

A Minor Conundrum:  
Contracting with Minors in Canada for Film and Television Producers

[originally published in *Hastings Communications and Entertainment Law Journal*]  
[cite to 29 *Hastings Comm. & Ent. L.J.* 45]

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## I. Introduction

Likely the most comprehensive review of Canadian law on contracting with minors was published in 1975,<sup>1</sup> when its author, David R. Percy, lamented that “the present state of the law is somewhat confused”;<sup>2</sup> thirty years later we are unfortunately unable to substantially revise that assessment. The uncertainty that surrounds contracting with minors impacts numerous activities, but has particular significance for the film and television industries. Reported cases in Canada dealing with minors’ contracts are relatively sparse. This may be a function of the relative value of contracts entered into with minors compared to the cost of seeking relief in the courts in the event of a dispute. That is, it is unlikely that most business transactions involving a minor would concern sums large enough to warrant the expenditure of legal action. In film and television production, however, the child performer’s contract may itself be for a relatively small amount of remuneration – however, the potential losses to a producer who is unable to bind a child performer could be enormous: the entire production may be rendered unexploitable if, for example, the minor played a leading role.

Producers seek two separate sets of rights. First, the producer wants the right to engage the performer to render their service at a particular time and place (*i.e.*, the ability to engage the actor to perform) and the right to exploit the results and proceeds of the performer’s services after the rendering of services (*i.e.*, the ability to make use of the image and/or voice of the performer in various media). The former matter is properly the subject of labour law, while the latter will often be governed by the terms and conditions of the contract entered into by the producer and performer. This becomes particularly acute in the case of minors, whom the common law has traditionally empowered with the ability to disaffirm or render void a contract into which they previously entered, prior to or within a short period of time after achieving the age of majority.

The “disaster” scenario for a producer would involve a minor who plays a significant role in a film attempting to disaffirm the contract. If successful, such effort would result in the producer being unable to exploit the production at all because the terms which granted the producer the right to make use of the image and/or voice of the minor would be void. Depending

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<sup>1</sup> David R. Percy, *The Present Law of Infants’ Contracts*, 53 Can. Bar. Rev. 1, 1 (1975) .

<sup>2</sup> *Id.* at 2.

on when the disaffirmance occurred, it could prevent the initial theatrical release or broadcast of the production, or the exploitation of ancillary or subsidiary rights – in either case, a potentially catastrophic financial hit.

In a number of the most important film and television production centres (as measured by volume of production), the concerns surrounding enforcing a contract with a minor have been addressed by legislative enactments specifically targeted at the entertainment industry. This article seeks to give producers and production counsel (both American and Canadian) sufficient information on the state of contract law and legislative initiatives in the more prominent North American jurisdictions in which film and television production occurs to enable them to make informed decisions about what steps need to be taken to protect their interests when contracting with performers who are under the age of majority. Employment law regulations are beyond the scope of this paper and are only addressed to the extent they affect the contractual analysis.

## **II. United States**

Generally speaking, United States common law provides that a minor does not possess capacity to enter into binding contracts.<sup>3</sup> The rigour with which this doctrine is applied varies from state to state and from situation to situation, giving rise to a confusing patchwork of caselaw which is hostile to the certainty sought by film and television producers, financiers and distributors. In California and New York, the two states hosting the largest domestic production industries, legislative action was taken in order to ensure that minors could be held to the terms of contracts into which they entered. The following is a brief summation of the legal regimes in place in both jurisdictions.

### **A. California**

The California Civil Code initially reflects the general common law position by providing that “all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights”,<sup>4</sup> and then modifies this by providing a comprehensive regime

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<sup>3</sup> See *Restatement (Second) of Contracts* §14 (1981).

<sup>4</sup> Cal. Civ. Code, § 1556.

for addressing the manner in which minors rendering services in the entertainment industries are able to enter into binding contracts.<sup>5</sup>

The California Family Code provides that minors “may make a contract in the same manner as an adult” subject to (a) the power of the minor to disaffirm the contract, and (b) certain substantive restrictions on the subject-matter of the contract.<sup>6</sup> The minor’s right of disaffirmance is codified, subject to the other provisions of the Family Code.<sup>7</sup> Again reflecting the common law position, the right of disaffirmance for unemancipated minors does not extend to contracts for necessities.<sup>8</sup>

The general power of a minor to disaffirm a contract entered into either before majority or within a reasonable period of time thereafter is circumscribed where the contract is for services rendered in the entertainment industry,<sup>9</sup> and the contract has been approved by a court.<sup>10</sup> California Family Code §6750 provides that the entertainment-contracting provisions apply to contracts entered into after January 1, 2000 for the “artistic or creative services” of a minor, the licensing of artistic properties, personality rights and depiction rights, and “services as a participant or player in a sport”.<sup>11</sup> “Artistic or creative services” is defined expansively, and includes services as an actor, dancer, comedian, writer, composer or musician.<sup>12</sup>

The judicial approval mechanism is described in detail in the legislation, including the stipulation of venue,<sup>13</sup> parties to the proceeding (being the parties to the contract, *i.e.*, the employer and the guardian *ad litem* of the minor – stipulated as the parent or legal guardian of the minor unless otherwise determined by the court)<sup>14</sup> and service of process.<sup>15</sup> Either party may commence the approval proceeding,<sup>16</sup> and the granting of approval validates “the whole of the

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<sup>5</sup> See Cal. Civ. Code, § 1157(a): “The capacity of a minor to contract is governed by Division 11 (commencing with Section 6500) of the Family Code.”

<sup>6</sup> Cal. Fam. Code § 6700 (1992). *See also* Cal. Fam. Code § 6701, which provides that a minor is incapable of (a) giving a delegation of power, (b) contracting with respect to an interest in real property, and (c) contracting with respect to personal property not in the possession or control of the minor.

<sup>7</sup> Cal. Fam. Code § 6710.

<sup>8</sup> *Id.* § 6712.

<sup>9</sup> *Id.* § 6750.

<sup>10</sup> *Id.* § 6751(a).

<sup>11</sup> *Id.* §§ 6750-6753.

<sup>12</sup> Cal. Fam. Code § 6750(a)(1).

<sup>13</sup> Cal. Fam. Code § 6751(a) provides that binding judicial approval can only be granted by the superior court “in any county in which the minor resides or is employed or in which any party to the contract has its principal office in [California] for the transaction of business”.

<sup>14</sup> *Id.* § 6751(b).

<sup>15</sup> *Id.* § 6752.

<sup>16</sup> *Id.* § 6751(b).

contract and all of its terms and conditions”.<sup>17</sup> Practitioners generally seek to include in such orders language stating that the court has determined the approval of the contract to be “in the best interests of the minor”. A judicial order approving a minor’s contract under these provisions must require<sup>18</sup> that 15 percent of the minor’s gross earnings (a term which is also defined in the statute<sup>19</sup>) be placed into a trust account (referred to as a Coogan Trust Account<sup>20</sup>), with one parent or guardian being named as trustee (though the court does have the power to determine that someone other than the parent/guardian should be named “in the best interests of the child”).<sup>21</sup> Deposit of the prescribed amount into the trust account absolves the employer of any further liability for the funds.<sup>22</sup> Funds may be withdrawn by the minor upon reaching the age of eighteen.<sup>23</sup> The trust account provisions of the California statute are quite detailed, going so far as to identify the various types of institutions at which trust accounts must be opened,<sup>24</sup> investments into which trust funds may be invested,<sup>25</sup> and the handling of unclaimed funds.<sup>26</sup>

## **B. New York**

Legislation in the State of New York erects a legal framework which is broadly similar to the situation obtaining in California, though it differs in several significant respects. The New York General Obligations Law confirms that minors are entitled to disaffirm contracts entered into prior to the age of majority.<sup>27</sup> The provisions dealing specifically with minor performers begin by twinning labor and contractual requirements: it is illegal (a misdemeanor) to employ a child performer unless a child performer permit has been obtained in accordance with New York labor laws.<sup>28</sup> The New York Arts and Cultural Affairs Law provides a statutory framework for

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<sup>17</sup> *Id.* § 6751(c).

