing the application of the APS at the time) a request to force Paramount to bargain under the APS, invoking the fact that it already held a legal recognition, under the APS, to represent movie technicians in Quebec. The request was granted by the CRAAAP (*AQTIS and Spiderwick Productions inc. and IATSE*, 2006 CRAAAP 426).

As a result of this inter-union conflict, many Hollywood productions decided to ban Quebec as a possible destination for their shooting, declaring Montreal as a “no shoot zone” (Guardia, 2006: 8). The idea of not knowing in advance and with certitude which set of working conditions should prevail on productions made many production companies reluctant to shoot their films in Quebec. The equivalent of more than 300 million dollars in contracts was considered to be lost in the industry due to the cancellation of production due to shoot in Quebec (Doyon, 2007).

In the spring of 2007, in light of the duration of the work conflict and the negative impact it had on work opportunities and revenues in the industry, the Quebec government decided to appoint a mediator to help both unions to come to an agreement (Ministère de la Culture, des Communications et de la Condition féminine, 2009). The objectives of the mediation were twofold. In the short term, the idea was to “restore a working environment conducive to the welcoming of foreign shootings”. In the long term, it was to “find durable solutions to the conflict” (L’Allier, Boutin and Sasseville, 2010: 9) so such inter-union conflicts could be avoided in the future.

Parallel to this intervention, a group of people from the Quebec movie industry were sent to Los Angeles to let the producers know of the progress in the inter-union conflict and the imminence of legislative amendments aimed at ensuring industrial peace for the future. The goal of the mission was unequivocal: the idea was to bring back Hollywood productions to Quebec (Morissette, 2007). As it was later reported by one of the participants in this mission, during the parliamentary debates surrounding the adoption of amendments to the APS, the Quebec team declared to the Hollywood producers:

Listen, as soon as we have the confirmation that the Bill is adopted, we will inform you by letter. (our translation)(Lemay, 2009: n(15h40)n)

It was reported by the same person that the response from Hollywood producers was positive.

And they [Hollywood producers] are ready, they have named us precise titles that are considering Montreal [as a shooting location], but they are on hold for this... for the adoption of this legislation. They do not want to face any more hint of industrial instability (our translation)(Lemay, 2009: n(15h40)n).

The outcome of the mediation was an agreement between the two rival unions. In June 2009, the Quebec government passed Bill 32. The legislative amendments to the APS integrated the precise terms of the agreement between the parties. These included a redefinition of each union jurisdiction over workers' representation in the movie production industry (the industry being divided into four sectors, each union representing two, resulting in IATSE being the union for American high-budget productions and "Majors" productions and AQTIS for American mid- to low-budget productions and all other foreign and local productions) (Bill 32, sections 35 and 36 and Schedule I). The amendments also broaden the scope of the APS as it now covers movie technicians, as listed in section 1.2 of the APS, notwithstanding whether they can qualify as an "artist" according to past jurisprudence (and despite the absence of "creation" or "interpretation" in their work).

The Alliance of Motion Picture and Television Producers (AMPTP), representing American producers, later pronounced itself in favour of Bill 32, stating:

[t]he film and television industry is global, mobile, and highly competitive. Among the factors which determine where productions are filmed are certainty and labour relations stability. It has been the AMPTP's experience that one of the main contributors to growth and prosperity of the film and television industry is labour stability achieved through collective bargaining and long-term collective agreements. Certainty and labour stability fosters the employment of workers in economically viable businesses, encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the industry and in the economy, and develops workforce skills, workforces, and workplaces that promote productivity. These factors facilitate the welcoming environment necessary to maintain and grow the industry (AMPTP, 2009).

B. WELLINGTON/HOBBIT

To now turn to New Zealand, a dispute began in October 2010 involving the International Federation of Actors (FIA), New Zealand Actors Equity (NZAE, representing around 400 local actors), the Australian actors' guild (the Media Entertainment and Arts Alliance, MEAA, of which NZAE is an independent affiliate) and the producers of *The Hobbit* films (principally, Three Foot Six Productions and Warner Brothers), concerning the use of non-unionized actors in the production. In New Zealand, film workers' unions represent "above-the-line" workers such as actors (the NZAE) and writers (Writers Guild of New Zealand) and "below-the-line" technicians can be represented by the New Zealand Film and Video Technician's Guild (NZF&VTG). They are then supported by the larger Council of Trade Unions (CTU). However, these are voluntary organizations with relatively small memberships and this is partly reflected in the size of the industry and its workforce. Two agreements have been used as a guideline for film industry working conditions, both negotiated with SPADA (the Screen Producers and Directors Association of New Zealand): The Pink Book which covers best practice in the engagement of screen cast (this has now changed to the SPADA/NZAE Individual Performance Agreement) and The Blue Book which covers best practice for screen crew (SPADA, 2016). These best practices cover a range of issues from contracts and residuals, to working hours, to health and safety, and dispute resolution. These are guidelines only and are not legally binding. Producers (both international and local) can offer their own contracts to engage cast and crew in New Zealand and can incorporate all or none of the Pink and Blue Book recommendations. As Kelly (2011) highlights, there had been concerns that New Zealand film workers had experienced "deteriorating" conditions in the industry, with both local and international producers "reducing conditions" and not complying with various aspects of the Pink and Blue Books.

