



Writers Guild of Canada

**Writers Guild of Canada
Response to the Ministry of Labour
Changing Workplaces Review
Special Advisors' Interim Report**

A Member of the International Affiliation of Writers Guilds

366 Adelaide Street West
Suite 401
Toronto, Ontario M5V 1R9
Tel 416 979-7907
1-800-567-9974
Fax 416 979-9273
info@wgc.ca www.wgc.ca

Writers Guild of Canada Response to the Ministry of Labour Changing Workplaces Review Special Advisors' Interim Report October 14, 2016

Introduction

This submission is made on behalf of the Writers Guild of Canada, the only national artists' association representing professional screenwriters across Canada in the film, television and new media industries. As artists and creators of work which attracts copyright protection, screenwriters have developed a unique collective bargaining model and scale agreements to meet their needs. While collective bargaining and scale agreements have enjoyed relative stability over a prolonged period, the absence of a legislative framework to underpin the relationship between the WGC and the producers who engage writers has necessarily created a degree of uncertainty with respect to the rights and remedies available to the parties.

The WGC's primary interest in the Changing Workplaces Review is with respect to developing an appropriate and effective bargaining regime for writers and similarly-situated artists. As such, this submission is addressed to Section 4.6.1 Broader-based Bargaining Structures of the Interim Report, which raises the special needs of artists.

The WGC is strongly of the view that it is inappropriate to merely seek to bring to artists under the umbrella of the *Labour Relations Act (LRA)*, by "deeming" employee status on those who clearly do not meet the traditional criteria of same. To do so ignores the independent status of writers, the copyright protections which flow from being independent contractors and the tax status of writers. Moreover, the mature collective bargaining relationship between the WGC and provincially-regulated independent producers has been characterized by voluntary recognition, small "bargaining units" of one or two individuals at an enterprise level and a national scale agreement, none of which are easily accommodated within the *LRA* model.

Rather, the WGC submits that an Act in the nature of the Status of the Artists Acts enacted in Quebec and at the Federal level serve as more appropriate models which can reflect the special circumstances of Canadian screenwriters.

The Writer as Worker

Screenwriters are and have always been engaged in non-standard work, in that they are mostly engaged for a defined, short-term project – to write a screenplay – after which an engager has no further obligation to the writer, beyond the payment of royalties on the production made from their work, if and when applicable. In addition, a screenwriter may take engagement with different engagers for different scripts in

overlapping time frames, since one project may slow down in development, while another proceeds toward production.

Most screenwriters provide their own workspaces and equipment, set their own hours and otherwise determine their conditions of work, subject only to the obligation to deliver a professional script in a timely a manner. As such, they squarely meet the definition of “independent contractors”. The concerns of employment standards legislation, such as minimum wages, overtime, vacations, termination and severance, etc. have little relevance to screenwriters. As such, there is no compelling reason to bring screenwriters within the ambit of the *Employment Standards Act*.

Most screenwriters are considered self-employed for tax purposes, permitting them to take advantage of business expenses not available as write-offs to employees. Given the marginal incomes of many screenwriters, having such status often makes the difference between a career that is viable and one that is not.

As the author of a script, the screenwriter is the first copyright holder.¹ A key feature of a writer's work is that its economic value is determined by the ability to exploit the copyright in the work, for example by making the script into a movie or television show. In this regard, screenwriters are similar to other kinds of writers, composers and visual artists. For this reason, the terms and conditions of engagement for screenwriters – including the quantum of remuneration - are linked not only to the effort of the writer in producing the work, but also to the success of the producer in exploiting it. The details of current terms of scale agreements in this regard are summarized below.

However, if the script were to be written in the course of employment, the presumptive ownership of copyright would lie with the “employer”², thus upsetting the underlying foundation of the relationship between screenwriters and engaging producers.

Therefore, self-employed status has traditionally been important for writers not only to ensure their marginal incomes are not further eroded by tax liabilities, but also to ensure they are the first copyright holder, thus providing some limited leverage in their negotiations of terms and conditions of engagement.

The WGC has never sought to be recognized as a trade union under the *LRA*, largely because the majority of its members are clearly not employees.

Incorporating screenwriters into the LRA is entirely inappropriate. The “deeming” of writers as employees would at best confuse and at worst undermine their status of independent contractors for tax and copyright purposes. Ironically, this would have the

¹ *Copyright Act*, s. 13(1), RSC 1985, c. C-42

² *Ibid*, s. 13(3)

effect of making screenwriters more economically vulnerable than they currently are, with little or no countervailing benefit.