<sup>18</sup> *Id.* § 6752(b)(1).

<sup>19</sup> *Id.* § 6750(c).

<sup>20</sup> *Id.* § 6753(a).

<sup>21</sup> *Id.* § 6752(b)(2).

<sup>22</sup> *Id.* § 6752(b)(6).

<sup>23</sup> *Id.* § 6753(a).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 6753(e)(3).

<sup>26</sup> See generally Cal. Fam. Code § 6752.

<sup>27</sup> § 3-101 of N.Y. Gen. Oblig. Law states that “A contract made on or after September first, nineteen hundred seventy-four by a person after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy”, indicating that a contract entered into by a person who has not attained eighteen years of age can be disaffirmed by that person.

<sup>28</sup> See N.Y. Arts & Cult. Aff. Law § 35.01 and N.Y. Lab. Law § 151.

judicial sanctioning of entertainment industry contracts for the services of minors:<sup>29</sup> assuming that a producer has complied with labor code requirements, judicial approval of a minor performer contract can be obtained, such approval obviating the right of the minor to disaffirm the contract on the ground of infancy or assert that the parent or guardian lacked authority to make the contract.<sup>30</sup> It should be noted that though court approval will prevent the minor from disaffirming the contract on the basis of infancy, a remedial device is present in the statute which allows the minor or his or her parent/guardian to ask the court to revoke its approval of the contract on the basis that “the well-being of the infant is being impaired by the performance” of the contract.<sup>31</sup>

The New York legislative framework focuses more on procedural requirements than substantive ones. The only substantive restriction on entertainment contracts for minors is that the term of service may not exceed three years (or seven years if the minor is “represented by qualified counsel experienced with entertainment industry law and practices”).<sup>32</sup> The provisions relating to procedural matters are more detailed than those set out in the California statute with respect to such matters as venue,<sup>33</sup> required parties to the proceeding<sup>34</sup> and materials to be filed with the application.<sup>35</sup> The statute provides that the court may withhold approval of a performer contract until the filing of a consent by the person(s) entitled to the earnings of the minor (typically the parent or guardian).<sup>36</sup> The statute also provides that part of the net earnings of the minor be set aside and saved for the benefit of the minor,<sup>37</sup> and that the court shall fix either the amount or the proportion to be set aside.<sup>38</sup> The statute does not stipulate the percentage of the minor’s earnings that must be set aside, though that percentage may not exceed 50%.<sup>39</sup> In determining such amount or proportion, the court is directed to consider “the financial circumstances of the parent or parents entitled to the earnings of the infant and to the needs of their other children, or if the infant is entitled to his own earnings and is married, to the needs of

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 35.03(1).

<sup>31</sup> *Id.* § 35.03(2)(e).

<sup>32</sup> *Id.* § 35.03(2)(d).

<sup>33</sup> *Id.* § 35.03(1).

<sup>34</sup> *Id.* § 35.03(4)(a)-(b).

<sup>35</sup> *Id.* § 35.03(5).

<sup>36</sup> *Id.* § 35.03(3)(b).

<sup>37</sup> *Id.* § 35.03(3)(a).

<sup>38</sup> *Id.* § 35.03(3)(b).

<sup>39</sup> *Id.* § 35.03(3)(b).

his family”.<sup>40</sup> However, the Estates, Powers and Trusts Law requires (a) the parent or guardian of a child performer to establish a trust account in favour of the minor, and (b) that any employer of a child performer pay 15% of the child’s gross earnings into the account.<sup>41</sup> In practice, then, both the parent/guardian and employer of a minor will be under legal compulsion to establish the trust account even absent the court order.

Unlike the California statutes, the New York provisions also speak to the liability of a parent or guardian who either is a party to the contract or “guarantees” the performance of the minor pursuant to the contract: only if the contract has been approved by the court pursuant to the procedure outlined above will the parent/guardian be liable to the producer for either a refusal on the part of the minor to perform or a purported disaffirmance of the agreement.<sup>42</sup>

The mechanisms described by the California Family Code and the New York Arts and Cultural Affairs Law enable producers carrying on business in those jurisdictions to contract with minors with a significant degree of certainty, assuming that they abide by the procedural and substantive obligations imposed by the legislative framework. Producers who undertake film activities in Canada face different challenges, particularly in the common law jurisdiction of Ontario.

### **III. Canada**

#### **A. Ontario**

##### **1. Overview**

It is beyond the scope of this paper to provide a full delineation of Canadian common law as regards contracting with minors. Readers seeking the most comprehensive treatments of the topic are encouraged to refer to the Percy paper noted above,<sup>43</sup> or “Restitution of Benefits Conferred Under Minor’s Contracts” by John D. McCamus.<sup>44</sup> The focus of this article, arising from its practical significance for producers, is on the formulation of cogent arguments which

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<sup>40</sup> N.Y. Arts & Cult. Affa. Law § 35.03(3)(b).

<sup>41</sup> N.Y. Estates, Trusts and Powers Law § 7-7.1.

<sup>42</sup> N.Y. Gen. Oblig. Law § 3-107.

<sup>43</sup> Percy, *supra* note 1.

<sup>44</sup> (1979), 28 UNBLJ 89.

can be advanced in an attempt to overcome the uncertainties of the caselaw and allow producers to obtain an enforceable agreement pursuant to which they obtain the rights necessary to enable them to produce and exploit their production. For purposes of this discussion, a brief overview of the current common law position, to the extent it can be summarized, is provided. Relevant statutes in Ontario which have modified the common law include the *Age of Majority and Accountability Act* (Ontario),<sup>45</sup> which sets the age of majority in Ontario at eighteen years, and section 7 of the *Statute of Frauds*, which stipulates that the ratification (*i.e.*, after reaching the age of majority) of a contract entered into during minority must be made in writing.<sup>46</sup> The focus on the ability of producers to rely on the enforceability of a minor's contract warrants special attention to two cases, *Chaplin v. Leslie Frewin (Publishers) Ltd.* and *Toronto Marlboro Major Junior "A" Hockey Club v. Tonelli*, which are of particular significance.<sup>47</sup>

In reviewing the commentary on the relevant Canadian case law, one is repeatedly struck by the frustration expressed by those who have undertaken to provide a cogent description of the current situation. As noted by Maddaugh and McCamus, "many observers have taken the view that the law in this area is beyond judicial repair and that a sound restatement of the law can be effected only legislative enactment".<sup>48</sup> Writing thirty years ago, Percy opined that the law in this area is "extremely uncertain, even on basic questions ... The rules which can be discerned often create arbitrary and rather irrational distinctions ... [which] often bear little relationship to present day realities".<sup>49</sup> That being said, it is possible to fashion a plausible argument rooted in existing case law that addresses the particular concerns of a producer contracting for intellectual property rights related to exploitation of a minor's performance.