In this context, NZAE decided to use a large-scale Hollywood production planning to shoot in New Zealand, as a prominent case to try to bargain collectively for a standard and binding employment contract that would bring its members in line with the contracts under

which other actors working on the films would work (as U.S. members of unions represented by the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)). This came after the NZAE had attempted, albeit unsuccessfully, to negotiate collectively on behalf of their members on New Zealand produced television productions such as *Outrageous Fortune* (Kelly, 2011). In May 2010, a contract of employment was sent to NZAE and to agents to engage cast in *The Hobbit* films. This contract did not conform to and even ignored many of the Pink Book recommendations and offered no residual payments to New Zealand performers. The NZAE took this contract to the FIA, the umbrella organization with international jurisdiction in relation to performers' trade unions and guilds. By August, the FIA had contacted Warner Brothers, the Hollywood studio issuing the contracts, notifying that it wanted to bargain terms and conditions collectively and Warners refused to bargain. The FIA then issued a 'do not work' order to its members and affiliates (Tyson, 2011).

When these New Zealand workers raised concerns about their labour conditions and these concerns were shared by international branches of their union, the local producers of the films, including the director Peter Jackson, reiterated the refusal to negotiate or engage in collective bargaining and threatened that the production would "go east" (to Eastern Europe) if the dispute was not quickly resolved. Over the proceeding days, New Zealand union representatives met with the producers, but the dispute was also recast in the New Zealand media as a "boycott" by New Zealand actors against the Hobbit producers, including Warner Brothers and Peter Jackson and his production team, and this led to street protests, led both by other local film workers concerned about their job security, as well as members of the public (Child, 2010).

The resolution to the dispute came after the widespread vilification of the NZAE and its members. Within a few months, the FIA had lifted the 'do-not-work' after discussion between representatives of NZAE, MEAA, New Zealand Council of Trade Unions (CTU), Warner Brothers, the principal Hollywood financiers of the films, and New Zealand government ministers. But in the mainstream New Zealand media, the local film industry was framed by the producers as inherently 'risky' and precarious as a result of the union

action (Kelly, 2011). As in the Spiderwick case, New Zealand, was labelled a “no-go zone”. In this context, and rather than industry representatives travelling to Hollywood as in the Spiderwick case (and although the ‘do-not-work’ order had already been lifted), Warner Brothers’ executives flew to New Zealand to engage in further negotiations with the New Zealand government. Generous tax breaks and forms of marketing subsidization were offered by the New Zealand government and willingly accepted by Warner Brothers, and these totalled nearly \$NZ100 million (McAndrew and Risak, 2012: 71). The agreement also enacted ‘emergency’ overnight changes to New Zealand employment legislation that ensured that New Zealand film workers would never be legally considered to be employees in this industry in the future. They will always be, and by default be, independent contractors. As McAndrew and Risak characterize it, such legislation led to “effectively ‘immunizing’ the New Zealand film industry against union activity and legislated employment regulation” (Ibid: 57). McAndrew and Risak go on to note in their analysis that this specific legislative change can now conveniently be extended to other workers or workplaces in New Zealand, or, as they call it, a “textbook example of an effective strategy to keep a workplace, an industry or even a national labour market union-free and unregulated” (Ibid: 74).

PART FOUR: NEW/NO BOUNDARIES OF FILM PRODUCTION WORK

The Hobbit and the Spiderwick cases illustrate in a vibrant way the influence of economic arguments on decisionmaking at the government level. In both cases, the threat of losing the perceived crucial revenues of the film industry captured policy makers’ attention and convinced them of the necessity to address these respective conflicts. In both cases, the legislative body was called into action to amend relevant legislation. And in both cases, the uncertainty with respect to the employment/work relation for cultural workers was alleviated, with very different effects however.

