KENNETH P. SWAN ARBITRATION LIMITED

70 BOND STREET, SUITE 500
TORONTO, ONTARIO
M5B 1X3

TELEPHONE (416) 368-5279
FACSIMILE (416) 363-9135
E-MAIL kpswan@bondlaw.net

June 11, 2012

Mr. Stephen A. Bernofsky
Fogler Rubinoff LLP
95 Wellington Street West, Suite 1200
Toronto-Dominion Centre
Toronto, ON
M5J 2Z9

Ms. Laurie Kent
Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, Ontario
M5H 3R3

Dear Mr. Bernofsky and Ms. Kent:

Re: Ed Mirvish Enterprises Limited and IATSE, Local 822; Union Grievance #2011-07

I enclose my award in this matter. I also enclose my account for services rendered, which I request that you forward to the appropriate person for payment.

Yours very truly,

Kenneth P. Swan

IATSE, Local 822

INVOICE

Invoice Number: 3397

June 11, 2012

IN ACCOUNT WITH

KENNETH P. SWAN ARBITRATION LIMITED

70 BOND STREET, SUITE 500
TORONTO, ONTARIO
M5B 1X3

GST Reg. No. R121926331

TELEPHONE: (416) 368-5279
FACSIMILE: (416) 363-9135
E-MAIL: kpswan@bondlaw.net

Re: Ed Mirvish Enterprises Limited and IATSE, Local 822; Union Grievance #2011-07

Our File: 7430-002

DISBURSEMENTS:

Hearing Room (May 1, 2012)	$ 465.00	
EACH PARTY'S SHARE OF DISBURSEMENTS:		232.50

FEES:

Scheduling and attending one day of hearing May 1, 2012); prepare and issue award.	$3,500.00	
EACH PARTY'S SHARE OF FEES:		$1,750.00
GST/HST PAYABLE		$ 257.73

TOTAL ACCOUNT - PLEASE REMIT **$2,240.23**

Kenneth P. Swan

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ED MIRVISH ENTERPRISES LIMITED

(The Employer)

- and -

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURES TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 822

(The Union)

AND IN THE MATTER OF "THE MAN IN BLACK" GRIEVANCE

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer: Stephen A. Bernofsky, Counsel
Mark Lavaway, Director - Labour Relations & Business Development
Scott Whitham, Head of Production

For the Union: Laurie Kent, Counsel
Cheryl Batulis, President, Local 822
Valerie Corbin, Business Agent, Local 822
Heather Clarkson, Former President, Local 822

AWARD

By letter dated February 14, 2012, the undersigned was appointed by the Director, Dispute Resolution Services, on behalf of the Minister of Labour of Ontario, as arbitrator pursuant to subsection 49(4) of the *Ontario Labour Relations Act*. The hearing was originally scheduled for March 5, 2012, but with the consent of the parties was adjourned to May 1, 2012. Upon convening on that date, the parties were agreed that the arbitrator had been properly appointed pursuant to the statute, and that I had jurisdiction to hear and determine the matter at issue between them.

The dispute arises from a grievance filed by the Union on March 10, 2011. The grievance alleges a failure of the Employer to abide by the collective agreement involving performances of "The Man in Black: A Tribute to Johnny Cash", which was performed at the Panasonic Theatre in Toronto, Ontario from February 15 – 27, 2011.

Local 822 of the International Union represents theatrical wardrobe, makeup artists and hair stylists employed by the Employer in the City of Toronto, with the usual managerial and other bargaining unit exceptions. There is no dispute that this representation included persons in those categories employed at the Panasonic Theatre, one of the venues at which the Employer stages theatrical productions.

This particular presentation, however, was "produced" by LCQ Productions, based in Quebec, and appeared at the Panasonic Theatre under an arrangement under which LCQ, "the Producer", would "co-present" the event with the present employer, referred to as "the Presenter" in the contract between those two entities dated August 30th, 2010. The co-presentation arrangement, as will appear, leads to some

confusion as to precisely which provisions of the collective agreement are appropriately applicable to the events from which the grievance arises.