Canadian courts have recognized that an unrestricted power vested in minors to avoid contracts could undermine the original policy of protecting the interests of minors; people would be extremely reluctant to contract with or engage minors if *all* contracts purportedly entered into by a minor could be rendered unenforceable at the whim of the minor. Minors have an interest in being able to securely obtain certain types of goods (such as food) and services (such as hygiene or education) and monetary remuneration in exchange for the rendering of their own

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<sup>45</sup> *Age of Majority and Accountability Act* (Ontario), RSO 1990, c. A-7, s. 1.

<sup>46</sup> *Statute of Frauds* (Ontario), R.S.O., ch. S-19 (1990).

<sup>47</sup> See *Chaplin v. Leslie Frewin (Publishers) Ltd.*, [1966] Ch. 71; *Toronto Marlboro Major Junior "A" Hockey Club v. Tonelli* (1979), 23 OR (2d) 193 (CA).

<sup>48</sup> Maddaugh and McCamus, *The Law of Restitution* (2005), 14:300, p. 14-27.

<sup>49</sup> Percy, *supra* note 1, at 55.

services; persons in a position to satisfy such interests seek certainty in contracting with minors for their provision. In seeking to reconcile the competing interests of protecting minors from exploitation (arising from their relatively weak situation compared to most counterparties) while also reserving certain species of contracts or relationships in order to ensure that the valid interests of minors (to obtain beneficial goods and services) are protected, a body of case law has arisen which is sometimes less than lucid if reviewed with the hope of finding predictability. Minors can, of course, enforce against the adult party any contract they enter into.<sup>50</sup>

David R. Percy, in surveying Canadian common law, concluded that “infants’ contracts” could be sorted into four categories: binding contracts; voidable contracts (itself divisible into contracts which are binding until repudiated and contracts which are not binding until ratified); and void contracts.<sup>51</sup> Though the boundaries between these categories are not always impermeable, and though the judicial reasoning does not always maintain the necessary rigour in maintaining this analytical framework, the categories do provide a useful mechanism with which to approach the problem of contracting with minors, and can serve to simplify the inquiry.

### *Void Contracts*

Though courts have tended to elide the difference between “void” and “voidable”, it is imperative to maintain the distinction: a void contract is a nullity *ab initio* and cannot be ratified by the minor upon reaching majority. This has a significant impact on the nature of recovery to which the minor is entitled: he “may recover back money paid or property transferred regardless of any benefits he has received and of his ability to make restitution to the other party”.<sup>52</sup> The draconian nature of this right to recovery has resulted in the category of absolutely void contracts being largely abandoned in the United States. Though there does not exist a comprehensive list of the types of contracts which will be deemed void, Percy argues that the category should be construed as narrowly as possible, and limited to those contracts which contain a penalty or clear prejudice to the minor.<sup>53</sup>

### *Voidable Contracts*

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<sup>50</sup> *R v Rash* (1923), 53 OLR 245 (Ont CA).

<sup>51</sup> Percy, *supra* note 1, at 2ff.

<sup>52</sup> Percy, *supra* note 1, at fn 148 and accompanying text.

<sup>53</sup> Percy, *supra* note 1, at Part D.1.

As Percy described in detail, the origins of the traditional distinction between contracts binding until repudiated and contracts not binding until ratified was obscure.<sup>54</sup> Even thirty years ago, Percy described the distinction as “arguably irrational”, and he concluded that some Canadian courts were inclined to ignore the distinction and simply treat all minor’s contracts (except those for necessities, discussed below) as binding until repudiated.<sup>55</sup>

*i. Contracts Which Are Binding Until Repudiated by the Minor*

Historically only four types of contracts fell into this category: contracts concerning land, contracts for the purchase of shares, partnership agreements and marriage settlements.

*ii. Contracts Which Are Not Binding Until Ratified By The Minor*

At common law, all contracts to which a minor was party (excluding the four types described in the preceding paragraph, contracts for necessities and services, and those so prejudicial as to be void), were not binding on the minor until ratified by the minor upon achieving the age of majority.

*Binding Contracts*

The common law doctrine that contracts for “necessaries” are enforceable against a minor<sup>56</sup> has been codified in Ontario law as section 3 of the *Sale of Goods Act*:<sup>57</sup> “where necessities are sold and delivered to a minor ... he or she shall pay a reasonable price therefor”. What constitutes “necessaries” has been the subject of diverse opinion; it clearly includes necessary food, clothing and medicine,<sup>58</sup> and can include matters such as the provision of legal services.<sup>59</sup> Even a contract for necessities, however, must be beneficial for the minor, and will not be binding on the minor party if it contains oppressive terms.<sup>60</sup> A complementary category of enforceable contracts are beneficial contracts of apprenticeship, service, education and livelihood;<sup>61</sup> as alluded to above, the rationale for enforcing such contracts is to ensure that

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<sup>54</sup> *Id.* at 14-32.

<sup>55</sup> *Id.* at 15.

<sup>56</sup> See, e.g., *Wharton v Mackenzie* (1844), 5 QB 606; *Roberts v Gray* [1913], 1 KB 520.

<sup>57</sup> *Sale of Goods Act* (Ontario), RSO 1990, c. S-1.

<sup>58</sup> See *Chitty on Contracts*, 29<sup>th</sup> Edition, Vol 1., (London, 2004: Sweet & Maxwell), para. 8-008.

<sup>59</sup> *Id.* para. 8-013.

<sup>60</sup> *Id.* para.8-009. See also *Fawcett v Smethurst* (1914), 84 LJKB 473.

<sup>61</sup> *Id.* paras. 8-021ff.

minors are not deprived of any potential advantage which may accrue from this type of relationship. Sometimes colloquially referred to as “contracts for service”, these are contracts which “permit [the minor] to earn his livelihood or to be trained for some trade or profession”.<sup>62</sup> A contract for service may be held to be enforceable so long as the minor is receiving some advantage from the transaction equal to or in excess of any rights or interests which are being foregone.<sup>63</sup> There has, perhaps inevitably, been some “bleeding” of the latter category:

“the principle that contracts beneficial to a minor are binding on him is not confined to contracts for necessities and contracts of employment, apprenticeship or education in a strict sense. It extends also to other contracts which in a broad sense *may be treated as analogous to contracts of service, apprenticeship or education.*”<sup>64</sup> [emphasis added]

Examples of contracts held to be enforceable against the minor under this rubric include a contract between a minor and a publisher to publish the ghost-written biography of the minor,<sup>65</sup> and a management agreement between a management company and a musical group.<sup>66</sup> This extension of enforceability should not be over-stated, however: there remains no general principle that simply because a contract is beneficial to a minor it will be held to be enforceable. Rather, the extent to which a contract can favourably be compared to a contract for necessities or a contract for services will likely be determinative.

## 2. Constructing the Argument

Based on the foregoing, the beginnings of an argument for the enforceability of a performer’s contract with a minor can be formulated: a performer contract can be described as, if not a contract for services, at least analogous thereto. As described above, the performer contract is essentially an employment contract, offering payment in exchange for services rendered.

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<sup>62</sup> Percy, *supra* note 1, at 9.

<sup>63</sup> *Clements v L & NW Ry*, [1894] 2 QB 482.

<sup>64</sup> *Chitty*, *supra* note 52, para. 8-028.

<sup>65</sup> *Chaplin v Leslie Frewin (Publishers) Ltd.*, [1966] Ch. 71.

<sup>66</sup> *Denmark Productions Ltd v Boscobel Productions Ltd* (1967), 111 SJ 715 reversed on other grounds [1969] 1 QB 699.

Given the realities of the entertainment industry, the engagement of a minor performer is one of the few feasible avenues for an actor to prepare for a career in the industry. Categorization as a contract for necessities or services will not be conclusive, however: it must still be found to be beneficial to the minor in order to be held enforceable by the courts.

