

by David Balcon

The Calgary court case had all the portents of becoming as infamous a legal joust as was the one on which the literary work in question was based. The issue at hand was not the bludgeoning of a human being, but rather, contended the plaintiffs, the murdering of a creative work. On the eve of the second court date, an unexpected settlement was reached. (As part of that out-of-court settlement, it was agreed by all parties not to discuss the matter further, which has made gathering the facts all the more difficult.)

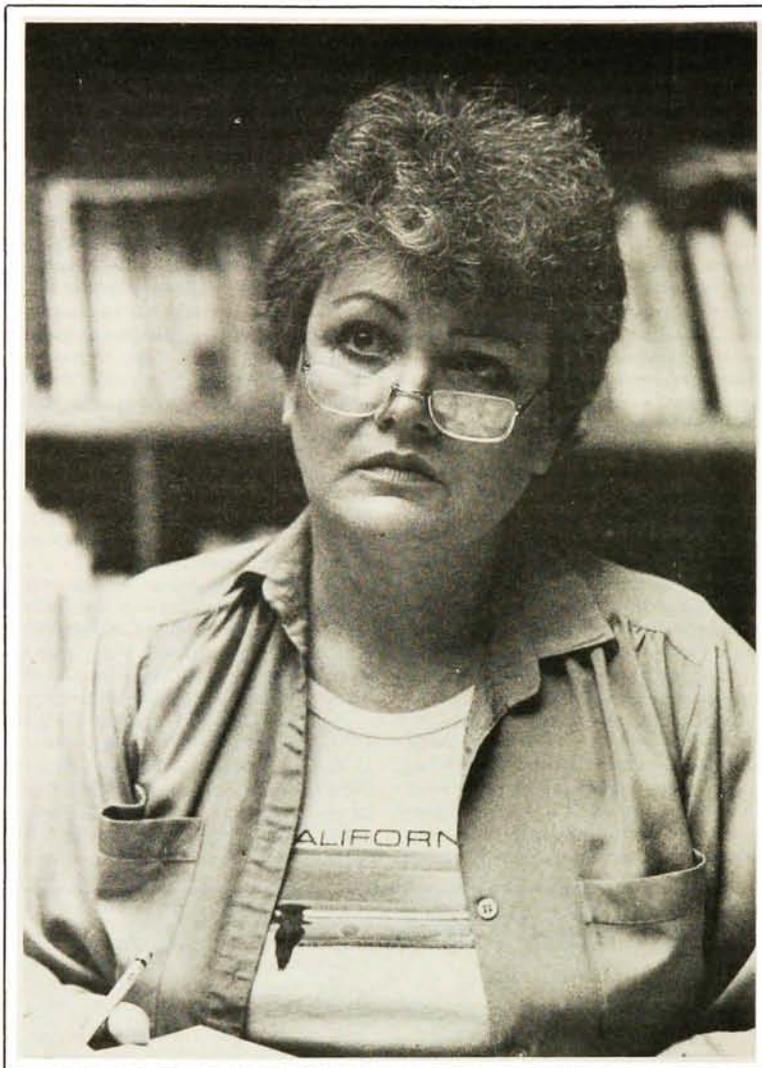
The case was an injunction sought by Calgary playwrite Sharon Pollock against local television station CFCN, to prevent it from distributing a film version of her stage play, "Blood Relations." In addition to the permanent injunction against the \$1 million made-for-television feature, the author was seeking \$400,000 in compensation for the damage done to her reputation, and for the breach of contract the finished film represented.

The larger issue, however, was one which held possibilities of affecting every writer who has ever worked on a film or television project, and seen his work substantially altered by a producer without his involvement.

Although it got to the preliminary hearing stage in the Court of Queen's Bench, and the actual dispute was settled out of court a month later by mutual agreement, the case does have a few points of instruction for all writers. Indeed, a review of events will serve as a primer to explain the intricacies of Canadian laws as they apply to the creative process and commercial enterprise that is filmmaking. While a part of the issue is covered by our archaic copyright laws, another is found in the more mundane area of straight-forward contract law, and yet another part by clauses of ACTRA's collective agreement.

The story begins in early 1982. Toronto producer Robert Barclay had been hired by Calgary's CTV affiliate CFCN-TV to review possible feature film projects

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A QUESTION OF COPYRIGHT The Sharon Pollock case

that the station might develop over the next few years. That summer, Barclay read the NuWest Press version of "Blood Relations," and considered the idea of producing a film based on Sharon Pollock's Governor-General's Award-winning play.