Industry Structures

a) National Collective Bargaining

While many of those working in Canada's film and television industry benefit from foreign (predominantly American) productions, screenwriters do not as most American productions shot in Canada engage American screenwriters.

Canada's indigenous production is undertaken primarily by independent producers, who are provincially regulated. Only one-tenth of one percent of production under WGC agreements is undertaken by federally-regulated entities, such as broadcasters or the National Film Board. Independent producers run the gamut from one-person operations to large corporations. In Ontario, in fact, in Canada, most producers are located in Toronto.

The funding for television and film production is largely determined by national funding and tax regimes (and to a lesser degree by provincial programs), as well as income which can be derived from global markets. As such, provincial conditions affecting production are not a major factor in determining a producers' ability to pay a writer, although many provinces do offer tax incentives. It is in part due to the national and global nature of the television and film industry that collective bargaining occurs on a national level, with a single scale agreement covering the entire country, known as the Independent Production Agreement (IPA). The IPA applies throughout Canada, including Quebec, which has Status of the Artist legislation, under which the WGC is certified as a bargaining agent. (It has been relatively easy to harmonize terms from Quebec's Status of the Artist Act with the IPA to maintain nationally standard terms for screenwriters.)

Therefore, any new collective bargaining legislation should recognize and support the national scope of bargaining. It should not impose any requirements for the negotiation, ratification or strike activity which – if replicated in other provincial jurisdictions – would make it functionally impossible for the WGC to continue national bargaining.

b) Short-term engagements, ephemeral engagers, craft-based bargaining and small numbers of screenwriters at the enterprise level

Typically, established producers incorporate single-purpose corporate entities (prodcos) to produce a production. Each show, or season of a show is made a by a different corporate entity. Prodcos, however, are under the control and direction of the producer.

Writers are typically engaged by the prodco, often for a short period of time. Indeed, the prodco itself is most often only an active business entity for the duration of the making of the production, after which it becomes largely inactive and without assets.

There is often only a single writer associated with a particular production. Sometimes, screenwriters are engaged serially, for example, one writer will complete a draft script and then another will be engaged to do a rewrite on the same script. In some cases, such as a television series, there may be a "writers' room" which includes perhaps half a dozen writers who perform the roles of both screenwriters and story editors on multiple scripts. Therefore, the number of writers engaged by any producer at any given time is usually very small.

As such, the film and television production industry, insofar as the engagement of writers is concerned, has many structural similarities to the construction industry. The itinerant nature of engagers, the absence of a fixed workplace and the small number of screenwriters engaged over short time-frames make it impossible for the WGC to become the certified bargaining agent for screenwriters in the traditional way.

Instead, because the vast majority of, and the best, professional screenwriters in Canada are WGC members, who may only work for producers who have become signatory to the IPA, producers have come to voluntarily recognize the WGC in order to gain access to superior talent.

Therefore, the structural features of screenwriters' engagement militate toward sectoral bargaining rights similar to those in the construction industry. Given the mature bargaining relationship currently in place (discussed below), any new collective bargaining regime should recognize the existing structure and not emphasize certification based on majority support at an enterprise level.

History of Collective Bargaining

There is a lengthy history of collective bargaining between screenwriters and engagers. The film and television industry, like the construction industry, has a history of bargaining by trade. Writers, performers, directors and production personnel all bargain separately in Ontario.

Writers have been engaged in collective bargaining since the 1950's, originally as part of what is now ACTRA. The short duration of prodcos' active business life and the small numbers of writers engaged on any one production makes it impractical to negotiate collective agreements on a production-by-production basis. The first scale agreement was signed in 1961 and collective bargaining for renewed IPAs has continued ever since.

Two jurisdictions have instituted specialized Status of the Artist (SAA) collective bargaining legislation: Quebec and the federal sector. While they are not identical, they both recognize the special needs of artists by:

- certifying artists' associations to represent all screenwriters engaged by all producers within the defined sector, covering the entire jurisdiction.
- requiring artists' associations to demonstrate that they are the "most representative" association in the sector rather than having to prove majority support within any engager.

The WGC has successfully negotiated scale agreements with federally regulated broadcasters as well as the National Film Board under the aegis of the federal SAA. These agreements are separate and distinct from the IPA.