There are also some developments in relation to the remedies available upon a purported repudiation by the minor which may be of assistance to producers. In addressing the rights of recovery of the parties to a contract with a minor, Maddaugh and McCamus write that there are Canadian authorities who address the uncertainties of the rights of a supplier of non-necessaries

“which suggest a jurisdiction to require the minor who wishes to avoid the agreement to make *restitutio in integrum* to the other party – provided that this jurisdiction need not be exercised where it would be inequitable [*i.e.*, to the minor] to do so.”<sup>67</sup>

Articulated another way, “Canadian courts ... have moved toward acceptance of the general principle that the minor is entitled to restitution, *provided that the minor makes restitution to the other party*” [emphasis added].<sup>68</sup> The ability of the minor to effect restitution, in other words, can limit the ability of a minor to repudiate a contract.

In the comparatively sparse collection of Canadian case on contracts with minors, there do not appear to be any reported decisions which involve performer contracts. Producers are forced, then, to turn to authoritative cases which address scenarios similar to the underlying elements of an actor agreement: the engagement of a minor to provide his or her services, such services being based on an inherent talent possessed by the minor for some type of performance, and the concomitant transfer of intellectual property rights from the minor to the counter-party. Two cases in particular recommend themselves to this task: *Tonelli*,<sup>69</sup> an Ontario Court of Appeal decision; and *Chaplin*,<sup>70</sup> a decision of the English Court of Appeal.<sup>71</sup> The former provides the controlling analysis under Ontario law for the enforceability of a minor’s contract,<sup>72</sup>

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<sup>67</sup> Maddaugh and McCamus, *supra* note 45, at 14-29. See esp. fn 116 for authorities.

<sup>68</sup> Maddaugh and McCamus, *supra* note 45, at 14-28.

<sup>69</sup> *Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli* (1979), 23 OR (2d) 193 (CA).

<sup>70</sup> *Chaplin v. Leslie Frewin (Publishers) Ltd.*, [1966] Ch. 71.

<sup>71</sup> While English court decisions are not binding authority on Canadian courts, decisions of the English Court of Appeal and the House of Lords are afforded considerable respect and consideration; see generally *The Canadian Abridgment*, 3<sup>rd</sup> Edition (2005: Thomson) vol. 61, para. XVIII.5.c.1 and ff.

<sup>72</sup> *Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli* (1979), 23 OR (2d) 193 (CA).

while the latter addresses the ability of a minor to effect restitution in the case of a transfer of intellectual property rights.<sup>73</sup>

**(a) *Tonelli***

The 1979 Ontario Court of Appeal decision in *Toronto Marlboro Major Junior “A” Hockey Club v Tonelli* offers the most recent appellate court consideration in Ontario of contracting with minors, and sets forth the current analytical framework.<sup>74</sup> At the age of 17, John Tonelli entered into a contract with the plaintiff junior hockey club, referred to as the Marlboros.<sup>75</sup> The contract contained stipulations which required Tonelli to play exclusively for the team for three years (extendable to four at the plaintiff’s sole discretion) and, were he ever to play for a professional hockey team, to remit twenty percent of his gross earnings to the plaintiffs during the first three years of his professional career.<sup>76</sup> The day after he turned 18, Tonelli repudiated the contract with the Marlboros and signed an agreement with the Houston Aeros of the professional World Hockey Association.<sup>77</sup> The Marlboros commenced an action for breach of contract, arguing that that the agreement was enforceable against Tonelli.<sup>78</sup> The Court of Appeal concluded that the contract was not enforceable against Tonelli, due to the contract not being for his benefit.<sup>79</sup>

The reasons for the decision written by Justice Blair (with Justice Arnup concurring), described the fundamental question facing the court as “whether the contract ... was beneficial to [the minor]”.<sup>80</sup> The majority reiterated that the onus of proving the contract to be to the minor’s benefit lay with the plaintiffs (i.e., the party seeking to enforce the contract against the minor).<sup>81</sup> In setting forth the fundamental principles of contracting with a minor (enunciating principles of law so “well established [that] no authority need be cited to support them”), Blair made clear that the contract could not “be invalidated simply because it places some burdens upon an infant”.<sup>82</sup>

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<sup>73</sup> *Chaplin v. Leslie Frewin (Publishers) Ltd.*, [1966] Ch. 71.

<sup>74</sup> *Toronto Marlboro Major Junior “A” Hockey Club v. Tonelli* (1979), 23 OR (2d) 193 (CA).

<sup>75</sup> *Id.* at 193.

<sup>76</sup> *Id.* at 197-198.

<sup>77</sup> *Id.* at 199.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 193.

<sup>80</sup> *Id.* at 204.

<sup>81</sup> *Id.* at 193.

<sup>82</sup> *Id.* at 207.

Rather, a nuanced assessment of the question of benefit was required. Though the reasoning includes the statement that the court was obliged to “construe the contract as a whole and strike a balance between its beneficial and onerous features”,<sup>83</sup> it is perhaps more accurate to describe the court’s role as assessing the beneficial and onerous features of the contract with the goal of measuring the balance between beneficial and onerous aspects – where the negative aspects outweighed the beneficial, the contract would not be held to be enforceable against the minor.

Blair’s reasoning takes pains to emphasize that the inquiry into whether the contract is “beneficial” is much broader than a simple assessment of pecuniary benefit (which would also encompass an assessment of opportunity cost).<sup>84</sup> It is not even clear from the reasoning that pecuniary matters are of overriding concern. In *this particular case* the economic aspects of the agreement were of “paramount” but not determinative importance – Blair undertook a survey of the non-pecuniary aspects of the agreement because it was, in his view, possible that the negative economic aspects could be “counterbalanced by other factors”.<sup>85</sup> Those other factors included “less tangible considerations” such as whether it was in Tonelli’s long-term interests to accept onerous conditions in exchange for an opportunity to access the more lucrative world of professional hockey.<sup>86</sup> Because the junior hockey leagues were virtually the only mechanism by which a promising player, and given the financial realities of the hockey industry, went the plaintiff’s argument,<sup>87</sup> Tonelli was being offered the best possible deal, all things considered.

The majority had no trouble concluding that the Marlboros contract contained “obvious economic disadvantages”<sup>88</sup> for Tonelli: the salary paid to Tonelli was described by Blair as “a pittance”,<sup>89</sup> and was expressly contrasted with the salary he could have been earning as a professional player if he had not been tied to the junior team. The requirement that Tonelli pay a fifth of his gross earnings to the team for a period of three years after he had left their employ was, if anything, an afterthought in light of what the court felt was the most offensive aspect of the contract: that the three- (and possibly four-) year term of the agreement “prevented him from capitalizing fully on his ability as a player” during that time.<sup>90</sup> Tonelli would lose the

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<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 207-208.

<sup>85</sup> *Id.* at 208.

<sup>86</sup> *Id.* at 210.

<sup>87</sup> *Id.* at 206.

<sup>88</sup> *Id.* at 208.

<sup>89</sup> *Id.* at 209.