It is also noteworthy that this intervention led not only to legislative amendment, but that the modifications adopted were customized to fit the specifics of the particular problem with which each government was confronted in each case. It resulted in more detailed wording in the legislation, rather than the adoption of more general rules. For example, in New Zealand's ERA, provision 6 defines who is an employee, regardless of the specific industry, except for the exclusion in relation to film, which reads "excludes, in relation to a film production, any of the following persons: (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer or entertainer: (ii) a person engaged in film production work in any other capacity." In Quebec, while an artist is defined in general terms as a "natural person who practices an art on his own account and offers his services, for remuneration, as a creator or performer in a field of artistic endeavour referred to in section 1", provision 1.2 exemplifies the detailed nature of the wording adopted to resolve the conflict:

"1.2. In the context of an audiovisual production mentioned in Schedule I, a natural person who, whether covered by section 1.1 or not, exercises on his own account one of the following occupations, or an occupation judged analogous by the Commission, and offers his services for remuneration is considered to be an artist:

(1) an occupation relating to the design, planning, setting up, making or applying of costumes, hairstyles, prostheses, make-up, puppets, scenery, sets, lighting, images, sound, photography, visual or sound effects, special effects, or any occupation relating to recording;

(2) an occupation relating to sound or picture editing and continuity;

(3) the occupations of script supervisor or location scout manager, and occupations relating to the management or logistics of an efficient and safe shoot, whether indoors or outdoors, including the transport and handling of equipment and accessories;

(4) the occupations of trainee, team leader and assistant in relation to persons exercising occupations referred to in this section or section 1.1.

The following are not covered by this section: accounting, auditing, management and representation, legal and advertising services, or similar administrative services that have only a peripheral contributing value or interest in the creation of a work.”

However, while there are some similarities between the two cases, the ways in which the conflict was handled by the various stakeholders involved in each and the net outcome of each case is dramatically different. Firstly, the nature of the interventions by the Hollywood producers was quite clearly dissimilar. In Quebec, Paramount producers were consulted and provided their opinion but did not seek to intervene directly, nor was there evidence here that producers had a direct stake in the clarification of the employment/work relationship for film workers. Either way, the producers were aware that the workers would, from now on, benefit from collective representation and the alternative was between one legal framework (LCQ) and the other (APS). Total exclusion of the movie technicians was not among the solutions contemplated. In contrast, and as the development of the ‘Hobbit law’ illustrates, Warner Brothers executives and the local producers worked very closely with New Zealand government officials. In fact, subsequent claims have been made that deception was used in order to pass the ‘emergency’ legislation that served both the Hollywood producers and the government (see Conor, 2015). In the latter case, the uncertainty across and within the categories of ‘employee’ and ‘independent contractor’ were certainly clarified and this was enacted by the removal of the employee category altogether. Secondly, the responses of the state also differ significantly. In Quebec, government officials took up the role of mediator in the process to assist the rival unions in reaching an agreement. They listened to and consulted with film workers’ representatives before then amending the legislation and, more fundamentally, the rights of these workers to represent themselves and collectively bargain were assumed rather than threatened or denied. In New Zealand, as we said above, the government worked with the producers and sought legal opinions to support this position and, as some scholars have argued, much of the available evidence points to their operations as directly ‘anti-union’ (for example, Kelly,

2011; McAndrew and Risak, 2012). Thirdly, the nature of the conflict itself is clearly different. In the case of Quebec, there was an *a priori* recognition that film workers were represented by either IATSE or AQTIS and thus the central question and conflict was about that representation i.e. “who has the jurisdiction to represent them?” The dispute was then focused on clarifying the work relation as it was understood in discussion between the workers and the unions, the state and the producers. In New Zealand, the *a priori* position was no recourse to collective bargaining. The dispute was then premised on the ongoing inequalities that a large Hollywood production exposes between unionized workers and non-unionized workers. In this case, local film workers sought to halt the uncertainty and insecurity of their employment status by requesting a collective bargaining process and this was denied by both producers and the state. This uncertainty was in fact alleviated, but was done so by removing a legislative category of work altogether. And this in fact opens up a new set of uncertainties with respect to the ways in which film workers as independent contractors, and their collective organizations may now be in breach of anti-competition law. Indeed, as McCrystal (2014) argues, some workers in film production do benefit from collective representation through several associations that preceded the Three Foot Six ruling. Uncertainty remains, however, because as McCrystal goes on to outline, common law presents some challenges to the ability of these associations to create and enforce collective bargaining and collective agreements. Moreover, further challenges are thrown up by the Commerce Act, under which forms of collective association could be framed as ‘market identification’ and ‘conduct short of price-fixing’, thus breaching local competition law (McCrystal, 2014). Fourthly, the subsequent legislative changes reflected these starkly different contexts. In Quebec, the process of consultation and moderation was genuine, conducted in good faith and thus the adoption of legislative change reflected this. In New Zealand, the cloak-and-dagger nature of change (overnight, without consultation and possibly with key information being withheld from union officials and from the public, see Kelly, 2011) and the unequivocal legislative outcome (removing permanent employment as a default/typical position for film workers) could not be in greater contrast to the Spiderwick case.