The following provisions of the collective agreement are arguably relevant to the determination of this matter:

> **2.1** **Employment/Good Standing.** The Employer agrees to employ only wardrobe, makeup and hair employees who are in good standing, supplied by the Union.
>
> .....
>
> **2.4** **Contracting Out.** No work function normally carried out within the terms of this Agreement under the Union's jurisdiction shall be contracted out of its jurisdiction. The Employer shall not employ, contract and/or sub-contract with any entity or use agents or employees of third party labour companies, promoters or independently contracted workers to perform bargaining unit work covered by this agreement unless the Union is unable to provide employees as described in **Article 5.5 Unable to supply.**
>
> .....
>
> **2.8** **Subleases.** Union personnel shall be used by the Employer or third parties who have sublet, leased or borrowed the premises, on all occasions where performers require assistance with costumes (other than what is normally described as street clothes) and/or hair/wigs. It will not be necessary to employ Union personnel for the sole provision of towels to performers.
>
> For purposes of this Article costume(s) shall mean the clothing worn by the performers in the course of a performance to define a character. These costumes shall not include clothing owned by a performer worn during a performance (and not changed); or clothing worn by an orchestra member, soloist, musical ensemble, group or choir member; or the clothing worn on stage by persons where the Employers' premises are being used for purposes other than a theatrical production.

While the grievance itself specified article 2.8 as one of the "pertinent clauses" involved in the grievance, counsel relied in addition on clause 2.4 of the

collective agreement, questioning whether, given the nature of the contract between LCQ Productions and the Employer, this was in fact a production of the Employer, a production of LCQ, or a co-production by the two. I shall deal with all of the arguments raised by both parties in the course of this award.

While extensive evidence was not presented, a brief outline of the performance can be constructed from the submissions of counsel, to the extent that they were essentially uncontested. As the title suggests, the performance was a tribute to the musician and singer Johnny Cash, who was portrayed by Shawn Barker. There were also other musicians in the cast, as well as female back-up singers. One of the back-up singers apparently portrayed Mr. Cash's wife and fellow performer June Carter Cash at some stages in the presentation.

The agreement under which the performance was mounted, dated August 30, 2010, provided that the Producer, that is LCQ Productions, would provide at its own expense the actors and certain necessary management personnel, as well as "all properties, costumes, scenery and furniture required in the Production". The Presenter, that is the present Employer, would provide "technical staff (crew) required during the fit-up, run of the show and take out". The agreement required that a Technical Rider which would include all crew requirements would be forwarded by the Producer to the Presenter no later than three months prior to the performance.

Negotiations between the parties relating to the Technical Rider appear to have begun in an e-mail from Chris Prideaux, production manager for the Employer, to Mr. Mark Lavaway, Director, Labour Relations & Business Development. The e-mail was dated July 5, 2010, and appears to have been circulated only in-house at the

Employer. In the e-mail, Mr. Prideaux notes that he has "made some assumptions with the crew that can likely change", including putting on a "wardrobe person" for the run of the show; this assignment would have been of a member of the local Union, and the crew requirements section of that document includes one head wardrobe person for the "load-in", "show crew" and "load-out" parts of the production. The version of the Technical Rider as attached to the contract of August 30, 2010 does not specifically include crewing assignments, but does include the following paragraph:

> **XVII. LAUNDRY AND MISCELLANEOUS**
>
> The Purchaser must provide, within close proximity of the stage, the following laundry equipment:
> - One (1) washer
> - One (1) dryer
> - One (1) iron
> - One (1) ironing board

On February 9, 2011, Mr. Prideaux sent a draft of his production schedule and crew calls to a Mr. François Dassylva, apparently a representative of LCQ Productions, asking for further input. The following appears in that request for input:

> One other item we need to confirm is whether the production needs a wardrobe person or not. If there are any wardrobe presets or maintenance to be done on the show we should have a person in, however, if the performers are taking care of themselves and there is no maintenance on site, we will be able to get away without one.

There is documentary evidence to the effect that the Producer communicated that there would be no necessity for a wardrobe person, and it is common ground that in fact no wardrobe person was called for this performance.

The Union's central witness was Ms. Heather Clarkson, a former President of Local 822, who attended the performance as a spectator. Her recollection of the

performance was that it took place in two acts, with one intermission, and was essentially a musical presentation based on the career of Johnny Cash. Shawn Barker, who portrayed Johnny Cash on stage, appeared in a single costume in the first act, but in a different costume, at least in respect of the jacket or coat which he wore, for the second act. The back-up singers appeared in one costume for the first act, and in different costumes for the second act, apparently portraying a different decade of the career of the singer.

