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

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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 from Bill C-11, the *Online Streaming Act*, which is presently before the Senate. Specifically, this opinion considers the following issue:

1. Is there a viable argument that the exclusion of "online undertakings" from the *SAA* violates s. 2(d) of the *Charter*?

Summary:

Yes, given 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.

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]

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

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

> 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
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> - **(a)** to the following organizations that engage one or more artists to provide an artistic production, namely,
>
> - **(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
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> - **(b)** to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who

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

- **(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 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

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

expansion of the *SAA's* scope, which would be an encroachment on provincial jurisdiction.

Analysis:

1. **Is there a viable argument that the exclusion of "online undertakings" from the *SAA* violates s. 2(d) of the *Charter*?**

A. Section 2(d) Law

As you likely know, s. 2(d) of the *Charter* has been revitalized in recent years. In 2015, the Supreme Court overturned its pre-existing jurisprudence through a new trilogy of cases. At a high level, s. 2(d) is now said to protect three classes of activity: the "constitutive" right to join with others and form associations, the "derivative" right to join with others to pursue other constitutional rights, and the "purposive" right to join with others to meet on more equal terms the power and strength of other groups or entities"[4], which, in the labour context, includes a right to meaningful collective bargaining and to strike in pursuit of common workplace goals.

For our purposes, the key case from the trilogy is *Mounted Police.*[5] *Mounted Police* addressed a violation of s. 2(d) because RCMP officers were excluded from the labour relations regime[6] governing the federal public service, preventing them from unionizing and bargaining. Instead, members of the RCMP were subject to an alternative scheme, called the Staff Relations Representative Program ("SRRP"), through which they could raise employment issues and provide input to management on draft policies through elected representatives, but management ultimately had the final word on everything.

Overturning earlier precedents, the majority of the Court found this scheme violated s. 2(d) because it denied the RCMP members their choice of representation and did not permit them to identify and advance their workplace concerns free from management's influence. In coming to this conclusion, the Court found that the key purpose of s. 2(d) is to protect individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power.[7] The Court stated that just as a ban on employee association impairs s. 2(d), so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters.[8] In finding that this scheme violated section 2(d) of the *Charter*, the Court reiterated that section 2(d) must be "interpreted in a purposive and generous fashion"[9] and that a "fundamental purpose of

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[4] *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1 ("*Mounted Police*").at para 66.
[5] *Mounted Police, supra.*
[6] First under the *Public Service Staff Relations Act* and now under the *Public Service Labour Relations Act*.
[7] *Mounted Police*, supra at para. 70.
[8] *Mounted Police*, supra at para. 68.
[9] *Mounted Police*, supra at para 47.

section 2(d) [is] to protect the individual from 'state-enforced isolation in the pursuit of his or her ends'."[10]

That said, however, the Court maintained that the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labour relations (i.e. access to a particular statute). The Court further noted that what is required to permit meaningful collective bargaining varies with the industry culture and workplace in question.[11]

Mounted Police built on the Court's earlier decisions in *Dunmore*[12] and *Fraser*[13]. In *Dunmore*, agricultural workers challenged their exclusion from the collective bargaining regime created by the Ontario *Labour Relations Act, 1995* ("*LRA*"). The majority of the Court concluded that the complete absence of legislative platform to organize made it impossible for the farm workers to meaningfully associate in order to achieve workplace goals and therefore violated s. 2(*d*). While the Court in *Dunmore* set out a test for whether an underinclusive labour relations scheme violates s. 2(d),[14] it is unclear if this test is still good law, given the Court's new articulation of the test for any s. 2(d) violation in *Mounted Police*.

In *Fraser*, the Court was faced with another constitutional challenge from farm workers relating to the legislative scheme imposed by the Government in response to *Dunmore*. The legislation granted farm workers the rights to: form and join an employees' association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment, and to be protected against interference, coercion and discrimination. However, it provided no process for bargaining or a right to strike.