Overall, these two cases are worth comparing because of exactly these surprising and extreme differences. It is worth reiterating that the broader economic landscape for both disputes is very similar. Both Quebec and New Zealand are locations for Hollywood filmmaking and, considering Hollywood producers' and studios' preoccupation with risk reduction, keeping the "industrial peace" is paramount for both industries. Policymakers, local producers, union representatives and film workers recognized in both cases that labour disputes are costly and highlight the differing investments that all these stakeholders have in maintaining or disrupting that peace. What is most instructive for us is that these stakes and their legislative outcomes are in such stark opposition. In Quebec, the resolution to the dispute involved the sharing of the responsibilities and requirements of collective representation between the rival unions and explicitly included technicians within the scope of the APS for the film industry. This was legislated in order to avoid further litigation surrounding the issue of their protection and to ensure these workers the same framework for bargaining as other artists working on the same productions. Thus, the uncertainties of employment/work were clarified via an inclusive process as the amendments to the wording in the legislation also illuminate. In contrast, the dispute that led to the "Hobbit law" was resolved by an exclusive process. All film workers (whether "above-the-line" actors or "below-the-line" technicians) were explicitly excluded from the ERA in order to avoid any litigation surrounding the issue of their protection under this legislation. The boundaries of employment were clarified via a process of exclusion – the wholesale removal of a permanent or typical employment relationship in favour of an atypical one.

CONCLUSION

When the Quebec government considered amending the APS, a union representing another sub-sector of cultural workers underlined an interesting discrepancy during the consultation process. In its memorandum, the union highlighted that while the solution put forward for film technicians resolved the problem of inclusion of these workers within the scope of the APS, it did nothing to address the problem in relation to technicians in other

kinds of production (i.e. theatre/stage) (APASQ, 2009). The issue surrounding their collective representation under the APS remained unsolved. In New Zealand, a central concern has been that the “Hobbit law” may be applied to other kinds of workers far beyond the cultural sector and there has been speculation that it was an ulterior move within the larger free-trade agenda of the current government (Kelsey, 2012). Thus the bargaining, shifting and clarification over the boundaries of employment continues. A crucial area of further investigation, although beyond the scope of this paper, is a comparative political economic analysis that considers how the broader political climate in each location has influenced the very different legislative outcomes we have outlined. However, the principle motivation for this comparison is combining the resources of legal and cultural labour analysis in order to consider how legislation is being framed and enacted in local industries to tackle the uncertainties facilitated by international production activity.

When analyzed together, these two cases highlight the differing role(s) and status of unions and guilds for cultural workers as they navigate the continued uncertainties of employment for their members and affiliates. They also highlight the ways in which, in the context of these uncertainties, legislation can both serve and limit the rights and freedoms of cultural workers. Our concern, and thus our motivation for analyzing these two cases together, is that there are vastly different possibilities in the outcomes of such bargaining. Here lies a continuum on which these two cases represent the two poles. It is crucial that we continue to deploy interdisciplinary analysis – cultural labour studies combined with legal analysis - to understand the ways in which legislative mechanisms can determine the forceful inclusion or exclusion of workers from collective representation, including collective bargaining, and fair and equitable working conditions.

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ⁱ 'Above-the-line' workers are considered to be the key creative inputs for a film (such as stars, directors and writers), have individually negotiated salaries and "are named explicitly as line item entries in any project budget" (Scott, 2005: 121). These workers are often then viewed as 'skilled'. 'Below-the-line' workers are then considered to be semi-skilled, technicians or 'crew'.

ⁱⁱ Along with these two categories, an in-between status was created in some legislation: "dependent contractor". The purpose of this is to include, in the labour protection granted by the legislation in question, workers that otherwise could not be qualified as an "employee" but are still considered as in need of protection because of the high economic dependency their profile presents toward their unique work provider. Because it is not applicable in any of the cases under review in the present paper, we do not develop further on this intermediary status.