Ms. Clarkson has worked as a wardrobe person and member of Local 822 for more than 26 years, and was the President of the Local for some 12 years. She testified that a wardrobe person would load costumes, bring them into the theatre, clean them, press them, steam them and mend them as necessary. Where "pre-sets", placing costumes or partial costumes just off-stage for quick changes during the performance itself rather than during intermissions, were required, the wardrobe person would establish them as determined. Prior to intermission changes, the wardrobe person would lay out the costumes, help with changes, and deal with costumes which had been worn by cleaning them and preparing them for the next production.

She testified that in her experience, given the nature of the costumes worn by the back-up singers in particular, there would be costume maintenance required, given that there were eight shows per week for two weeks and that the costumes were of a nature that would require a degree of attention simply to keep them in appropriate condition for the performance. On cross-examination, Ms. Clarkson frankly admitted that she did not observe costume changes taking place, did not know whether any help in changing costumes was either necessary or provided by anyone, or whether any

maintenance was required or actually carried out on the costumes during the course of the performance. She agreed that there were no costume changes while the actors were on stage, and therefore that "pre-sets" were not required.

The Union also called Ms. Cheryl Batulis, the current President of Local 822, as a witness. Ms. Batulis is also an experienced wardrobe person, and her testimony about the usual involvement of wardrobe persons in a stage production corroborated that of Ms. Clarkson. Ms. Batulis had not attended the performance, however, and was unable to provide any evidence as to exactly what had occurred during the course of the performances of this production.

The only Employer witness was Mr. Scott Whitham, Director of Production for the Employer and previously Production Manager since 1977 or 1978. Mr. Whitham is the direct supervisor of Mr. Prideaux, the Production Manager who engaged in the negotiations with the Producer in relation to the performances of "The Man in Black". He also saw the show, and corroborated Ms. Clarkson's observations, from the point of view of an audience member, of the nature of the costumes worn and the changes made during the course of the performance.

Mr. Whitham testified that, although the Technical Rider provided for laundry facilities in paragraph XVII, in discussion between Mr. Prideaux and the Producer it was agreed that there would be no necessity for those facilities to be made available on site, and that they would not in fact be available to any member of the Producer's company. Mr. Whitham conceded that if those facilities had been provided and had been used, that would have come within Local 822's jurisdiction, and it would have been necessary to call a wardrobe person for the production. He also conceded that,

had there been pre-sets required in the production, or costume maintenance provided on site, that would also fall within the Local 822 jurisdiction and would result in the call of a wardrobe person. He testified that on earlier occasions for other performances, when no wardrobe person had originally been called, the necessity for unforeseen costume maintenance on site had resulted in a call-in for a wardrobe person.

I turn next to the issues of collective agreement interpretation involved in this matter. The first question to be resolved is whether clause 2.4 or clause 2.8 is applicable to this issue. As already noted, the Union referred to clause 2.8 in the body of the grievance, but clause 2.4 was also argued by counsel on the basis of the "all other pertinent clauses" addition to the listed clauses in the collective agreement.

The document from which it must determined whether this was a situation of a third party who had "sublet, leased or borrowed the premises", or whether the Employer was responsible for the bargaining unit functions here at issue, is the agreement with LCQ Productions dated August 30, 2010. This document would appear to suggest that the legal structure of the "co-presentation" involved here was something of a hybrid between a sub-lease, lease or loan of the premises, and the situation where the Employer itself presents and produces a performance.

Certain of the obligations of a producer are agreed to be performed by LCQ Productions, while others, in particular those set out in paragraphs 5 and 6 of the agreement, are to be provided by the Presenter, the present Employer. In particular, paragraph 6 requires the Employer to provide technical staff (crew) required during the fit up, run of the show and take out. In my view, the expression "technical staff (crew)" is broad enough to cover members of the present bargaining unit who are required by the

Technical Rider, which is specified in paragraph 4 of the agreement to include all crew requirements.

In the circumstances, it is my view that both of the two provisions must be considered to determine whether first, this is an occasion on which bargaining unit members were required to be called out and second, whether in the absence of bargaining unit members in the crew there was a contracting out contrary to paragraph 2.4.