<sup>90</sup> *Id.*

opportunity to play in a professional league, which would have enabled him to burnish his reputation, improve his skills and make better money – in short, “the loss of three years of valuable time in a major league would ... be irreplaceable”.<sup>91</sup>

The court rejected the plaintiff’s arguments that any immediate economic unfairness was the acceptable *quid* for the *quo* of being allowed possible entrance into the world of professional hockey.<sup>92</sup> It was not, Blair noted, an issue “whether Tonelli’s contract was necessary for the preservation of the League or the Marlboros”.<sup>93</sup> At this point, the inquiry could reasonably have been concluded: the pecuniary benefits were, relatively speaking, negligible, and could not be outweighed by any non-pecuniary benefits which might be said to accrue under the agreement. Regrettably, the court’s reasoning continued into a brief discussion of contracts of adhesion, unconscionability and agreements in restraint of trade. Though the analysis on these additional theories of unenforceability also militated in favour of Tonelli, it should be made clear that they are not traditional elements of the contracting with a minor analysis (though unconscionability may share an originary impetus, namely the protection of weaker parties), nor are they necessary for arriving at the conclusions reached by the *Tonelli* decision. For reasons of analytical and doctrinal clarity, adhesion, unconscionability and restraint of trade should be pleaded and considered in the alternative, not as adjuncts to the discrete question of whether a contract against a minor is enforceable.

In contrast to the morass of case law and arcane distinctions which Percy took such pains to attempt to make sense of, the brisk clarity of the *Tonelli* reasoning offers a better analytical model and way forward: simply assess whether the agreement is for the benefit of the minor, and avoid the inevitable entanglement of trying to parse the accumulated bramble of common law analyses which no longer serve any rational purpose. In evaluating “benefit”, the *Tonelli* decision also makes it clear that the analysis is to be comprehensive: rather than limiting itself to bare monetary concerns, a constellation of concerns can be examined, including whether the contract can be viewed as a component part of advancing the career of the minor.

**(b) *Chaplin***

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 210.

The 1966 English Court of Appeal decision in the case of *Chaplin v Leslie Frewin (Publishers)* is particularly apposite for producers, since it is one of the only cases involving a minor which addressed the issue of whether copyright could be transferred pursuant to a contract with a minor.<sup>94</sup> The case involved a dissolute son of Charlie Chaplin, who at the age of eighteen (twenty-one then being the age of majority in England) entered into an agreement whereby Chaplin's biography was to be ghost-written for the benefit of the publishers; the contracts stipulated that Chaplin was to hold copyright in the memoir as author thereof, and an exclusive license to publish and sell the book was granted to the publishers. Within six months of signing the contracts, Chaplin sought to repudiate them on the basis of advice given to him that the negative picture painted by the manuscript would be prejudicial to his interests.

It is important to note that all three appellate judges were of the opinion that the contract could be binding on the minor Chaplin so long as the publishers were able to demonstrate that it was "on the whole" for his benefit. Indeed, Lord Denning, though ultimately dissenting from the majority decision and holding that the agreement was unenforceable because enforcing it would have the effect of "purveying scandalous information" about the minor (and thereby not being to his benefit), described the contract as being "of a class which would be binding on him ... if it was on the whole for his benefit". Denning acknowledged that "authors and composers often start young" and that contracts of this type were "analogous to contracts of service and are binding if they are for his benefit". The category of contracts in question, presumably rooted in the rendering of services by a minor which could be described as artistic or athletic, can rationally be expanded to include all contracts whereby an intrinsic aptitude of the minor is sought to be exploited by the contracting party.

Reflecting the dynamic identified at the beginning of this paper, the publishers, in seeking to enforce the contract, made two alternative arguments: either the contract was enforceable since it was analogous to a contract of service which itself was analogous to a contract for necessities, or, even if the contract was potentially voidable by Chaplin, the assignment of copyright contained in the agreement was not revocable. In other words, even if a contract is avoided by a minor, any property and interests, including copyright, previously transferred cannot be recovered. Two of the three appellate judges concurred: as Danckwerts, L.J. stated,

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<sup>94</sup> *Chaplin v Leslie Frewin (Publishers), Ltd. And Another*, [1966] Ch. 71 (CA).

“the transfers of property made by the plaintiff remain effective against him, even if the contract is otherwise revocable. This, I think, is the true effect of the authorities cited to us. ... The copyright is no longer at the plaintiff’s disposal.”

In assessing whether the contract was for the benefit of the minor, the court was satisfied that because the contract “would enable the plaintiff to make a start as an author and thus earn money” it was sufficiently beneficial to be enforceable. Entry to an otherwise closed industry, in other words, together with the possibility of a reasonable amount of remuneration for services rendered or rights granted, is sufficient to render a contract enforceable. Chaplin’s argument, that the material contained in the book would be prejudicial to his interests because it cast him in a negative light, was dismissed:

“I find it difficult to sympathise with a person who, for the purpose of gain, has approved of a book which is calculated to denigrate his character and afterwards wishes to change his mind. ... The mud may cling, but the profits will be secured.”

It is worth emphasizing that the *Chaplin* decision held that the copyright was not capable of restitution, and the book had not yet even been published. Justice Danckwerts goes so far as to say that the effect of the caselaw authorities is that transfers of copyright by a minor “remain effective against [the minor], *even if the contract is otherwise revocable*” [emphasis added]. Justice Winn, concurring in the reasoning of Danckwerts, reiterated that, *because copyright had vested in the publishers*, the transfer of copyright “could not be divested or avoided by any ... purported election on the part of the infant”. It is thus sufficient, on the basis of the *Chaplin* decision that copyright merely must have been effectively transferred – where the transferred copyright has already been exploited, the case for the impossibility of effecting restitution of the copyright becomes even more compelling.

Though the *Chaplin* decision did not make it an express element of their decision, perhaps the most compelling argument to limit the ability of a minor to rescind any grant of intellectual property rights is with reference to the principle that the minor’s right to recover property transferred (in effect, to rescind the grant of rights) should be conditional on the minor’s

ability to effect *restitutio in integrum* to the benefit of the other party. If the minor actor is unable, by returning the money he or she was paid to perform, to return the producer to the position they occupied prior to the agreement having been effected, then the grant of rights should not be capable of rescission. Because of the realities of film financing, where a producer is often obliged to grant rights to third party distributors well in advance of the first frame of film being shot (in exchange for a commitment to provide funds necessary to finance the production), a producer will often be in a position of having relied on the grant of rights contained in the performer agreement. As well, simply returning the fee paid (*i.e.*, in exchange for a rescission of the rights granted) will not serve to ameliorate the producer's loss: it will often be prohibitively expensive, if not impossible, to try to and re-shoot the scenes in which the minor was filmed. Though the general notion that the impossibility of restitution acts as a limitation on the ability of a minor to disaffirm a grant of property rights has been recognized in the abstract in Canadian law,<sup>95</sup> there does not appear to be authority directly on point. With respect to the intersection of this issue and intellectual property rights, the *Chaplin* case appears to be the closest decision to a binding authority.

**(c) Summation**

Based on the foregoing discussion, the interlocking component elements with which to argue for the enforceability of a minor's performer contract can be ascertained. A fundamental requirement is that the agreement be for the benefit of the minor: while fair monetary remuneration for the services rendered would almost certainly be required, in crafting the contract producers must be careful to avoid provisions whose negative impact could outweigh the pecuniary aspects. Overlong exclusivity periods, onerous penalty clauses or failure to include adequate provision for ensuring that the working conditions of the minor are acceptable could all prove fatal. As will be discussed below, a producer should take the position that engaging the minor in accordance with the terms of a collective bargaining agreement (such as

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<sup>95</sup> See *Sturgeon v Starr* (1911), 17 WLR 402 at 404 (Man KB) and *Louden Mfg Co v Milmine* (1908), 15 OLR 53 at 54: "it must be that if an infant avails himself of the right he has to avoid a contract which he has entered into and upon the faith of which he obtained goods, he is bound to restore the goods which he has in possession at the time he so repudiates".

the ACTRA Independent Production Agreement) should be conclusive evidence that the contract is for the benefit of the minor.