A hit wherever it was performed, the play is a haunting spin-off of the tale of Miss Elizabeth Borden of Fall River, Massachusetts, accused in 1893 of the axe murder of her mother and father. However, woven into the story in an exploration of attitudes towards women still prevalent in today's society. The interplay of ambiguities between events and persona are more central to the story than the actual killings.

Equally ambiguous was the sudden interest on the part of the television station to do a major production, and bring Barclay in to handle the project. CFCN

Communications, holders of the television station's license, is owned by Toronto-based media conglomerate Maclean Hunter. At the time, the Calgary company was slated to appear before the CRTC, the broadcasting regulatory authority, for the renewal of its television license.

Four years before, the CRTC had been quite critical of Alberta's two CTV affiliates for not contributing regular programs and series to the network. The stations' CFRN in Edmonton carries the network's programming to the northern part of the province, CFCN to the south - are very profitable enterprises. Yet beyond providing CFL game coverage, or the occasional musical special, neither has contributed a regular series to prime-time television. Anticipating such criticism again, the Calgary station wanted a project with a local tie-in to

indicate its compliance with the Commission's wishes.

Further, Maclean Hunter had recently acquired a large chunk of the Calgary Sun, and the federal government had directed the CRTC to hold special hearings to review certain instances of concentration of ownership in the media. One of the three cities slated for special attention was to be Calgary since CFCN Communications, the parent company, also held AM and FM radio licenses there. It needed to prove itself an extra good corporate citizen at these hearings.

Barclay convinced Terry Coles, CFCN Program Director, of the viability of the project. "Blood Relations" was a good story, and in Canadian terms a proven property. Further, Pollock was a Calgary resident. A lengthy contract was drafted, agreed to, and signed by Pollock and CFCN in November. Barclay began to gather together his production group by year's end, bringing Canadian expatriate Silvio Narizzano to direct. Ironically, Narizzano had been involved in a previous western Canadian feature project which involved the CTV Network, *Why Shoot The Teacher*.

The cast was soon assembled: Maureen Thomas to play Nance O'Neill - the actress with whom Lizzie may be having a lesbian relationship - and the younger Lizzie Borden; Maureen McRae as Lizzie and the Irish housemaid Bridget; and Robert Clothier as Mr. Borden. Lois McLean, Suzie Payne, Robert Koons, Bob Collings and Barney O'Sullivan, all Calgary performers, completed the cast.

A part of the controversy surrounds the speed at which things moved, since principal photography was slated to begin in the second week of February, 1983. Under the contract, Pollock was to deliver "a screenplay based on the property or parts thereof at the request of the producer." In just over one month, she provided a script for Barclay. He received and read it during the week between Christmas and the New Year.

At the preliminary hearing, the producer noted in his affidavit that "the screenplay appeared to be little better than a re-typed version of the original play." It was over two hours long, rather than the 90-minute version requested. And, Barclay claimed, it still contained strong lesbian overtones, and failed to include references to the press coverage of the trail. These two changes to the tone of the play had, according to the

producer, been mutually agreed to by the parties.

Under the terms of the contract, Pollock was paid \$13,500 for the screen rights to the play and the draft screenplay. But the agreement continued to the effect that "it being understood the owner is to be retained in preference to any other writer"; if she refused, however, CFCN could hire another writer. Arguing that she had complied with the terms of the written contract, and had delivered what was the first draft of her script, Pollock further noted that the contract also contained clauses from the ACTRA writer's collective agreement.

These clauses – under the heading of Script Changes [C119] – note that: "The writer of the script shall be consulted in regard to all proposed changes, modifications, additions or deletions affecting meaning, intent, theme, characterization or plot development of the script and all editorial changes of a major nature. It is however agreed that any such changes to which the writer agrees shall be made by the writer."

The provision goes on: "It shall not be a breach of this clause for the producer to make minor script changes during the production to meet production needs. Any change that affects the meaning, intent, theme, characterization or plot development of a script or any editorial change of a major nature shall not under any circumstances be considered a minor script change... to meet production needs."

CFCN's lawyer Richard Low argued that the script as delivered by Pollock was not consistent with the alterations the parties had discussed at the time the contract was negotiated. They felt that her version would not be suitable for the type of television film they had in mind. It was further claimed that under the terms of their contract, the parties had entered into an agreement to buy rights to adapt the stage play, and to create a film version of the Lizzie Borden story.

