

Hollywood Strikes Are Over – So What Does That Mean for Productions in Canada?

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The short answer is that Hollywood is back to work, and that should be good news for Canadian producers, those whose livelihood depends on film and television production, and the viewing public in general.

With the December 5, 2023, ratification of the newly-negotiated Basic Agreement and Television Agreement by the membership of the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), performers and other media professionals returned to their creative endeavours and ended the longest strike in SAG-AFTRA's history. This followed on the heels of the October 9, 2023, ratification of the new Writers Guild of America (WGA) three-year Minimum Basic Agreement, ending the second-longest writers' labour stoppage in WGA's history.

Both Hollywood strikes were in response to protracted labour negotiations that ended in pre-strike impasse over a number of factors, including fundamental changes in the industry's business model, such as the rise of on-demand and streaming services; the rapid development and anticipated adoption of artificial intelligence (AI) technologies in the creative and technical aspects of production; and the residual adverse effects of the COVID-19 pandemic on the entertainment industry.

While American performers and writers are represented by SAG-AFTRA and the WGA, respectively, their Canadian counterparts are represented by the Alliance of Canadian Cinema, Television, and Radio Artists (ACTRA) and the Writers Guild of Canada (WGC). The WGC has been in negotiations on a new collective agreement with the Canadian Media Producers Association (CMPA), and to that end, the term of the current WGC Independent Production Agreement (WGC IPA) for writers was extended for 18 months, expiring as extended on December 31, 2023. However, an impasse was reached in the WGC-CMPA negotiations and mediation ensued in December 2023, with the negotiations set to reconvene on January 25 and 26, 2024. As of this writing, the CMPA has offered a four-month extension of the WGC IPA coupled with a minimum script fee increase while mediation and negotiations continue.

In addition, while the current ACTRA Independent Production Agreement (ACTRA IPA) runs to December 31, 2024, similar negotiations to those leading to the new SAG-AFTRA collective agreement are anticipated between ACTRA and the CMPA.

Thus, we find ourselves in Canada, and in most other non-US jurisdictions, with significantly different domestic collective agreement terms applicable to writers and performers than in the corresponding

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agreements that bind SAG-AFTRA and WGA signatory producers when producing in or outside the US. Since 2002, SAG-AFTRA Global Rule One has prevented SAG-AFTRA performer members from working on any non-union productions anywhere in the world unless an exception or waiver applies on a case-by-case basis. A notable exception for a waiver is that a non-resident SAG-AFTRA member who is a citizen of a country other than the United States may work for a non-SAG-AFTRA signatory foreign production, provided the foreign production is subject to applicable domestic union agreements in the country of production. This most commonly occurs in the case of Canadian actors who are members of SAG-AFTRA but reside in Canada. Canadian productions that are not SAG-AFTRA and WGA signatory producers may engage US performers and writers who are members of SAG-AFTRA or the WGA under a memorandum of agreement with SAG-AFTRA or a side letter agreement with the WGA to have most of the terms in their respective US collective agreements apply to the union members employed for the Canadian production.

Accordingly, there are potential planning opportunities for Canadian producers, and for the use of Canadian service producers, while we await alignment in the terms of the Canadian collective agreements. This dissonance between US and foreign collective agreements ought to be of concern, as well as a potential opportunity, to performers and writers who are SAG-AFTRA or WGA members and who are approached to perform or write under Canadian collective agreement jurisdiction.

So, let's examine some of the new provisions of the SAG-AFTRA and WGA collective agreements that may be of particular importance to Canadian producers, Canadian productions, and SAG-AFTRA and WGA members who are also subject to ACTRA and WGC jurisdiction.

Streaming

As one of the keystones of the Hollywood strikes, both SAG-AFTRA and the WGA negotiated gains for their members regarding streaming projects.

For both writers and performers, there is a new streaming residual based on viewership. For any series or film made for high-budget subscription video on demand (HBSVOD) platforms, such as Netflix, and released on or after January 1, 2024, there is a bonus residual if the project is viewed by 20% or more of the service's domestic subscribers, either in the first 90 days of release or in the first 90 days of release in any subsequent exhibition year. For writers, the bonus residual is equal to 50% of the fixed domestic and foreign residual for the applicable exhibition year; for performers, it is equal to 100%.

In addition, foreign streaming residuals for writers are now based on the HBSVOD platform's number of foreign subscribers. This means that, for Netflix, the largest global subscriber base, the three-year foreign residual for its projects will increase by roughly 76%.

These provisions promote the alignment of interests between the writers/performers and the studios,

ensuring that both sides share in the success of streaming projects.

Artificial Intelligence

Another headliner in the Hollywood strikes was the use of AI in the entertainment industry. The potential—and threat—of increasingly sophisticated AI technologies to perform creative functions, such as writing scripts and generating animation and images, was important for all parties to address.