If a producer is confronted with a situation where the enforceability of a minor's contract is called into question, his or her counsel should frame their arguments so as to cast the agreement as analogous to a contract for service. This would include pointing out that the agreement is essentially an employment contract, should include reference to the fact that the terms of the agreement are consistent with industry standard and should emphasize that by entering into the agreement in question the minor is realizing on an opportunity to work in the entertainment industry; in other words, if the minor were not prepared to accept the terms of the contract offered by the producer (assuming, of course, that such terms are fair and for the benefit of the minor), the minor could run the risk of not being able to exploit his or her talents in a potentially lucrative field.

In the worst case scenario, where a producer is unable to satisfy a court that the contract was indeed for the benefit of the minor and the contract is deemed to be unenforceable against the minor, the *Chaplin* decision, as authority that a conveyance of intellectual property cannot be rescinded by a minor, may be turned to account. As a further buttress against the potential loss of the intellectual property rights, a producer can attempt to rely on the authorities, noted above, which indicate an equitable jurisdiction in the courts to bar a minor from recovering (i.e., being granted a rescission of the grant of his or her intellectual property rights) unless the minor can effect restitution to the producer. Because the producer will have expended time, money and opportunity in reliance on the grant of rights, it will likely be insufficient for the minor to simply refund to the producer the money which was paid to the minor; where the production is already in the process of being exploited, it is difficult to imagine how a minor can restore the producer to his or her pre-contractual position. That incapacity should be a bar to the minor seeking to repudiate the contract.

## **B. British Columbia**

### **1. Statute and Regulations**

The Province of British Columbia, a major film and television production centre within Canada, has, in an approach similar to that found in California and New York but unique amongst Canadian provinces, codified the handling of contracts with minors. Section 19(1) of the *Infants Act* provides that a contract entered into by a minor is unenforceable against the minor, unless (a) otherwise specifically provided by statute, (b) affirmed by the minor upon reaching the age of majority, (c) performed or partially performed by the minor within one year after attaining the age of majority, or (d) not repudiated by the minor within one year after attaining the age of majority.<sup>96</sup> Section 9 of the British Columbia *Employment Standards Act*<sup>97</sup> provides that a minor under twelve years of age cannot be employed without the permission of the Director of Employment Standards, who also has authority to set the conditions of employment for each such minor; the *Employment Standards Act* regulations governing the employment of minors in the province are incorporated into the collective agreement of the Union of B.C. Performers.<sup>98</sup>

The *Infants Act* provides two routes to obtain a binding contract with a minor, though in practice the two routes merge into one procedure. The first option is to make an application to the court, on behalf of the infant (which requires the permission of the parent or guardian of the minor), seeking an order granting the minor capacity to enter into a specific contract.<sup>99</sup> The second option is to make an application to the Public Guardian and Trustee of British Columbia (the “PGT”);<sup>100</sup> the PGT is empowered to make an order granting contractual capacity or ratify a contract already entered into if the PGT determines that “the making of such an order would be in the best interests of the child”.<sup>101</sup> The granting of an order by either the court or the PGT obviates the effect of section 19(1) of the *Infants Act*, thus rendering the contract which is the subject of the order enforceable against the minor (and removing the ability of the minor to repudiate the agreement).<sup>102</sup> The practical merger of the two options occurs because any

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<sup>96</sup> RSBC 1996, C. 223, as amended.

<sup>97</sup> RSBC 1996, C. 113, as amended.

<sup>98</sup> See Section C (ACTRA/UBCP), below and *infra* notes 78 and 79 and accompanying text.

<sup>99</sup> *Infants Act*, s. 21(1). An order may also be sought which grants the minor “full capacity” (or “emancipation” in the American argot), or capacity to enter into a “class” of contracts.

<sup>100</sup> *Id.*, s.22(1).

<sup>101</sup> *Id.*

<sup>102</sup> See BC *Infants Act*, s.21(3) for court orders and s.22(3) for PGT orders.

application to the court must also be copied on the PGT,<sup>103</sup> which triggers a review process undertaken by the PGT.<sup>104</sup>

In assessing whether to grant an order applied for under section 21(1), the court must be satisfied that the order “is for the benefit of the infant and that, having regard to the circumstances of the infant, he or she is not in need of the protection offered by law to infants in matters relating to contracts”.<sup>105</sup> The PGT, in reviewing an application for an order, is directed to undertake a more fulsome review in which it must consider: “(a) the nature, subject matter, and terms of the contract; (b) the requirements of the minor, having regard to his or her particular circumstances; (c) the age and means of the minor; and (e) the wishes of the minor’s parent or guardian”.<sup>106</sup> Although not statutorily required to do so, the identical review is undertaken by the PGT when it is provided notice of an application for an order which has been made to the court.<sup>107</sup>

There are no statutory requirements compelling the court or the PGT to include particular substantive requirements in an order. However, British Columbia labour law regulations stipulate that with respect to any minor under fifteen years of age<sup>108</sup> (but not minors aged between fifteen and eighteen) who is employed in the film industry and who earns more than \$2,000 on a production, the employer must remit 25% of any earnings over \$2,000 to the PGT to be held in trust for the child.<sup>109</sup> In practice, most court orders obtained pursuant to the provisions of the *Infants Act* provide for the imposition of some form of trust for the benefit of the minor.

## 2. *Hann-Byrd*

*Re Hann-Byrd*,<sup>110</sup> the only reported case on point, decided pursuant to an earlier version of the provisions contained in the *Infants Act*, is notable for two reasons: the criteria which the court used in concluding that an order should be granted giving the minor capacity to enter into the contract in question; and the substance of the financial protection provisions which were

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<sup>103</sup> BC *Infants Act*, s.21(4).

<sup>104</sup> See [http://www.trustee.bc.ca/services/youth/protective\\_services.html](http://www.trustee.bc.ca/services/youth/protective_services.html).

<sup>105</sup> BC *Infants Act*, s.21(2).

<sup>106</sup> *Id.*, s.22(2).

<sup>107</sup> See [http://www.trustee.bc.ca/services/youth/protective\\_services.html](http://www.trustee.bc.ca/services/youth/protective_services.html).

<sup>108</sup> See *Employment Standards Act*, Employment Standards Regulation, BC Reg. 396/95, as amended, s. 45.5(2).

<sup>109</sup> *Id.*, s. 45.14.

<sup>110</sup> [1992] BCJ No. 2594 (BCSC).

included in the order. Adam Hann-Byrd was a ten-year old film actor who was engaged to appear in a film entitled “*Digger*”. Adam’s mother, as his guardian *ad litem*, brought the application, though the court noted that the application was “in reality being made by the producer of the film ... with the full approval of Adam’s parents”.

In brief written reasons, the court noted the following in concluding that the contract was “for the benefit of the infant”: a “handsome payment” in exchange for a relatively short period of work; potential merchandising royalties; as well as potential residuals from future exhibitions. Although the court noted certain “penalties” contained in the contract (which were not otherwise described) which would be imposed if Adam failed to perform his acting services, it was also noted that “there is no rational way to confer the benefits ... without imposing ... certain obligations”. The criteria which the court examines are, in short, primarily pecuniary in nature. The court noted as well that Adam’s parents were “obviously keen” to have the contract approved, and that they trusted the producer of the film. In characterizing the role played by the court in reviews of this type, Fraser J. opined that the court’s function was effectively to replace the need for Adam to obtain independent legal advice by determining whether the terms of the contract were for the minor’s benefit.

