Ursel Phillips Fellows Hopkinson LLP

JUSTICE AT WORK

Joshua S. Phillips
Direct Dial: (416) 969-3514
E-mail: jphillips@upfhlaw.ca

Kristen Allen
Direct Dial: (416) 969-3502
E-mail: kallen@upfhlaw.ca

October 24, 2022

Via Email: (n.mcdougall@wgc.ca; l.channer@wgc.ca)

Neal McDougall and Laurie Channer
Writers Guild of Canada
366 Adelaide Street West, Suite 401
Toronto, ON M5V 1R9

Dear Neal McDougall and Laurie Channer:

Re: Writers Guild of Canada – Bill-C-11 Review Opinion
UPFH File No.: 0348139

Instructions:

You have requested a legal opinion relating to certain issues arising from Bill C-11, the *Online Streaming Act*, which is presently before the Senate. Specifically this opinion considers the following issues:

1. Are streamers that produce content in-house engaging in a federal undertaking, such that, absent the proposed statutory exclusion in Bill C-11, they would be regulated by the *Status of the Artist Act* ("SAA")?

2. Does the proposed amendment to Bill C-11 that would exclude "online undertakings" from the application of the *SAA* maintain status quo, or change it? What are some of the potential consequences of the amendment?

Summary:

1. Are streamers that produce content in-house engaging in a federal undertaking, such that, absent the proposed statutory exclusion in Bill C-11, they would be regulated by the *Status of the Artist Act* ("SAA")?

    - Yes, there is no jurisdictional reason why online undertakings should be excluded from the *SAA*. If online undertakings are broadcasters, as the entirety of Bill C-11 indicates, and as the CRTC has already found, then the Federal government has the jurisdiction to subject online undertakings to the *SAA* labour regime like all other broadcasters.

2. Does the proposed amendment to Bill C-11 that would exclude "online undertakings" from the *SAA* maintain status quo, or change it? What are some of the potential unforeseen consequences of the amendment?

    - The proposed amendment is a radical change to the status quo. For decades, broadcasters who directly produce Canadian content in-house have been required to respect the basic labour rights set out in the *SAA*. In our view, the statutory exclusion being contemplated in Bill C-11 could have many unpredictable consequences that are highly detrimental to Canadian artists. With the decline of traditional cable television, it is not difficult to imagine a future where virtually all television broadcasting is done through national or international online platforms. The exclusion thus creates significant potential for artists to be exploited in a context where they will have no ability to act collectively and no access to the minimum protections in the scale agreements negotiated by the Guilds.

Factual Background:

The Guild's SAA Certification:

The Guild has also been certified since 1996 under the *SAA* as the exclusive bargaining agent of screenwriters in a sector described in part as "independent contractors engaged by a producer subject to the *Status of the Artist Act* as: (a) an author of a literary or dramatic work in English written for radio, television, film, video or similar audiovisual production including multimedia …". The Guild has negotiated several scale agreements in the federal jurisdiction, including with broadcasters such as the CBC, CTV, Ontario Educational Communications Authority (TV Ontario) as well as with the National Film Board of Canada.

It is noteworthy that this is a "sector wide" certification, in that it binds any "producer" covered by the *SAA*, which is defined in that act to include "broadcasting undertakings", as discussed below.

Bill C-11

Bill C-11 was introduced for first reading in the House of Commons on February 2, 2022. It passed third reading on June 21, 2022 and is presently at second reading before the Senate. Bill C-11 is a revised version of predecessor legislation, Bill C-10, which was introduced in November 2020 but died on the order paper at the end of the session.

Generally speaking, Bill C-11 aims to modernize the *Broadcasting Act* to bring Internet-based streaming services like Netflix, Amazon Prime Video, Crave and Disney+ ("streamers") explicitly under CRTC regulation and subject to Canadian content requirements.[1]

[1] Prior to Bill C-11, the CRTC generally treated streamers as engaged in "broadcasting" under the *Broadcasting Act* but has chosen to exempt them from licensing and regulation through the promulgation

Bill C-11 amends / introduces new definitions into the *Broadcasting Act* to group broadcasting undertakings into the following categories: broadcasting, distribution, programming, network, and online. The relevant definitions in Bill C-11 include:

