Submission to the Senate Standing Committee on Transport and Communications on Bill C-11

The Online Streaming Act

October 27, 2022

I. C-11 is crucial legislation that must be passed promptly

Bill C-11 *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts,* also called the *Online Streaming Act*, is crucial legislation whose time has long since come.

For nearly a century, Canadian public policy has recognized the essential role of supporting Canadian media as a core component of our national and cultural sovereignty. From at least the Aird Commission (1929)[1] onwards, public regulation and support for Canadian broadcasting has been considered crucial to Canadian identity and national consciousness. In the decades since, the economic benefits have also become apparent, with the Canadian domestic television production sector generating over $3 billion in GDP for the Canadian economy in 2020-2021, along with nearly $2.5 billion in labour income.[2] We can compare this to the domestic Canadian theatrical feature sector which, absent any meaningful regulation, languishes at roughly one-tenth the size of television,[3] Canada having long ago ceded its cinemas to domination by American films, such that Hollywood now literally treats Canada as its own domestic theatrical market.[4] Canadian domestic broadcasting, by comparison, exists, despite challenges, in a meaningful way, thanks in immense part to the various iterations of the *Broadcasting Act* (the Act) and resulting regulation, which has ensured that Canadian broadcasters contribute to the creation and presentation of Canadian programming, for the benefit of Canadians.

As is now well-understood, the digital revolution has profoundly challenged 20th Century models of broadcasting regulation, and we are now at a tipping point, if not already beyond it. The emergence of the Internet generally, and large foreign streaming services specifically, has created new and immense competitive pressure on traditional Canadian broadcasters. The result has been, among other things, a precipitous, 75% decline in private, English-language broadcaster licence fees that contribute to financing Canadian programming, from $456 million and 17% of financing in 2013-2014,[5] to just $116 million and 7% in 2020-2021.[6] Meanwhile, the cost of producing world-class content remains high.[7] At the same time, our own internal data shows that the hours of scripted production under the WGC's jurisdiction commissioned by the major private English-language broadcasters have fallen even more dramatically. The number of hours of new programming commissioned under the WGC's jurisdiction by the Bell, Corus, and Rogers broadcast groups dropped by over 68% from 2014 to 2021.

None of this is news any longer. Numerous consultations over the past five years alone have repeatedly demonstrated the need to act. The Creative Canada Policy Framework (2017),[8] the Canadian Radio-television and Telecommunications Commission's (CRTC) report, "Harnessing Change: The Future of Programming Distribution in Canada" (2018),[9] and the final report of the Broadcasting and

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[1] Royal Commission on Radio Broadcasting, 1929.

[2] *Profile 2021*, Canadian Media Producers Association (CMPA) in collaboration with the Department of Canadian Heritage, Telefilm Canada, the Association québécoise de la production médiatique (AQPM) and Nordicity, https://cmpa.ca/profile/, Exhibit 1-7.

[3] *Profile 2021*, Exhibit 2-1.

[4] E.g. Vlessing, Etan. "Canada Box Office: Revenue Rises to $699M in 2015." *The Hollywood Reporter*, 8 Jan 2016. http://www.hollywoodreporter.com/news/canada-box-office-revenue-rises-853273

[5] *Profile 2018*, Exhibit 4-19.

[6] *Profile 2021*, Exhibit 3-17.

[7] *Profile 2021*, Exhibit 3-9.

[8] https://www.canada.ca/en/canadian-heritage/campaigns/creative-canada/framework.html

[9] https://crtc.gc.ca/eng/publications/s15/

Telecommunications Legislative Review Panel, “Canada's communications future: Time to act” (2020),[10] have all recognized both the impacts of the digital shift, and the need for a government response, including updating the *Broadcasting Act* to the new, digital reality. The latter emphasized, in its very title, that the time to act is now.

The urgency is all the more pressing because passage of Bill C-11 is not the end of the process, but rather just the beginning. The CRTC implements the Broadcasting Policy for Canada under the *Broadcasting Act*, and following passage of the bill the Commission must still have a public proceeding and hold hearings to determine specific regulatory requirements. A Preliminary Draft Policy Direction to the CRTC of August 2020, in relation to C-11’s predecessor bill, C-10, proposed a time frame of 9 months to do so. We believe that was itself ambitious, but whatever is ultimately done, the actual realization of the objectives of Bill C-11 will still be many months—and maybe years—away. For an industry on the brink, the clock is ticking.