For writers, the guardrails for their use of AI are set to allow AI as an optional writing tool. This means that, with the consent of the studio, writers can choose to use AI technology when writing, but the studio cannot require or mandate that the writer to use AI technology. Any AI-generated material will also not be considered as source material under the WGA Basic Agreement, which ensures that writers' credit and separated rights are protected.

For performers, AI is divided into two main types of uses: (i) digital replication and alteration; and (ii) synthetic generation. Detailed rules around clear and conspicuous consent from, and fair compensation for, the relevant performers are set out to ensure that the potential benefits of AI technologies in a production are not gained solely at the expense of performers.

Notably, in response to the constant and rapid development of AI, both unions reserved rights to address certain future AI-related issues. The WGA has reserved the right to assert that the exploitation of writers' material to train AI models is prohibited by the WGA Basic Agreement or other laws, such as copyright. SAG-AFTRA has stipulated that regular meetings between SAG-AFTRA and the studios be established to discuss the rights and associated remuneration to use works to train AI models for synthetic generation of performances, as well as possible efforts to ensure that the uses of generative AI are mitigated against biases.

These provisions initiate a discussion between both sides about AI that is likely to evolve in the near future as the opportunities and risks continue to emerge and are better understood.

Self-Tapes and Virtual Interviews/Auditions

With the increase in self-tapes and virtual interviews and auditions, in part stemming from the impact of the COVID-19 pandemic, SAG-AFTRA has created a comprehensive set of rules to govern these remote interactions. These rules govern what performers can (and cannot) be asked to do and the storage and use of the recordings.

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Intimate Scenes

SAG-AFTRA has negotiated a set of guidelines for scenes involving nudity or simulated sex. Producers must use best efforts to engage an intimacy coordinator for such intimate scenes, and any request by a performer to engage an intimacy coordinator for any other scenes must also be considered in good faith without retaliation against a performer for making such a request.

In addition, there are protections for background actors in roles that involve scenes with nudity or simulated sex. Producers must notify the background actor prior to an interview or audition if the producers know that there are intimate scenes expected in the role, and the casting notice must also specify if any nudity is required in the audition. In any case, producers must notify background actors of any intimate scenes no later than 48 hours in advance of the background actor's call time on the day the scene is to be shot.

Increased Minimums

Minimum wages for both writers and performers are set to increase over the course of both the SAG-AFTRA and WGA collective agreements. Writers will see most minimums increase by 5% effective as of ratification, 4% on May 2, 2024, and 3.5% on May 2, 2025. Performers will have increases to their minimums of 7% effective November 9, 2023, 4% on July 1, 2024, and 3.5% on July 1, 2025. Minimums for deal performers will also increase based on the production format and schedule breaks.

Improved Employment Terms

The WGA also negotiated improved employment terms for its members, centered around job security and compensation. This was a serious concern for television writers who have been affected by smaller writers' rooms and fewer episodes per season of a series. Highlights of the improved terms include:

- a guaranteed second step for a writer hired to write a first draft screenplay for 200% of the minimum or less;
- an accelerated payment structure for screenwriters hired on a flat deal basis for 200% of the minimum or less, under which the writer is paid 50% of their fee upon commencement and another 25% if the writer has not delivered the script within nine weeks of commencement;
- for full-length projects made for streaming with a budget of US\$30 million or more, increases to the minimum initial compensation (now at US\$100,000) and the residual base (26% increase);
- for writers with series employment, a new writer-producer tier with a higher minimum weekly rate and a minimum guarantee of 19 weeks at premium rates for writers of any pre-greenlight rooms of at least three writers; and

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- for episodic series, certain staffing and duration guarantees for writers.

Pension and Health Plan

For SAG-AFTRA members, the contribution ceilings for the pension and health plan increase after one year of ratification, with the amount dependent on the format of production. There are similar increases for WGA members as well. In addition, writers will now benefit from a new provision pursuant to which each writer on a writing team employed for a script receives pension and health contributions up to the relevant cap as though they were a single writer, as opposed to splitting the applicable cap among the writing team.

What's Next?

While the new SAG-AFTRA and WGA collective agreements ensure that writers and performers will return to work after the Hollywood strikes, it remains to be seen how effective the new and improved provisions in these collective agreements will be in addressing the concerns of studios, producers, and members of both SAG-AFTRA and the WGA. At the same time, a number of the issues at the heart of the collective agreement negotiations remain alive, reflecting the continued emerging modifications to industry business models and the effect of rapid technological innovation.

The Cassels Entertainment & Sports Law group will continue to monitor developments related to the SAG-AFTRA and WGA collective agreements and the current and anticipated companion ACTRA and WGC negotiations in Canada. If you have any questions about these matters and how it may impact your business or your engagement, please reach out to any member of our team.

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