> ***broadcasting*** means any transmission of programs — regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not — by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place; (*radiodiffusion*)
>
> ***broadcasting undertaking*** includes a distribution undertaking, an online undertaking, a programming undertaking and a network; (*entreprise de radiodiffusion*)
>
> ***distribution undertaking*** means an undertaking for the reception of broadcasting and its retransmission by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking, but does not include such an undertaking that is an online undertaking; (*entreprise de distribution*)
>
> ***programming undertaking*** means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus, but does not include such an undertaking that is an online undertaking; (*entreprise de programmation*)
>
> ***online undertaking*** means an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus; (*entreprise en ligne*)

The CRTC has already found that devices such as personal computers, or televisions equipped with Web TV boxes, fall within the definition of "broadcasting receiving apparatus".[2] There is therefore no question that a streamer falls within the definition of “online undertaking” under Bill C-11 and would be regulated under the amended *Broadcasting Act.*

Amendment to the Status of the Artist Act

At third reading of Bill C-11, the government adopted a new amendment which would exclude online undertakings from the application of the labour relations regime set out in the *SAA* (“the amendment”).

If the amendment is adopted, s. 6 of the *SAA* in its entirety will read:

> **(2)** This Part applies
>
> - **(a)** to the following organizations that engage one or more artists to provide an artistic production, namely,

---

of successive *Digital Media Exemption Orders,* Available online: https://crtc.gc.ca/eng/archive/2012/2012-409.htm

[2] *Canadian Radio-television and Telecommunications Commission (Re),* 2010 FCA 178 at para. 31.

- **(i)** government institutions listed in Schedule I to the *Access to Information Act* or the schedule to the *Privacy Act*, or prescribed by regulation, and
- **(ii)** broadcasting undertakings, including a distribution or programming undertaking, under the jurisdiction of the Canadian Radio-television and Telecommunications Commission; and

- **(b)** to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who
  - **(i)** are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audiovisual works,
  - **(ii)** perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or
  - **(iii)** contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.

Non-application

(3) This Part does not apply in respect of an online undertaking, as defined in subsection 2(1) of the *Broadcasting Act*.

The amendment excludes all online undertakings – which may be broader than just the streamers – from the application of the *SAA*. Under the new definitions, an online undertaking cannot be both an "online undertaking" and a "programming undertaking". This means that even if CBC developed a subsidiary for its online streaming platforms, or essentially became an online undertaking, the amendment potentially would result in that activity being excluded from the *SAA*. If over time it shifted most of its creative content online, then the *SAA* would not apply to that work.

The amendment means that all artists considered "professionals" under the *SAA*[3] who work for any online undertaking (foreign or Canadian) would not have the right to join an Association (such as the Guild) for the purposes of that work and generally would have no protection against unfair labour practices or other unfair actions regulated by the *SAA*. Likewise, the Guild would have no statutory platform through which it could become certified and negotiate a scale agreement for members who are directly retained by the streamers or other online undertakings.

Contextual Considerations for the Proposed Exclusion of Streamers from the SAA:

The streamers articulated objective of owning the "Canadian content" that Bill C-11 would require them to produce suggests they could engage in significant levels of in-house production. As such, having them covered by the *SAA* is not merely a matter of principle

[3] Sections 6(2) and 18(b).

but will have important real-world consequences for the writers they engage. On the other hand, government sources have stated the view that allowing "online undertakings" to be captured as "broadcast undertakings" under the *SAA* would be an expansion of the *SAA*'s scope, which would be an encroachment on provincial jurisdiction.

Analysis:

1. **Are streamers who produced artistic content in-house engaging in a federal undertaking, such that, absent the proposed statutory exclusion in Bill C-11, they would be regulated by the *Status of the Artist Act* ("*SAA*")?**

A. When the Federal Government Has Legislative Authority Over Labour Relations

The federal and provincial governments derive their respective authority to legislate in certain areas from the distribution of powers in sections 91 and 92 of *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 (the "Constitution").