II. The central role of Canadian creators—and Canadian screenwriters

Art is made by artists.

Canadian art is made by Canadian artists.

Creative work does not exist unless and until it is created by creators. In other creative forms, like painting or novel writing, the artist is a single individual creating a single work, and their status as author and creator of their work is broadly understood. We would not say that a painting is Canadian simply because it was commissioned by a Canadian art collector, or exhibited in a Canadian-owned gallery, if the painter themselves was not Canadian; we would not say that a book is Canadian simply because it was published by a Canadian publisher or sold in a Canadian-owned bookstore, if the author was not Canadian. In every creative medium there are a number of important, non-creative roles that help get a work from an idea to a final product in the hands (or on the screens, or onto the digital devices) of consumers. Yet in no creative medium is the artist somehow secondary with those other roles when it comes to the creative nature and identity of the work. The *Mona Lisa* was commissioned by a wealthy Florentine silk merchant, but that does not make it any less Leonardo da Vinci’s painting, nor does its current ownership by the Louvre in France transform it from a work of the Italian Renaissance into a French painting. *Hamlet* is the work of William Shakespeare, and therefore of English drama, no matter in what country it is staged, no matter who produces, directs, or acts in a performance of it, and even though it is about a prince of Denmark.

Professional audiovisual content, television programming included, is a collaborative form, requiring the work of many people to bring it to fruition. This does not mean, however, that television programming lacks creators or a creative vision. On the contrary, of the hundreds of people who may be involved in the production of an hour-long drama series, many do not inhabit *creative* roles. Television shows are nevertheless creative works that bear the stamp of their creators—of an authorial voice or voices and individual artistry. In serial dramatic television in particular, that voice is the screenwriter:

[10] https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html

> Television is a writer's medium. Always has been. …Great dramatic television is serialized; the stories are ongoing, often from season to season, weaving a vast, multiple-hour tale. It is the novel to film's short story.
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> And in television, the actual telling of the story is everything—the narrative flow of that story and the character development within that story solidify greatness, if present.[11]

The screenwriter begins with a blank page. There is no greater act of creation than to start with an empty piece of paper, or computer screen, and to fill it with stories, characters, ideas, emotions, and details—to fill it with *life*—all within the framework of the television form. This is the screenwriter's art and the screenwriter's craft. This fundamental creative act is necessary before anybody else in the production process can do their job. Without the script, there is nothing to produce, nothing to direct, nothing to perform. Legendary filmmaker Alfred Hitchcock said, "To make a great film you need three things – the script, the script, and the script."[12] Even when a television show is adapted from another form, like a novel, the screenwriter's job is foundational, and the screenwriter remains the creator of their show, just as much as the novelist is the creator of their novel or the playwright of their play.[13]

At the centre of the writing process is the showrunner. A showrunner is a writer-producer who is the chief custodian of the creative vision of a television series and whose primary responsibility is to communicate the creative vision of that series through control of both the writing process and the production process—often from the pilot episode through to the finale. The showrunner concept emerged in the U.S. in the 1980s, where it has become closely associated with the current "Golden Age" of television, and it has since expanded internationally, including to Canada. Showrunners are writer-producers who control and guide the creative vision of the show.[14] Showrunners are fundamentally both screenwriters and producers, and they creatively control dramatic television production. There are now a significant number of talented, experienced Canadian showrunners, and they are the creative forces behind their shows. Ins Choi took his experiences growing up in a Korean-Canadian family and turned them first into a play, and then in a television show, as co-creator of the hit CBC sitcom, *Kim's Convenience*. Jared Keeso and Jacob Tierney bring a uniquely Canadian sensibility to their show *Letterkenny*, streaming on Crave. Joseph Kay is the creator/showrunner of *Transplant*, the highest-rated Canadian drama in 2020, and a critical success on NBC. Floyd Kane created *Diggstown*, about a Black lawyer navigating law and life in Nova Scotia. Black screenwriters Marsha Greene and Annmarie Morais developed *The Porter*, and put together the first all-Black Canadian writer's room. Indigenous