The order issued by the *Hann-Byrd* court (which was issued, it should be noted, prior to the enactment of the labour law regulations referred to above) is instructive: it stipulates that payments made by the producer to Adam be treated in a manner identical to that set out in a previous order applicable to Adam made by the Superior Court of California, *i.e.*, deposited into a blocked account set up in accordance with the California provisions described in Section II.A of this article. Precedent therefore exists for Canadian courts approving the substantive mechanics for protecting minors as required under California law – in other words an arrangement similar to the “Coogan Account” system familiar to US producers is likely to be acceptable under, at least, BC law.

### **C. ACTRA/UBCP**

Producers who wish to engage performers who are members of the Alliance of Canadian Cinema, Television and Radio Artists (“**ACTRA**”) are required to become signatories to either

the Independent Production Agreement (the “**IPA**”) (which establishes minimum terms and conditions of engagement for performers in the film, television and radio industry) or the National Commercial Agreement (the “**NCA**”) (which serves a similar function for commercials), by means of the signing of a voluntary recognition agreement or submission of an “intent to produce” notification, respectively.<sup>111</sup> In the Province of British Columbia, the Union of B.C. Performers (“**UBCP**”) is a branch of ACTRA and is the exclusive bargaining agent for performers in film and television productions within the province; producers who wish to engage ACTRA/UBCP members are required to become signatory to the B.C. Master Production Agreement (the “**BCMPA**”).<sup>112</sup>

Producers who engage minors<sup>113</sup> under the auspices of the IPA, the NCA or the BCMPA are contractually required to observe certain requirements for the protection of minors specifically negotiated into each collective agreement. Pursuant to the ACTRA IPA, the primary income protection mechanism is the establishment of a trust for the benefit of the minor performer, into which 25% of earnings in excess of Cdn\$5,000 lifetime earnings are deposited.<sup>114</sup> The trust is then administered by the ACTRA Performers’ Rights Society (“**PRS**”), with the parent(s) or guardian(s) of the minor performer choosing amongst three investment options.<sup>115</sup> While the ACTRA PRS has acknowledged that the protection mechanism is “to some extent based upon” the British Columbia provisions, they expressly take the position that “ACTRA knows it can do a better job than Governments even if Provincial legislatures had the will to enact laws to protect Minor’s earnings.<sup>116</sup> ACTRA is closer and more accountable to its members and understands their needs.”<sup>117</sup> The BCMPA incorporates as Appendix “F” the British Columbia Employment Standards Act regulations governing the employment of minors; the provisions require that 25% of a minor’s earnings in excess of Cdn\$5,000 lifetime earnings be deposited either with the Public Guardian and Trustee of British Columbia in trust for the

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<sup>111</sup> See ACTRA IPA Appendix 3 and NCA Appedix “C”.

<sup>112</sup> B.C. Master Production Agreement, Article A101.

<sup>113</sup> The defined term “Minors” refers to “Performers under the age of 18 years”, see ACTRA IPA Article A2701; under the BCMPA, the defined term “Minors” refers to “Minors under the age of 17”, see BCMPA Article A2701.

<sup>114</sup> See Article A2716 of the IPA and Article 1611 of the NCA.

<sup>115</sup> The options include two separate types of mutual fund and a Registered Education Savings Plan (RESP), each of which is managed by outside advisors.

<sup>116</sup> [http://www.actra.ca/actra/control/mt\\_faq](http://www.actra.ca/actra/control/mt_faq) Accessed on September 20, 2005.

<sup>117</sup> *Id.*

minor, or, if approved by the Public Guardian and Trustee, into a trust established for the benefit of the minor or a court-approved account established for the benefit of the minor.<sup>118</sup>

Neither the ACTRA IPA, the NCA nor the BCMPA expressly address the concerns discussed in this article about the enforceability of a minor's contract. There are no reported cases dealing with an ACTRA- or UBCP-member minor who sought to repudiate his or her contract and there does not appear to be a mechanism which would enable a producer who has engaged an ACTRA- or UBCP-member minor to seek relief directly against ACTRA or the UBCP, as applicable. The fact that a minor performer is an ACTRA or UBCP member and that their contract has been entered into on terms which respect the minimums set forth in the IPA or the BCMPA should, however, be used to buttress arguments of the type advanced in this article. The fact that the *minimum* terms of the agreement have been sanctioned by a collective agreement should be *prima facie* evidence that the contract is for the benefit of the minor. Certainly the requirement for monetary remuneration is present, as well as the insurance that the best interests of the minor are being addressed in terms of working conditions. Furthermore, each of the ACTRA IPA and BCMPA ensure that there is an entitlement to residuals, and that sophisticated advocacy and grievance mechanisms are in place to protect the minor's interests.

#### **D. Guarantees and Indemnities**

As a practical matter most producers engaging a minor try to obtain a guarantee or indemnity from the parent or guardian of the child. There are, however, a number of potential pitfalls in this area which require careful drafting in order to ensure that the goal of being able to hold the parent liable is realized. Additionally, as will be discussed below, it is questionable whether even a guarantee or indemnity will provide sufficient assurances from a producer's point of view: as alluded to above, the critical element for the producer will be obtaining the right to exploit the image and voice of the minor in the production – even if a parent can be held financially liable for the failure of the infant to perform the contract, it is not clear that the producer's goal of obtaining the necessary rights to exploit the production can be realized via this mechanism.

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<sup>118</sup> See BCMPA, Appendix "F" – Part G; and see *supra* notes 77, 78 and accompanying text.

The distinction between a guarantee and an indemnity should be highlighted, as there are practical (and potentially dire) consequences between the two. A “guarantee” is a promise whereby one person undertakes to be responsible for the debt, default or miscarriage of another;<sup>119</sup> the guarantor promises to a third party that another party (the “principal”) will perform obligations owed to the third party, and if the principal fails to do so, the guarantor will be liable for that failure. One immediate consequence of classifying an obligation as a guarantee in Ontario is that the obligation must be evidenced in writing (pursuant to the *Statute of Frauds*).<sup>120</sup>

An indemnity, in contrast to a guarantee, may be defined as “an obligation to compensate for loss or liability”.<sup>121</sup> Thus, while a guarantee is predicated on the existence of an underlying obligation and the failure to meet that obligation (by the principal), an indemnity does not require a similar set of circumstances obtaining, even though such an unmet obligation may be present. Indemnities do not need to be reduced to writing in order to be cognizable at law or in equity. As commentators have noted, the distinction between guarantees and indemnities “is far from airtight”<sup>122</sup>, but an example using a child performer contract may serve to illustrate the difference.

Assume the scenario where a producer filming a feature film in Ontario has entered into a distribution contract whereby the producer promises to deliver a film on or before a certain date, which date happens to be just before an important film market overseas. The distributor, in turn, undertakes marketing and promotion expenses in relation to the film in the expectation that the film will form a central component of its sales efforts for overseas territories at the market. The producer, meanwhile, engages a fourteen year-old performer to perform a significant role in the film; aware of the potential uncertainties relating to engaging minors, the producer’s lawyer adds additional language to the contract and requires the mother of the child to sign the contract. Presume the child is scheduled to render services for fifteen days, a major component of the twenty-day shoot for the film. The child shows up, but on the fifth day adamantly refuses to perform any further services. The producer is stymied: at best, she will need to re-cast the part

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<sup>119</sup> See *Statute of Frauds* (Ontario), s. 4; see also Kevin P. McGuinness, *The Law of Guarantee* (2d ed.) (Scarborough: Carswell, 1996), paras. 3.7 and 3.12.

<sup>120</sup> *Statute of Frauds* (Ontario), R.S.O. 1990, ch. S-19.