While the provinces have general jurisdiction to regulate labour relations under the property and civil rights power set out in s. 92(13) of the Constitution, there are at least two ways the federal government can have jurisdiction over labour relations. First, when the entity at issue is a core federal undertaking in its own right. Secondly, where the entity's activities are found to be "vital," "essential" or "integral" to a core federal undertaking (sometimes call "derivative jurisdiction"). [4]

To determine if the federal government has derivative jurisdiction, adjudicative bodies consider if the entity's activities are vital, essential, or integral to a federal undertaking to such a degree that it becomes necessary to apply federal legislation to the entity's labour and employment relationships.[5] This is a contextual analysis which focuses on the relationship between the activity, the particular employees under scrutiny, and the federal operation that is said to benefit from the work of those employees.[6]

B. Case Law Defining Core Broadcasting Undertakings

Section 92(10)(a) of the Constitution provides the Federal government with jurisdiction over "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province." In contrast, the provinces are granted power over "local works and undertakings".

Over several decades, Canadian Courts have repeatedly affirmed, even in the face of evolving technology, that broadcasting is generally a federal undertaking under s.

---

[4] *Tessier Ltée* v. *Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23; See also *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 (*Central Western*); *Westcoast Energy Inc.* v. *Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (*Westcoast Energy*).

[5] *Keith Russell v Writers Guild of Canada*, 2022 CIRB 1004 at para. 39.

[6] *Russell (Re),* [2022] CIRBD No 6 at para. 54.

92(10(a).[7] Historically, there was also a reluctance on the part of the Courts to divide constitutional control over different aspects of broadcasting (i.e. transmission versus distribution versus program development) when provided by one entity, as the whole undertaking is generally viewed as a functionally inter-related system.

For example, in *Capital Cities Communications* (1977),[8] the respondent argued that the distribution system—the cable network that carries the signals from the telecast to the televisions in the homes of the cable subscribers—was a separate local undertaking within provincial jurisdiction. The Supreme Court determined that the cable system was "no more than a conduit for signals from the telecast", and that federal power over broadcast television extended to the cable system. The Court found that it would be incongruous to deny the continuation of regulatory authority because the signals are intercepted and sent on to viewers through a different technology. Finally, it confirmed that program content regulation is inseparable from regulating the undertaking through which programs are received and transmitted as part of the total enterprise.[9]

In *Division of CHUM Limited* (*City-TV*),[10] the Canadian Industrial Relations Board (the "Board") determined that webcasting services amounted to a form of broadcasting. In that case, the Board had to determine the constitutional jurisdiction of CityInteractive, a division of CHUM Ltd., which was involved in the design and production of interactive marketing materials such as websites, online chat services, and webcasting for CHUM television stations. After applying the constitutional tests, the Board found CityInteractive to be under federal jurisdiction as "the 'interactive arm' of the television broadcasting operation". The Board concluded that, even if CityInteractive was severable from CHUM, CityInteractive would be federal on its own account, as its webcasting services amounted to a form of broadcasting, and its other interactive services were interprovincial in nature, and were being performed on a regular and continuous basis as an integral part of CityInteractive's operation. The Board stated as follows:

> [165] The test for determining whether CityInteractive is an interprovincial undertaking on its own account boils down to the question of "what is the ordinary business of CityInteractive?" The answer to that question leads to the conclusion that CityInteractive's ordinary business connects provinces on a regular and continuous basis, rendering it federal in nature. CityInteractive is not a mere publisher on the Web. It carries on activities that in effect take television on-line and the Internet to the air.

---

[7] An early case in this respect is *Re C.F.R.B. and Attorney-General for Canada et al.,* 1973 CanLII 788, where the Ontario Court of Appeal had to determine the validity of a provision in the *Broadcasting Act* which prohibited the radio broadcasting of partisan political programs on the day before an election. The Court held that Parliament's jurisdiction over radio extended to the control and regulation of the intellectual content of radio communication and that "the whole of the undertaking of broadcasting" was within federal jurisdiction.

[8] *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141.

[9] In the companion case, *Public Service Board v. Dionne* (1977), Laskin C.J. affirmed the exclusivity of federal power over cable television, and affirmed the Court's refusal to accept "divided constitutional control of what is functionally an inter-related system."

[10] *City-TV, CHUM City Productions Limited, MuchMusic Network and BRAVO!, Division of CHUM Limited,* 1999 CIRB 2 (CanLii).

This case suggests that where a web-broadcaster (like a streamer) is also engaged in producing program content in-house, labour relations would be subject to Federal jurisdiction.