Barclay's affidavit statement suggests that requesting a first script from Pollock was an exercise in corporate fair play that had backfired because the author failed to make the extensive alterations which were required.

To further add to the controversy, and flowing beyond the agreement in contention, the focus was shifted to the fact that Barclay, through CFCN, then hired his wife, Jane, to write a new and acceptable script which still contained elements of Pollock's original stage play. Within a month – and two weeks before shooting was to begin – there was a new script which was, as stipulated in the contract, forwarded to Pollock for review.

She refused to work on the new script. Ariel Breitman, her lawyer, claimed that the very act of bringing in a new writer without consulting Pollock, was a breach of contract. At that point, rights were returned to his client. CFCN then proceeded to produce a film for which it no longer held a license to the original property on which it was based.

In her affidavit, the playwright noted that not only was the rewrite a breach of the contract – it was ultimately used without her approval – but that it "mutilat[ed] and distort[ed] the thematic statement of my work."

In submissions to the court on behalf of Pollock, both John Murrell, fellow Calgary playwright and dramaturge, and Urjo Kareeda, critic and artistic director of Toronto's Tarragon Theatre, contended that the Jane Barclay version of the script was an over-simplification of the

original play. According to Murrell, "by robbing the Pollock scripts of much of their excitement as created through theatricality, the [Jane] Barclay screenplay has in fact robbed it of its reason for existing." He went on to say that, "Anyone familiar with Sharon Pollock's work and reputation would indeed be disappointed, disheartened and embarrassed by such a television production, regardless of its quality in execution." Kareeda's affidavit reviewed the Barclay script and noted that the screenplay removed Miss Pollock's feminist message and left "a single horror story about an axe murder."

As released, the film maintains a clear stage-play style rather than a cinematic bent. But given the needs of the medium, many of the conventions of theatre used in the stage play are not appropriate for a film, particularly with the shifting personas of the lead players. As well, the relationship between the two lead female characters still remains ambiguous, though sexual and feminist overtones are probably less oblique in the film version. And although the murders are depicted, this is done off-camera, and their graphic nature is not as stark as Kareeda suggested by his remarks. In his submission to the court, the film's director, Silvio Narizzano, said that the production is a "carefully crafted movie," which enhances Pollock's feminist statement by drawing on the writing experience of others and the flexibility of film.

CFCN indicated that they had met the terms of the contract and paid the fees stipulated. They demonstrated that they could make any changes by referring to specific sections of the contract. If Pollock wished, they conceded, she could have her name removed from the credits. In the release print shown at this summer's Banff Television Festival, the opening titles indicated that the film is "based on the award-winning play 'Blood Relations'."

Given the nature of the case, few people in the Calgary creative community are willing to discuss the matter. One Toronto-based writer who had seen the contract confided that Pollock should never have signed it as it was presented to her. She had given away all rights to her original stage play, not withstanding the ACTRA clauses which applied only to the screenplay she agreed to deliver, and not to a full-scale adaptation as is often the case with a work originally created for another medium. The contract, in the writer's view, had actually bought all rights to the property for its translation into film, and gave the original writer a first option to write a screenplay. If it were accepted by the producers, then the ACTRA agreement would come into play. Otherwise, CFCN had the right to bring in another writer to do the adaptation.

In addition to basing her case and claims on the terms of the clauses incorporated in the ACTRA contract, Pollock also brought in the larger issue of those rights covered by the Copyright Act. Although it does not specifically grant rights to cinematographic works [films], the Act does give protection to the original work upon which a dramatic film might be based. In the case of an original screenplay, the actual script is the copyrightable work in Canada. However, in the case of an adapted work, the law is unclear as to which property is uniquely copywritten, the original stage play or the adaptation. Laws in other countries provide for coverage of filmed and videotaped works in their own right, and it is likely that proposed chan-

ges to the Canadian Act will embrace this category of work. But for the time being, the law is less than clear cut.

Pollock and her lawyer claimed that, in this instance, it was also a case of an adaptation, and thus the original work covered by the variety of protections under the law is the novel, short story or dramatic work (i.e. stage play). A writer may authorize use of this work in specific ways, issuing a license to a second party to utilize the original work. It would be up to the court to interpret whether in altering the screenplay, the defendants [CFCN and Barclay] were in breach of provisions of the Act, as well as any contract or collective agreement.