The majority of the Court found that there could not "be any doubt that legislation (or the absence of a legislative framework) that makes achievement" of collective workplace goals "substantially impossible, constitutes a limit on the exercise of freedom of association."[15] However, the Court clarified that governments are not constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, exclusive majority representation, or a mechanism for resolving bargaining impasses and disputes

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[10] *Mounted Police*, supra at para 48.
[11] *Mounted Police,* supra at para. 93.
[12] *Dunmore v. Ontario, 2001 SCC 94* ("*Dunmore*").
[13] *Fraser v. Ontario,* 2011 SCC 20 ("*Fraser*").
[14] The Court in *Dunmore* set out three requirements at paragraphs 22-26: (1) the claim of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime; (2) there must be a proper evidentiary foundation demonstrating that the exclusion from a statutory regime permits a substantial interference with protected associational activity; and (3) it must be shown that the state can truly be held accountable for any inability to exercise a fundamental freedom.
[15] *Fraser*, supra at para. 32 emphasis added

regarding the interpretation or administration of collective agreements.[16] It found there was no violation of s. 2(d) on the facts of that case.[17]

However, in the most recent Ontario case on point, the Ontario Labour Relations Board ("OLRB") found it violated s. 2(d) to exclude horticulture workers from the *LRA*. [18] As is the case with lawyers, horticultural workers had access to a statutory scheme for collective bargaining in many other provinces and were covered by the *LRA* between 1992–1995 before the Government enacted the exclusion under challenge.

The Union argued that the exclusion substantially interfered with freedom of association by denying the workers access to any collective bargaining regime— especially considering their general vulnerability as employees and specific vulnerability as horticultural workers. It further argued the purpose of the exclusion was to prevent collective bargaining, and this purpose itself violated s. 2(d). The Attorney General argued that the exclusion did not violate section 2(d) since the workers were not specifically prevented from organizing, negotiating, or withdrawing their services, and other employees (including lawyers) were similarly excluded from the *LRA*. In essence, it argued the workers could still collectively pursue their goals without access to a statutory scheme for certifying a union.

To determine whether the *Charter* had been violated, the OLRB adopted the framework set out in *Dunmore* "but as informed by the subsequent decisions of the Supreme Court of Canada" including *Mounted Police*, adding that "[w]hether or not there has been substantial interference with a protected freedom can only be determined in a factual context that considers the substantive content of that freedom."[19]

On the evidence, the OLRB found that the exclusion constituted substantial interference under s. 2(d) because, among other things, there was no evidence of any voluntary associational activities by the excluded employees at all. The OLRB rejected the need to find evidence of some special vulnerability of horticultural workers, noting that the employee relationship is inherently vulnerable. As well, the OLRB rejected the fact there were a few voluntary (extra-statutory) collective agreements that covered horticultural workers as evidence that they were able to associate.[20] Ultimately, the OLRB found there was no evidence that horticultural workers were able to unionize and bargain collective agreements in the face of employer opposition while excluded from collective bargaining legislation. The wholesale exclusion of horticultural workers meant that none

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[16] *Fraser*, supra at para. 47

[17] More recently, the Divisional Court again upheld the legislation applying to farmworkers has been upheld following the new trilogy, primarily because the UFCW had not demonstrated that the *AEPA* interfered with the freedom of employees to collectively withdraw their services: it did not explicitly curtail the right to strike. See: *UFCW v Aurora Cannabis Enterprises Inc.,* 2021 ONSC 5611

[18] *International Union of Operating Engineers, Local 793 v Hermanns Contracting Limited (2017)*, 20 CLRBR (3d) 1, 2017 CanLII 82853 (OLRB).

[19] *Ibid* at para 170.