C. Case Law Considering the Derivative Jurisdiction to Regulate Labour Relations with Producers

Despite the conclusions in the above-noted cases, adjudicators have also found that where programming content is developed by a separate entity who then sells the content to the broadcaster, that entity's activities may be regulated under provincial labour law unless there are unique facts that suggest it is integral or vital to the federal broadcasting undertaking (and as such there is derivative federal jurisdiction).

The leading case on this point is the 1983 decision of the SCC in *Paul L'Anglais Inc*.[11] In that case, the core federal broadcaster, Télé-Métropole, had set up two companies, Paul L'Anglais Inc. and JPL Productions Inc., to sell commercial air time and to produce commercials which were sold to Télé-Métropole. These wholly-owned subsidiary companies had their own employees and had clients unrelated to the parent company. The subsidiaries were not involved in the broadcasting or transmission of the content they sold to the parent. The decision was decided on a very limited evidentiary record, but the Court found:

> The sales which are made by respondents' employees and the programs they produce serve Télé-Métropole. The activities of respondents' employees are conducted on a continuous and regular basis. These facts do not necessarily create the requisite relationship between the respective operations of the businesses. A television broadcasting undertaking may well sell no sponsored air time and produce no programs, yet remain a television broadcasting undertaking. Conversely, an undertaking may sell sponsored air time for another or produce programs which it sells to another undertaking without thereby becoming a television broadcasting undertaking.
>
> It may be asked whether these activities would fall within the field of television broadcasting if they had been undertaken by companies completely unrelated to the parent company. I think the answer to this question is clearly no. Selling sponsored air time and producing programs and commercial messages does not make the seller or producer a television broadcaster. Furthermore, these activities are not indispensable to the Télé-Métropole Inc. operation.[12] [emphasis added]

More recently, in *Exploration Production Inc (Re)*,[13] the Board summarized the impact of *Paul L'Anglais* as follows:

---

[11] *Canada Labour Relations Board et al.* v. *Paul L'Anglais Inc. et al.*, 1983 CanLII 121 (SCC),

[12] A similar finding was made in *Canadian Broadcasting Corp. (Re)*, (1987) 71 di 12 [CIRB].

[13] [2011] CIRBD No 22; upheld on judicial review, see *Communications, Energy and Paperworkers Union of Canada v Exploration Production Inc*, [2012] FCJ No 1271.

> **116** In that case, the Supreme Court of Canada considered whether there was a vital, essential or integral relationship between Télé-Métropole Inc., a television broadcasting undertaking and two of its subsidiary operations, one of which was a company that produced programs and commercial messages. The Court applied the *Northern Telecom* test and first found, among other things, that the activity of producing program content and commercials did not fall within the definition of broadcasting. It then stated that the activity of producing programs and commercials and selling them to a broadcaster did not turn the producer into a broadcasting undertaking. Thus, if those activities are undertaken by an unrelated company, the entity would remain under provincial jurisdiction. Finally, it stated that the links of the subsidiary, namely the corporate relationship and the commercial benefit it provided to the broadcasting undertaking by its services, did not have the effect of making the producer part of the television broadcasting undertaking, so as to bring it under federal jurisdiction. The possible exception would be if those activities were in some way indispensable to the broadcasting operation.
>
> **117** It may be taken from this that, as a general rule, production of programming content itself is not ordinarily considered to be part of broadcasting, even where there is overlap of corporate directors and the sharing of facilities. Such overlap is not sufficient to establish that the subsidiary operation is vital, essential or integral to the core federal undertaking. This does not mean, however, that the relationship between two such entities can never meet the test and every case will turn on its own specific facts.

In that case, EPI was subsidiary owned by Discovery Canada, a broadcaster, and produced documentaries for its science channels (and a small amount of content for other broadcasters). EPI was not subject to regulation under the *Broadcasting Act* and did not require a CRTC broadcasting licence. The Board found its core function was not broadcasting, and further it was not vital or integral to Discovery Canada's undertaking, in part because Discovery Canada relied on other producers in addition to EPI to meet its Canadian content requirements.

D. Application of the Federalism Law to the Streamers

Like radio and television, streamer services like Netflix make content accessible across provincial boundaries. While technology may evolve in ways which could impact our analysis, we believe the Board's conclusion in *City-TV* that webcasting services is broadcasting is instructive. Importantly, the fact that the purpose of the amendments in Bill C-11 is to explicitly subject online broadcasting undertakings to regulation undermines the Government's position that it does not have the constitutional power to regulate the streamers as broadcasters. If this were the case, they would not be able to regulate any aspect of the streamer activity as a federal undertaking.