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[11] Goodman, Tim, "Critic's Notebook: The Rise of the TV Auteur? No Thanks." *The Hollywood Reporter,* October 10, 2018, https://www.hollywoodreporter.com/bastard-machine/critics-notebook-rise-tv-auteur-no-thanks-1150887.
[12] "Alfred Hitchcock: Quotes." *IMDB*, http://m.imdb.com/name/nm0000033/quotes.
[13] In professional film and television production, books, plays and other media are always adapted into a script by a screenwriter. No producer or director hands out copies of a novel to key cast and crew on the set to shoot from. Adaptation is as much a creative act as "original" writing, since audiovisual content differs fundamentally from other media. What works creatively in a novel, for example, may not work on the screen: emotions that were evoked in prose must now be evoked visually or with dialogue; an "interior monologue" on paper must be externalized in action and performance; or, a book that takes 20 hours to read must be condensed to ~10 1-hour episodes. This is why, for example, major awards, like Oscars and Emmys, are given to adapted scripts/screenplays, and the same novel can be adapted brilliantly (see Stanley Kubrick's famous 1980 film, *The Shining*) or poorly (see ABC's forgotten 1997 miniseries of the same name).
[14] E.g. Collins, Andrew. "Showrunners – TV's lords and creators." *The Guardian,* September 16, 2016 https://www.theguardian.com/media/2013/sep/16/showrunners-tv-writers-creative-power.

showrunner Ron E. Scott has been responsible for *Blackstone* and *Tribal*, both of which deal with issues affecting Indigenous communities in Canada, such as pipelines, the right to clean water, social services, and missing and murdered Indigenous women. And Dan Levy's *Schitt's Creek* has garnered numerous accolades in Canada and the United States, thanks to his unique creative vision.

These creators—these *screenwriters*—must be a central component of the *Broadcasting Act*. It is far from sufficient to claim that content in the broadcasting system is Canadian simply because it was shot within our borders, was (partially) financed with Canadian money, its copyright is owned by a Canadian production company, or its (Canadian) distribution or broadcast rights are held by a Canadian distribution company or broadcaster. Canadian creative work is fundamentally made by Canadian creators. Television is fundamentally made by Canadian screenwriters. If it's not Canadian-written, it's not Canadian content.

We continue to battle a massive drain of Canadian creative talent out of the country, as opportunities for a creative livelihood abound in Hollywood while they are stagnating here. From the WGC's perspective, this has reached a crisis level. Currently, the WGC's largest membership region is Toronto, but its second-largest region, running not far behind, is Los Angeles. That is worth emphasizing. The WGC is a guild of Canadian screenwriters, yet more of our members are working out of an American city than out of Montreal, Vancouver, or anywhere else in this country other than Toronto. This represents a generational loss of Canadian screenwriters, most of whom we are likely never to get back.

We must ensure that Canadian creative resources—and a **Canadian authorial voice**—is and remains central to the meaning of Canadian content/programming, and is prominent in the *Broadcasting Act*. The final report of the Broadcasting and Telecommunications Legislative Review Panel, "Canada's communications future: Time to act", stated:

> There is no question that productions in which all key creative positions are occupied by Canadians — which have a Canadian writer, a Canadian director, and Canadian lead actors — are more likely to reflect a Canadian perspective.[15]

The 2017 Creative Canada Policy Framework, in making "investing in Canadian creators" one of its three pillars, was explicit:

> Creators, broadly defined, must be at the centre of our new approach for the creative industries. They are the heart of the ideas and work that fuel our creative industries.[16]

The *Broadcasting Act* must reflect this foundational concept. Failure to do so would be the death knell for both Canadian screenwriters and the uniquely Canadian content they create.

III. Two essential amendments: Section 3(1)(f) and the *Status of the Artist Act*

Section 3(1)(f)

Given our comments above, while the WGC supports Bill C-11, we do have concerns with the proposed legislation. Most crucially, we are deeply concerned about the amendment in the bill to section 3(1)(f) of the *Broadcasting Act* as follows:

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[15] Page 151.

[16] Creative Canada Policy Framework, "The path forward: taking action along three pillars".

> (f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
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> (f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;

This two-tiered approach is deeply problematic for Canadian screenwriters and other Canadian creators. By setting two different standards, C-11 would allow foreign online undertakings to engage fewer Canadian creators (such as screenwriters) in the creation and presentation of Canadian programming, and open the door to content that is creatively driven from the United States or elsewhere to count towards meeting the policy objectives of the Act. Given that we face a possible future in which foreign online undertakings could dominate the Canadian market—especially when it comes to the creation and presentation of larger-budget programming like drama, comedy, animation, children's programming, and documentaries—this could make the lower bar of (f.1) the *de facto* standard for the Canadian broadcasting system.