The IPA is negotiated with the Canadian Media Producers Association (CMPA), a national association of producers, along with the Association québécoise de la production médiatique (AQPM), a provincial association of Quebec-based producers. The CMPA represents its members who agree to be bound by the scale agreement. Non-members of the association, or those who choose not to be, are not bound by the scale agreement unless or until they choose to engage a WGC member. (WGC members may not work for a non-signatory engager). Among those who tend not to be bound by the IPA are those producing very small-budget productions where a non-member writer may also be the producer, and has no need of the protection of a guild agreement.

a. The Negotiation Protocol

In addition to the scale agreement, these parties have also negotiated a Negotiation Protocol, which regulates the parties' relationship after the expiration of the scale agreements and during the bargaining process. It adopts many features of labour relations legislation, such as unfair labour practices, common producer provisions, etc. As such, mandatory compliance with the requirements of individual provincial labour relations regimes during collective bargaining is both impractical and unnecessary to the extent the parties have dealt with the issues through contract.

b. The IPA

The IPA sets out minimum terms and conditions of engagement of writers. Writers, if their individual bargaining power permits, may negotiate terms and conditions more beneficial to them. All writers engage in a level of individual negotiation with producers, resulting in a writer's contract, which incorporates by reference the minimum terms

contained in the IPA. As such, individual negotiation remains an important feature of writer engagement.

Because of the vast array of productions covered by the scale agreement, it seeks to tailor terms to the economic reality of the particular production, ensuring that it remains viable to engage a WGC writer regardless of the economics of the production. For example:

- Different rates of pay are established for television productions, animation, documentary, feature films, internet production, etc., recognizing that the markets and economics are different for different types of production
- Writer compensation is scaled depending on the success of the production, and is comprised of the following:
 - a fee for writing the script (Script Fee)
 - a fee in the event the script is actually produced (Production Fee); and
 - a royalty in relation to the revenue generated, after the recoupment of certain costs (Distribution Royalty).
 - Writer compensation is further scaled depending on the budget of and revenue generated by the production. The Production Fee is a proportion of the production budget and Distribution Royalty is calculated on the Distributors Gross Revenue after certain costs are recouped by the producer.
 - Fees for productions below certain production budget thresholds are discounted, and at some lower levels, are entirely negotiable.

As such, the IPA enshrines significant flexibility to ensure that it remains an appropriate basis for engaging screenwriters, no matter where in the country, no matter what kind of production and no matter what the budget.

Notwithstanding this flexibility, large numbers of the most vulnerable writers remain outside of the scope of the IPA. Writers of the ever-growing “reality” programming genre are often not recognized as such in their engagements, don’t receive distinct or standardized fees for their writing services, and the bulk of them do not receive credit as writers. The WGC’s outreach to these writers have revealed a considerable “chill factor” in their ability to seek out union representation. Sector recognition would be key in helping these writers receive the same benefits of an agreement as other screenwriters across Canada.

Therefore any new collective bargaining legislation must:

- *recognize and support the existing bargaining structure which results in a scale agreement designed to be flexible enough to apply to the varying needs and resources of different aspects of the industry;*

- *provide for sectoral certification based on “most representative” criteria, including a mechanism whereby screenwriters engaged by producers who do not voluntarily recognize the WGC can seek certification of the WGC as their bargaining agent;*
- *recognize the reality of individual bargaining between writers and producers, within the framework of the IPA;*
- *recognize that screenwriters have already compensated for the lack of underpinning legislation by formulating tools such as the Negotiation Protocol. To this extent, artists associations and producers should be able to “contract out of” legislative provisions, especially in the context of mature bargaining relationships, where they have provided for substantially similar, or better, rights and obligations.*

Summary

The WGC submits that it would be inappropriate to seek to bring screenwriters and other similarly situated artists within the ambit of the *LRA*. The requirement of employee status – real or deemed – is anathema to the reality and needs of writers. The enterprise level certification is not feasible and is at odds with the sectoral approach successfully adopted by the Quebec and federal jurisdictions. Moreover, the mandatory compliance required with most provisions of the *LRA* may not be appropriate where agreements are negotiated on a national level and the parties have already negotiated a framework to regulate their relationship between and during the re-negotiation of scale agreements.

However, the legislative void in Ontario with respect to artists' collective bargaining has left significant uncertainty which should be addressed.

The unique features of the film and television industry, including the drivers of production activity, the status of writers as independent contractors, writers' copyright interest, individual bargaining between writers and producers and the fleeting nature of production activity all militate toward a specialized collective bargaining regime, which like those designed for teachers, police officers and health care workers, recognizes and provides for the needs of their industry. At the same time, any legislation must acknowledge, support and not undermine the historical efforts of the parties to establish fruitful and stable labour relations.

The current Status of Ontario's Artists Act provides nothing of substance to assist artists in this regard. The WGC recommends that dedicated SAA legislation be introduced, similar to those in other Canadian jurisdictions, to fill the current legislative void.