Turning first to paragraph 2.8, the parties are not in dispute that what the performers wore on this occasion fit clearly within the definition of "costumes" in that provision. The only dispute between them is whether the cast could be said to "require assistance" with those costumes. On that issue, the parties disagree.

The interpretation of the word "require" must, in my view, be objective and not subjective. It is not enough for a third party covered by clause 2.8 to decline assistance on the basis that it does not wish to have the expense of having it provided; it must be found that a reasonable party in the position of that third party would not objectively require assistance in all the circumstances.

Turning to clause 2.4, it must be observed that the provision is attracted when a "work function normally carried out within the terms of this Agreement under the Union's jurisdiction" is contracted out. In particular, the employer is prohibited from using "agents of third party … promoters…. to perform bargaining unit work covered by this agreement".

In my view, this provision would have been breached if LCQ Productions had brought its own wardrobe person with it to perform any bargaining unit functions in relation to the costumes used in the performances, and it would equally be breached if the

actors/singers had themselves performed any such functions; in either case, the bargaining unit work would have been done by "agents or employees" of LCQ Productions, contrary to clause 2.4.

The central issue in this case is the onus of proof, and whether the Union has met the onus of proof which falls upon it, to make out the factual basis of the grievance in order to succeed.

The Union sought to shift the onus to the Employer by arguing that the words "all occasions where performers require assistance with costumes" in clause 2.8 constitute an exception, the burden of proof in respect of which falls on the party relying on that exception: see *Re Real Canadian Superstore and UFCW, Local 175*, (2010) 104 C.L.A.S. 193, 2010 CLB. 32861 (Monteith).

With respect, the language of clause 2.8 is not written in the form of an exception, but rather in the form of a condition precedent. The relevant provision in the *Re Real Canadian Superstore* case expressed the exception in the words "unless for reasons of"; there is no such language here to create an exception.

In my view, therefore, the onus lies on the Union either to establish that, on an objective basis, assistance with costumes was required for the purposes of clause 2.8, or that bargaining unit work was performed by the actors/singers or some other third party contrary to clause 2.4.

What the evidence makes clear, or what is conceded, is that there were no costume changes except during the intermission, and therefore no pre-sets were required. The evidence is that instructions were given that no one from the LCQ Productions company would have access to the laundry and maintenance facilities located on the

premises, in which bargaining unit members would normally perform maintenance work. Beyond that, the evidence only reveals that there were costume changes during intermission.

From the descriptions available, the costumes appear to be of a kind that would not normally require assistance to change, provided that enough time was available. The big issue, therefore, is whether any maintenance was required, in an objective sense, and whether that maintenance was performed by the actors/singers or by some other individuals not covered by the collective agreement.

On that point, the evidence simply falls short of anything except speculation and assumption. The Union was unable, either by direct testimony or by cross-examination of the Employer's witness, to adduce any evidence that any maintenance was carried out on any of the costumes in the course of the two week run of the performance. The Union witnesses argued strongly that some such maintenance must have been required, and Mr. Whitham conceded that it was likely that some maintenance would have occurred, but no one had any information to offer as to what maintenance, when, and where it might have been performed.

This is obviously a very close case, and apart from the onus of proof the Union is able to advance a very strong suspicion that in objective terms some assistance with costumes was required and that some work which would normally fall within the concept of such assistance must have been carried out somewhere by someone. Unfortunately for the Union's case, however, arbitrators are not permitted to rely on suspicion, but must apply the onus of proof and rely on evidence which, on the balance of probabilities, overweighs that onus in favour of the Union if the grievance is to succeed.

Here, evidence that maintenance work, at the very least, had been performed in the course of the performance run would have been sufficient to satisfy either clause 2.8 or clause 2.4. Unfortunately, however, that evidence was simply not available to the Union, and it is therefore not available to me to permit me to resolve the grievance in the Union's favour.

In the result, therefore, the grievance must be denied. In the circumstances, it is not necessary to consider the extent of the remedy requested by the Union in light of the fact that only a policy grievance was filed.

DATED AT TORONTO, ONTARIO this 11th day of June, 2012.

Kenneth P. Swan, Arbitrator