At the same time, we understand the rationale for amending section 3(1)(f) of the existing Act. The 1991 Act contemplates a "closed system", in which all broadcasting undertakings operating in Canada are Canadian owned-and-controlled, and all programming created and presented by those undertakings is presumably Canadian programming. Bill C-11 "opens up" the system, contemplating one in which foreign online undertakings operate under a Canadian regulatory framework that seeks to treat both traditional and online services in a comparable way. In such a system, foreign online undertakings like Netflix may not be realistically expected to make maximum-but-not-less-than-predominant use of Canadian creative and other resources in the creation and presentation of *all* its programming offered in Canada.

Recognizing the need to amend the section, but not in a way that diminishes the role of Canadian creators, the WGC has a proposed solution. The following proposal is presented in blackline format, showing changes from the current, 1991 *Broadcasting Act*.

> (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation, production and presentation of Canadian programming, ~~unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources~~ and shall contribute significantly to the creation, production and presentation of Canadian programming to the greatest extent that is appropriate for the nature of the services provided by the undertaking;

This section would be the complete amendment to s. 3(1)(f), and s. 3(1)(f.1) would be deleted from the bill.

This proposal seeks to achieve the following objectives:

1. Recognize that the Canadian broadcasting system will no longer be a "closed system" under the new Act, and that the existing s. 3(1)(f) in the 1991 Act may not be effectively applicable to that reality;
2. Retain the principle of maximum-but-not-less-than-predominant use of Canadian creative and other resources, as an important signifier of the essential role for Canadian creators;
3. Apply the "maximum-but-not-less-than-predominant use" language to *Canadian* programming only, rather than to all programming created and presented by each broadcasting undertaking operating in the Canadian system;
4. Delete the "exception" clause, beginning with "unless the nature of the service provided…", as outdated and inappropriate in the current system—"specialized content" is effectively a meaningless concept today, given the vastness of choice within the system;
5. Add that each broadcasting undertakings shall contribute significantly to Canadian programming, using the language currently applicable to private networks in s. 3(1)(s) of the Act (and proposed to be deleted in Bill C-11), to retain the concept that s. 3(1)(f) is a system-wide objective to support Canadian programming;
6. Retain the concept of, "to the extent that is appropriate for the nature of the services provided by the undertaking" as originally proposed in Bill C-10 at first reading, but add "services provided by" for consistency with language elsewhere in the Act, and add the word "greatest" to strengthen this language; and
7. Add the word "production" in between the words "creation" and "presentation" of Canadian programming, as C-11 currently does.

All of these proposals are consistent with existing language in the 1991 Act, Bill C-10 as originally drafted, and Bill C-11 as it now stands, and as such should be seen as entirely reasonable.

With respect to "5." Above, the current Act has imposed a comparable obligation on private broadcasters in the past without concern, and it therefore should not be an issue for private "online undertakings" as well. We note that the current s. 3(1)(s) says "should" and not "shall", and adds the language, "to an extent consistent with the financial and other resources available to them", which we have proposed to delete from a renewed s. 3(1)(f). At the same time, however, the WGC's proposal adds "to the extent that is appropriate for the nature of the services provided by the undertaking", which is not present in the existing s. 3(1)(s), but which is present in Bill C-11. We believe these characteristics, taken together, provide an appropriate balance to the section.

The WGC's proposed amendment is not unnecessary or redundant in the context of the Act. The WGC's proposed amendment states, in part, that each broadcasting undertaking, "shall contribute significantly to the creation and presentation of Canadian programming". At the same time, Bill C-11, as it currently exists, would amend section 3(1)(a.1) to state that:

> (a.1) each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy set out in this subsection in a manner that is appropriate in consideration of the nature of the services provided by the undertaking;

These are *not* duplicative concepts. The above section refers to contributing to the *implementation of objectives*, whereas the WGC's proposal refers to contributing to the *creation and presentation of Canadian programming*. Our proposal therefore specifies *programming* contributions, and would not allow *non-programming* contributions to be considered sufficient to meeting the Act's objectives.[17] Canadian *programming* is at the heart of the Canadian broadcasting system, a specific statement to that effect in the Act is appropriate, as indeed it currently exists in s. 3(1)(s) of the Act.