<sup>121</sup> See McGuinness, *supra* note 87, para. 11.5, and see generally *Zurich Insurance Co. v Modern Marine Industries Ltd.* (1993), 111 Nfld. & PEIR 181 (Nfld TD).

<sup>122</sup> See McGuinness, *supra* note 87, para. 11.6.

and re-shoot the five days already completed. In any event, she has incurred significant costs to date and will miss her delivery date to the distributor, who in turn will have nothing to sell at the market. If the language inserted by the producer's lawyer regarding the mother's obligation is worded as a guarantee, the mother's potential liability is much narrower: being a contractual obligation, the extent of the mother's liability will be a question of constructing the terms of the contract.<sup>123</sup> She may only be liable for the standard measure of contractual damages: *i.e.*, the amount required to put the producer in the position she would have been in had the contract been performed – in other words, the amount necessary to identify and engage a replacement performer. If the language was worded so as to include an indemnification concept, however, the mother may well be liable to indemnify the producer for losses incurred by the producer as a result of the distributor bringing claims against the producer for failure to deliver the film on time, because the nature of an indemnity may lie not just in contract, but in equity and even restitution.<sup>124</sup>

There are three significant shortcomings with relying on the assurances of third party (*i.e.*, a parent or guardian) as a mechanism for protecting a producer's interests. First, while an indemnity would, as described above, be preferable because it addresses a wider spectrum of circumstances and potential liability, in many cases the ability of a parent to satisfy any judgment is likely to be modest. There is something to be said for the persuasive aspects of having a potential lawsuit in your quiver, so to speak, but if a parent or child is adamant about repudiating the contract or not rendering the services, or if the parent and child have few assets, moral suasion may offer only cold comfort.

A second potential defect with the guarantee as a device to protect the producer is that a guarantee may not be enforceable. In general, for a guarantee to be enforceable the primary obligation which is being guaranteed must itself be enforceable.<sup>125</sup> However, as noted above, contracts with minors may not be enforceable against the minor, due to lack of capacity on the part of the minor and the residual ability of the minor to disaffirm the agreement. Whether a contract entered into with a minor can properly be the subject of a guarantee by a third party (such as a parent) remains open debate unless the jurisdiction in question has acted to answer the

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<sup>123</sup> *Id.* para. 6.14; and see *Hoole Urban District Council v Fidelity & Deposit Co of Maryland*, [1916] 1 KB 25, *aff'd* [1916] 2 KB 568 (CA).

<sup>124</sup> See McGuinness, *supra* note 87, para. 11.2.

<sup>125</sup> *Swan v Bank of Scotland* (1836), 6 ER 231 (HL).

question by means of legislation. In England, a statutory provision was required to make clear that a guarantee of a minor's contract was not unenforceable solely on the basis that the underlying obligation was unenforceable against the minor.<sup>126</sup> No similar provision exists in Ontario. Contrary to the position described above with respect to New York law,<sup>127</sup> statutory provisions in British Columbia stipulate that a guarantor or indemnitor of a contract with a minor remains liable on such guarantee or indemnity even if the underlying contract with the minor is unenforceable against the infant.<sup>128</sup>

The third, and most fundamental, deficiency in looking to a third party to satisfy a minor's obligations is that there is no effective transfer of the required intellectual property rights. The guarantor does not own or have control over the intellectual property rights which the producer seeks, and thus is unable to effect a transfer of such rights from the minor to the producer. In other words, a producer relying on a guarantee may be able to recover monetary damages against the guarantor, but will be unable to realize an obtaining of the property rights which are sought. For that reason it is preferable to have the contract be found enforceable or that the transfer itself be incapable of rescission, using the *Tonelli* and *Chaplin* analyses, described above.

## **E. Court Declarations**

Producers (and their counsel) from jurisdictions outside Ontario (or the other common law provinces which have not, unlike British Columbia, enacted a statutory remedy addressing minor's contracts) often express unease at the apparent inability to obtain judicial approval of a minor's contract. While the foregoing sections have sought to outline a way forward based on the caselaw, it may be the case that the arguments outlined herein offer insufficient comfort. One other potential mechanism is available, at least in Ontario, though it appears to be unused thus far.

Ontario courts retain a residual authority to "make binding declarations of right".<sup>129</sup> It is therefore at least possible to make an application seeking a declaration with respect to a minor's

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<sup>126</sup> *Minors' Contracts Act, 1987*, C. 13.

<sup>127</sup> See supra text accompanying note 41.

<sup>128</sup> *BC Infants Act*, s.23.

<sup>129</sup> *Courts of Justice Act*, section 97.

contract. Although it would be tempting to strive to obtain a declaration that the contract is enforceable against the minor, it is much more likely that a court would be more amenable to a declaration that the contract is in the minor's best interests. Such a declaration would presumably have the effect of estopping the minor from attempting to avoid the contract on the basis that it was prejudicial to his or her interests. Because declaratory relief of this nature is not often sought in Ontario, there is little judicial guidance on which to draw. It may be the case that Ontario courts, presented with the fact that the British Columbia legislation is in place, may take the position that in the absence of any such legislation in Ontario they have no jurisdiction to provide such declaratory relief.

In the case of *Nickerson v Nickerson*, a parent sought, in the course of marital dissolution proceedings, a declaration that he had not sexually abused his daughter.<sup>130</sup> The court declined to make a declaration on three bases: (1) the legislation in question (in that case, the *Divorce Act* and the *Children's Law Reform Act*) did not expressly allow a parent to seek a declaration of the type sought in that case; (2) the declaratory order sought did not originate "from a right arising under a contract, agreement or statute ... I cannot find a right upon which a declaratory order .. could be founded"; and (3) because the declaration sought would be a judgment *in rem* and would thus affect the rights of the child, it would be necessary for the child to be a party to the application.<sup>131</sup> Two of those three concerns could be assuaged in an application brought by a producer for declaratory relief, by making the minor (or the minor's guardian *ad litem*) a party to the proceeding, and by presenting the court with the contract. In such a situation, where the parties were eager to obtain the declaration and the court could be satisfied that the terms of the agreement were not prejudicial to the minor, there appears to be no compelling reason for the court not to issue the declaration. Indeed, the commercial benefits to both parties (certainty for the producer, access to remuneration for the minor) should be of precisely the type which a court would want to facilitate by exercising its jurisdiction.

#### **IV. Conclusion**

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<sup>130</sup> (1991), 4 OR (3d) 447 at 454.

<sup>131</sup> *Id.* at 454-455.

This article has attempted two objectives, both within the context of the entertainment industry: a survey of the current state of the law of minor's contracts in the four primary North American common law jurisdictions in which film and television production occurs; and the tracing of the arguments and options available to producers who are confronted by the lack of certainty surrounding this issue in Ontario. It would not be rash to conclude that the legislative arrangements put in place in California, New York and British Columbia better serve the interests of producers and minors by creating a mechanism for entering into binding contracts with performers who have not reached the age of majority. The somewhat labyrinthine nature of the arguments which are described above in the Ontario context hopefully provides all the impetus necessary to conclude that the entertainment industry and performers in that province would be well-served by implementing a regime similar to that in British Columbia.

That being said, dependent of course on the circumstances of the particular case, producers should be relatively comfortable about engaging minors in Ontario. Especially where the performer agreement is entered into under the auspices of ACTRA, the controlling analysis under Ontario law indicates that a reasonably fair contract entered into with a minor performer will be deemed enforceable against the minor. In the event that analysis provides insufficient certainty, a number of remedial devices are available to producers, including the *Chaplin* decision and the possibility of obtaining a court declaration.