[20] *Ibid* at para 107.

of the minimum requirements for a meaningful collective bargaining regime were available to them:

> …As described above, the Supreme Court of Canada has prescribed minimum requirements for freedom of association. Those requirements include:
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> • The right to collectively present demands related to employment conditions to the employer
>
> • The duty of the employer to receive the demands in good faith
>
> • The right to a meaningful process of collective bargaining
>
> • The ability of employees to advance workplace concerns free of management's influence
>
> The exclusion of horticultural workers from the Act means that the Act does not provide horticultural workers with those minimum requirements. The horticultural employees are not covered by the Act. Nor are they covered by the AEPA. They have no statutory protection. They are like the title character in the 1960's hit record by Martha and the Vandellas because they have "nowhere to run to, nowhere to hide". The affected horticultural workers are in a statutory no man's land. [21]

Furthermore, the Board found it could infer that the legislature had intended to prevent collective bargaining, as they had been covered by the *LRA* before. [22] In effect, the OLRB found the exclusion substantially interfered with the employees' freedom of association both in purpose and effect. The government did not attempt to defend the exclusion under section 1.

Ultimately, it is clear following *Mounted Police* that excluding workers from a statutory labour relations scheme can violate s. 2(d) if it otherwise denies the ability to meaningfully collectively bargain and pursue collective workplace goals.

B. Application to the Amendment to the *SAA*

In our view, there is a strong argument that excluding online undertakings from the application of the *SAA* violates s. 2(d) in a manner that would not be saved by s. 1 (where the infringement is justified as a reasonable limit in a free and democratic society). While a further investigation into the evidence relating to the relationship between artists and streamers is required, the Charter analysis will consider at least the arguments set out below.

1. While artists are not in a typical employer-employee relationship with streamers, there is a similar inequality in power present. The majority of streamers are large

[21] *Ibid* at paras 128-129.
[22] *Ibid* at para 111.

international corporations that have significant power over access to work in the industry. Although artists may only work for the streamer on a temporary basis (which is different than the employees in all the cases considered above), the streamer can influence their career in the long-term by controlling access to future work. As you know, reputation is critical in the entertainment sector. Unlike non-unionized employees in other industries, artists do not enjoy protections under employment standards legislation that may mitigate some of this imbalance of power. This leaves artists uniquely vulnerable, and uniquely in need of a statutory scheme to associate and collectively pursue their workplace goals.

2. While it may be argued that artists do not need access to an Association to collectively pursue their workplace goals with the streamers, the *SAA* itself undermines this argument. The purpose sections of the *SAA* specifically recognize the importance of providing a legislative scheme to allow artists to organize to ensure their work is valued in a way that reflects their contributions to Canadian culture and society. This is equally true for artistic endeavors that are ultimately accessed through online undertakings. Like horticultural workers who were subject to the *LRA* for a period of time, in this case "online undertakings" would have historically been subject to the *SAA*. The history shows that artists need unionization to collectively pursue their goals and meaningfully negotiate with more powerful entities like producers and broadcasters.

3. The Government may argue that artists are professionals who own copyright over their craft and therefore are not vulnerable *vis-à-vis* the online undertakings in the same manner as farmers or horticultural workers. They may argue there is no need to provide access to a labour relations scheme for every piece of work an artist may engage in – in other words arguing this is just a small exception to what is otherwise an industry with union-representation. In our view, these arguments ignore the significant vulnerability and precariousness of the industry, including but not limited entry-level and low-budget work in the fields of writing, acting, or directing. Unchecked, these circumstances can result in extremely precarious working conditions. And while it is true that the amendment at issue does not deny the right to associate with respect to all manners of work, this is a short-sighted argument that ignores the emerging dominance of streaming platforms in the production and distribution of content.

Following the recent OLRB case, it is open to a Court to find that excluding workers from a scheme they had access to previously violates s. 2(d) in purpose, since the only basis to exclude artists from access is to prevent them from collective bargaining or collective negotiation in pursuit of their workplace goals. Even applying the more restrictive *Dunmore* framework, it is very likely that it violates s. 2(d) to deny artists access to a statutory platform to organize and negotiate in pursuit of their workplace goals with respect to the streamers.

While it remains open for the government to seek to justify the exclusion under section 1 of the *Charter*, to date the Guild has been provided with no rationale for the exclusion which would even arguably be considered "pressing and substantial" so as to support such a justification.

Conclusion:

In our view, the case law reviewed above suggests that it would be unconstitutional to exclude "online undertakings" from the application of the *SAA*.

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