Further, s. 3(1)(e) states that, "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming". This section, however, refers to each *element* contributing, not each *broadcasting undertaking* doing so (as appropriate for the nature of its services). "Element" is generally recognized to refer to s. 3(1)(b), which states:

> (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

As such, there are three "elements" in the Canadian broadcasting system—public, private, and community—and s. 3(1)(e) states that each element, as a whole, shall contribute to Canadian programming. This is again distinct from specifying that each *broadcasting undertaking* shall contribute, as appropriate. It is not sufficient that an "element" as a whole contributes to Canadian programming—each undertaking *within* that element must do so, to the greatest extent that is appropriate to that undertaking.[18]

In addition, the WGC feels that our proposal for s. 3(1)(f) is consistent with both an expenditure requirement regime[19] and a fund-contribution regime,[20] as well as, by extension, a regime that allows

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[17] It is not at all far-fetched that broadcasting undertakings might seek to have non-programming activities counted as or towards their contribution to the Broadcasting Policy of Canada and, indeed, it has already happened. The CRTC's Tangible Benefits Policy long recognized non-programming activities as "social benefits", such as donations to educational institutions or live festivals, in relation to changes to the ownership or effective control of broadcasting undertakings, and in practice broadcasters often sought to maximize the amount they could dedicate to such non-programming "benefits". See Broadcasting Regulatory Policy CRTC 2014-459 and predecessor policies.

[18] The CRTC will retain exemption powers, so in the case of some small broadcasting undertakings, what is appropriate for them to contribute may, in fact, be nothing. As such, the WGC's proposal does not require that literally every broadcasting undertaking must contribute to the creation, production and presentation of Canadian programming if it is not appropriate given the service provided by that undertaking. This flexibility remains.

[19] In which broadcasting undertakings are required to invest certain minimum amounts in the production of Canadian programming, which ultimately is presented on—and therefore inures to the benefit of—their own platforms, similar to "Canadian programming expenditure" or "CPE" requirements applicable to traditional Canadian broadcasters now under CRTC regulation.

[20] In which broadcasting undertakings are required to contribute certain minimum amounts to a production fund, such as the Canada Media Fund (CMF), which is then used to fund the development and production of Canadian programming, subject to the eligibility rules of that fund.

undertakings to choose between the two. Section 3(1)(s) has in the past been associated with an expenditure requirement regime, since that is how private broadcasters have contributed to the system historically. But “contribute” is a broad enough word to encompass both, and need not be strictly associated with the regulatory mechanisms chosen for private networks in the past.

Further, subsection (f.1) in C-11 appears to introduce a problematic distinction between the use of Canadian resources and Canadian programming, which is not found in (f). This could lead to confusion as to what is meant in (f.1)—use of Canadian creative resources other than in programming?—and lead to lower standards for foreign online undertakings as a result.

Bill C-11 would also add a new subsection at section 5 of the Act, namely, subsection 5(2)(a.2), directing the CRTC to ensure that any broadcasting undertaking that cannot make maximum or predominant use of Canadian creative resources contributes to those Canadian resources in an equitable manner. The WGC would prefer to see section 3(1)(f) amended as we propose above than see the current subsection (f.1) which is “supplemented” with s. 5(2)(a.2) as C-11 currently proposes. For one, s. 5(2)(a.2) does not eliminate the fundamental two-tiered approach of sections 3(1)(f) and 3(1)(f.1) in C-11. For another, it’s unclear how s. 5(2)(a.2) would even apply to foreign online undertakings given that they are not required to make maximum or predominant use in the first place. Finally, contributing “in an equitable manner” is unclear, since it is not stated what this “equity” is in comparison with. As such, the WGC prefers its approach to the one currently set out in Bill C-11, even with s. 5(2)(a.2).

The WGC’s proposal for s. 3(1)(f) is supported by many other key stakeholders in our sector, including the Coalition for the Diversity of Cultural Expressions (CDCE), the Canadian Media Producers Association (CMPA), the Directors Guild of Canada (DGC), and the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA). This is an industry-consensus proposal.

Finally, while we aware that our proposal may be opposed by foreign online undertakings as somehow unworkable, there is no reason at all to believe that this in fact is the case. The section as proposed refers to *Canadian* programming only—it has no impact whatsoever on the foreign location service production that foreign online undertakings also make in Canada, and it will not affect that activity going forward whatsoever. Moreover, as demonstrated above, the maximum-but-not-less-than-predominant wording is based on decades-old language from the 1991 *Broadcasting Act*, which has never been interpreted by the CRTC or others so as to impose unduly onerous obligations upon Canadian broadcasters. Notably, the CRTC has seen fit to define Canadian content, in part, as only needing to meet a 6-out-of-10 CAVCO points standard under the 1991 Act. And, while the WGC would indeed prefer that all Canadian programming be Canadian-written, that is not a requirement now nor is there is any reason to believe that this 6-point standard is difficult for foreign streamers to meet. “Maximum” does not mean “total” or “everything”, and meaningful flexibility will continue to exist should our proposal be adopted. Simply put, maximum-but-not-less-than-predominant is already very flexible. It is the *minimum* that we should expect from foreign online undertakings and Canadian broadcasters alike.