And key to the plaintiff's request for an injunction in this instance was one of the protections offered to authors under the Act, provisions known as Moral Rights. The Act details these as the right to say they did, or did not, actually create the work in question, and the right to protect that work from unauthorized mutilations by other parties, including those with a contractual arrangement with the author.

Encouraged by a Toronto court decision last December, Pollock's lawyer Ariel Breitman noted that sculptor Michael Snow had succeeded in obtaining an injunction against The Eaton Centre based on his rights as a creator being infringed by the alteration of his work. To wit that, in the holiday spirit, the shopping arcade had tied red ribbons around the necks of Snow's Canada geese sculptures. A judge agreed with Snow that the ribbons did alter his work, and under the terms of Moral Rights protection in the Copyright Act, such alteration was grounds for an injunction. The red ribbons came off.

Breitman argued before Calgary judge Mr. Justice Kenneth Moore that the Copyright Act permits the creator of a work to protect it from such alterations as had been perpetrated by Barclay and CFCN. Under the terms of the Act, Section 12 (7), "independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work [paternity], as well as the right to restrain any distortion, mutilation or other modifications of the work that would be prejudicial to his honour or reputation [integrity]."

However, in a discussion paper prepared for the Copyright Review Committee of Consumer and Corporate Affairs by Toronto lawyer Barry Torno, it is argued that "although Moral Rights are viewed as inalienable in the sense that they may not actually be transferred to another, they are alienable in the sense that the author may bind himself contractually not to pursue his moral rights against the other parties to the contract." It is unlikely that the contract proffered this option, and so this may have been a reason for the stand-off and ultimate out-of-court settlement that came in mid-June.

Justice Moore noted his quandary by stating in court, "How does the common ham-and-egger like me watch the film and decide if Miss Pollock's reputation has been damaged?" Fortunately for the judge, he never had to rule on the issue beyond granting a temporary month-long injunction until the full case could be argued before him. The parties agreed that the temporary injunction would be lifted and that no further legal action would take place.

Nobody is saying how much Pollock received, and everyone involved is close-

mouthed about the case. Her name has been removed from the film, and the title is now *Double Play*. CFCN premiered it at Banff in August, to thus far good reviews. However, CTV has not yet purchased the film for a network airing, and station officials were just beginning to market the property now that the legal problems were out of the way. It will be handled by Ralph Ellis Enterprises in Toronto.

The CRTc has decided to renew the station's license for another five-year term. And in a related decision, the Commission found that the ownership structure of the Sun newspapers by Maclean Hunter did not constitute majority control, and thus there was no undue concentration of media interests in Calgary. CFCN has caught the film bug and is now offering to rent its new sound stage, the largest in the province, to all comers.

As far as doing another feature, there have been no comments from Edward Chapman, CFCN Communication's president, as to what the property will be except that they hope to undertake a new one soon.

"There is great potential here to do something like Playhouse 90," he noted at Banff, "if we can find the right formula structures. A lot of people have mixed feelings about it, but I think that in the long run it can work, if properly handled."

Pollock is working as a director this season at Theatre Calgary. She is also writing new stage plays, a CBC radio adaptation of "Whiskey Six," and doing the occasional bit of radio acting. Courts and film scripts are far from her mind these days.

The lesson for most writers should be clear: there is a confused regime of protection under our existing copyright laws. Even contracts tend to be an uncertain remedy. John Gregory Dunn, the American novelist and screenwriter, once noted that until a few years ago the last thing that was implemented when a film was made in Hollywood was the contract – there being a code of honor between producers and writers. Today, however, the first thing that gets made is the deal, the paperwork, the contract.

In Canada one of the few certain protections a writer has, and particularly with an original screenplay, is that he or she first write it as a short-story or a play. This way the copyright rests solely with the writer and not with the producer. It is that property (the short-story or play) and not the screenplay that is given subsequent consideration by the law. In any other case the owners of the original screenplay will be the film's producers who therefore own the copyright. Upcoming proposals to revise our Copyright Act do, however, suggest that a change is coming and that Canada will soon offer the same regime of protection that the rest of the world shares; that is, films will be able to have their own copyright and screenplays similarly their own protection as individual entities. In the Pollock case, in spite of everything that was written into the contract to delimit her control of the subsequent property, it was still not at all certain that CFCN had control of their own film. What permitted the injunction to be considered was the fact that the original property's copyright was valid for the court and that the film script had no basis in the judgment.

Still confused? Welcome to the club.