Therefore, if a streamer conducts production work in-house (i.e. by directly contracting with the artists), we see no legal reason why the streamer's labour relations would fall within provincial jurisdiction. The status quo is that the *SAA* would apply, absent an statutory exemption. The SCC's decision in *Capital Cities* suggests that where developed

in-house by the broadcaster, program content is integral and inseparable from the core broadcasting undertaking and therefore subject to federal jurisdiction.

While the streamers may argue the should be excluded form the *SAA* because the way they do production work in-house is analogous to assigning the work to independent producers, this is incorrect. Firstly, none of the cases have found that a broadcaster who has directly produced work is subject to provincial jurisdiction for labour matters. Secondly, if the streamers deploy subsidiaries or other arms-length companies to contract with the artists, whether the subsidiaries' activities are integral to the federal activity of broadcasting would have to be determined on a case-by-case basis, based on the relationship between the parent entity and the subsidiary and the work and artists at issue. There is simply no a basis to exclude the application of the *SAA* to all online undertakings because of a concern about encroaching into provincial jurisdiction.

2. **Does the proposed amendment to Bill C-11 that would exclude "online undertakings" from the application of the *SAA* maintain status quo, or change it? What are some of the potential unforeseen consequences of the amendment?**

The status quo is that if a broadcaster contracts with a truly independent producer to retain artists who in turn create programming content, then the artists are engaged by the independent producer and their relationship is regulated provincially. However, if the broadcaster produces the content in-house, like CBC, they are appropriately subject to federal jurisdiction. To maintain status quo, there should be no statutory exemption. Online undertakings who produce content in-house should be subject to the *SAA* like all other broadcasters who produce content in-house. If they choose to contract with a truly independent producer, then the status quo is that independent producer will be subject to provincial jurisdiction.

With respect to the ultimate ownership of rights by streamers or independent producers, the proposed exclusion has no impact either way. Broadly speaking, such "ownership" is determined by the application of intellectual property law and the contractual terms negotiated between the streamers and rights holders. Neither of these are influenced by the proposed exclusion, other than the fact the streamers would not be compelled to recognize artists' associations such as the Guild as exclusive bargaining agents when negotiating such rights.

In our view, the exclusion being contemplated in Bill C-11 could have many additional consequences. Firstly, in-house production by streamers would emerge as a massive non-union sector, creating a significantly unbalanced playing field in the Canadian production industry as between largely unionized traditional broadcasters/independent production and streamers. Secondly, it is not difficult to imagine a future where virtually all television broadcasting is done through national or international online platforms. Traditional broadcasters who find themselves increasingly relying on online broadcasting may seek to have all or some of their operations considered "online undertakings" and thereby not be subject to the *SAA*, upsetting decades of *SAA* foundation to the current scale agreements. These, and other unforeseeable consequences, could have significant destabilizing impacts on the Canadian industry.

If the streamers find it more economic to produce content in-house, they have the economic and technical capacity to do so. Without the protection against reprisal and the right to minimum standards associated with *SAA* certification, there would be nothing to stop the streamers from refusing to contract with artists who try to informally organize in pursuit of common terms or standards. There would also be nothing to stop the streamers from pursuing a 'race to the bottom' type arrangement with new artists who are desperate to break into this intensely competitive industry. The amendment therefore leaves Canadian artists extremely vulnerable to future exploitation, which may over time result in a weakening of talent in Canada as artists are driven out of the profession by the sub-standard labour conditions.

Conclusion:

In our view, there is no jurisdictional reason why online undertakings should be excluded from the *SAA*. If online undertakings are broadcasters, as the entirety of Bill C-11 indicates, and as the CRTC has already found, then the Federal government has the jurisdiction to subject them to the *SAA* regime like all other broadcasters.

The amendment at issue is highly problematic for Guild members, and could result in increasing precarity when they work for streamers, who over time are likely to dominate the traditional media market.

Please do not hesitate to contact us if you wish to discuss this opinion further.

Yours truly,

Ursel Phillips Fellows Hopkinson LLP

Joshua S. Phillips
JSP/nm

Kristen Allen