The *Status of the Artist Act*

Under a last-minute amendment to the bill when it was before the Parliamentary Standing Committee on Canadian Heritage (CHPC), C-11 now includes the following:

> 31.1 Section 6 of the *Status of the Artist Act* is amended by adding the following after subsection (2):
>
> Non-application
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> (3) This Part does not apply in respect of an online undertaking, as defined in subsection 2(1) of the *Broadcasting Act*.

The rationale for this amendment was not debated at CHPC, nor has any rationale been provided subsequently that justifies the serious reduction in bargaining rights of artists, including WGC members, under the *Status of the Artist Act* (SAA). The WGC opposes this amendment and requests that it be deleted from the bill.

For context, the *Status of the Artist Act* addresses a gap in labour relations legislation involving creative artists. Traditional labour relations legislation applies to "employees", and is based on the fact that employers and employees have unequal bargaining power, which the existence of unions and collective bargaining is intended to remedy. Artists are typically not employees, however—they typically operate as independent contractors. However, there is an imbalance in negotiating power between artists and producers in much the same way as in an employee-employer relationship. The *Status of the Artist Act* bridges this gap in the law by providing collective bargaining rights to artists even as they remain independent contractors. The federal *Status of the Artist Act* has long applied to "broadcasting undertakings", as such undertakings are federally regulated. Beyond that, only Quebec has a provincial *Status of the Artist Act* with meaningful protections for artists. Other provinces, such as Ontario and British Columbia, do not have substantively comparable legislation.

The federal SAA only applies where specified "producers", narrowly defined to mean "a government institution or broadcasting undertaking", as described further in the legislation, directly engage "artists" for their services.[21] Currently, the vast majority of domestic Canadian film television production activity involving WGC members occurs through intermediaries that are *independent producers*, and *not* "producers" as defined under the SAA. As such, the SAA currently applies to Canadian broadcasters, and the WGC has 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 WGC 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.

The application of the SAA to "online undertakings" under the *Broadcasting Act* would be entirely consistent with this, *status quo* approach.[22] If online undertakings were to continue to make use of

[21] Section 5.

[22] Indeed, online undertakings very arguably already *are* subject to the SAA, given the CRTC's longstanding interpretation of the 1991 *Broadcasting Act* to be technologically neutral and to therefore include online audio and video.

independent producers to produce Canadian content for their services, such activity would continue to fall under existing collective agreements between those producers and creative guilds like the WGC, and *not* under the SAA. It is only if online undertakings choose to directly engage artists such as screenwriters would the SAA apply to them. This would be entirely appropriate.

The WGC has heard concerns that the federal division of powers under the *Constitution Act* might require the amendment to the SAA as is currently in Bill C-11. However, the WGC has obtained a legal opinion from the law firm of Ursel Phillips Fellows Hopkinson LLP which clearly states:

> [T]here 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.

Moreover, as also provided in a legal opinion from Ursel Phillips Fellows Hopkinson LLP, the amendment currently contemplated in C-11 may well violate the *Charter of Rights and Freedoms*:

> [G]iven the substantial inequality in power between artists and online undertakings, it is likely unconstitutional for the Government to exclude online undertakings from the application of the SAA while providing access to no other labour relations scheme. If the amendment is enacted, artists will have no meaningful ability to pursue their workplace goals in common and negotiate minimum terms and conditions. While it is unclear what the Government's objective is in pursuing this exclusion, it does not appear to be pressing and substantial.

Given the above, we ask the Senate to simply remove this amendment from C-11, such that "online undertakings" are considered "broadcasting undertakings" under the SAA, just as they would be under the amended *Broadcasting Act* itself, and just as they are now. As further stated in the legal opinion from Ursel Phillips Fellows Hopkinson LLP:

> 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.

The Writers Guild of Canada is the national association representing approximately 2,500 professional screenwriters working in English-language film, television, radio, and digital media production in Canada.