ARTICLE

IT'S NOT "WORK" IF THEY'RE HAVING FUN…RIGHT? THE APPLICATION OF B.C.'S *EMPLOYMENT STANDARDS ACT* TO CHILD-INFLUENCERS

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ABSTRACT

Influencers are becoming more entrenched in popular culture every year. However, it is not just adults participating in this lucrative career. Children are also earning a substantial income from posting influencer-content on social media platforms such as YouTube, Instagram, and TikTok. However, even though child-influencers are performing similar work, it is unlikely that the legal protections provided to child actors and performers apply to these "kidfluencers". This article examines British Columbia's employment standards legislation and whether its provisions apply to children earning money on social media. Based on this analysis, the article concludes that the statute's application to child-influencers is unclear and inadequate and contends that more needs to be done to regulate this ballooning area ripe for child-exploitation.

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INTRODUCTION

With 17.3 million followers, three year-old Wren Eleanor and her mom Jacquelyn's sponsored "Shein Try-on Haul", has amassed over 217,000 "likes" on TikTok.[1] On YouTube, ten-year-old Everleigh Labrant has been sharing toy hauls and toy unboxing videos with her nearly four million subscribers since she was four years old.[2] Perhaps most notably, eleven-year-old Ryan Kaji, star of the *Ryan's World* YouTube channel, was the highest-paid YouTuber in 2018, 2019, and 2020, earning $22 million, $26 million and $29.5 million each year, respectively.[3] This is not including the additional estimated $200 million he earned from branded toys and merchandise.[4]

Money is not the only thing at stake for child-influencers. In 2019, Machelle Hobson, creator of the *Fantastic Adventures* YouTube channel, was charged with alleged child abuse and kidnapping related to the treatment of her seven adopted children.[5] When the children did not perform to her standards on their family YouTube channel, it was alleged that she would physically assault, starve, and confine the children in closets for days at a time.[6]

Lawmakers have been slow to adapt legislation to accommodate adults earning money from social media, or "influencers". Considering that children are now participating in this lucrative industry, it becomes even more important to have legislated protections for child-influencers. Certainly, children working in entertainment is not new. In fact, a portion of British Columbia's ("B.C.") *Employment Standards Regulation*[7] (the "*Regulation*") outlines specific rules for child actors and performers in recorded and live entertainment. However, it is unclear whether or how these regulations would apply to child-influencers, colloquially known as "kidfluencers".

This paper contends that the application of B.C.'s employment standards legislation to children earning money on social media (child-influencers) is unclear and inadequate to achieve the purposes of that legislation. Part I examines B.C.'s current legislative framework for employing children, including the *Employment Standards Act*[8] (the "*Act*") and the *Regulation*. Part II applies this framework to child-influencers, determining whether this unconventional job fits within the

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1 Wren & Jacquelyn, "SHEIN Summer Try-on Haul with my mini-me…" (24 June 2023), online (video): <tiktok.com/@wren.eleanor/video/7112833815587933482?lang=en>.

2 Everleigh, "HI, I'M EVERLEIGH! MY VERY FIRST TOY UNBOXING!!!" (12 September 2017), online (video): <youtube.com/watch?v=grY5CeTBwE8>.

3 Jay Caspian Kang, "Ryan Kaji, the Boy King of YouTube", The New York Times (5 January 2022), online: <nytimes.com/2022/01/05/magazine/ryan-kaji-youtube.html>.

4 Rupert Neate, "Ryan Kaji, 9, earns $29.5m as this year's highest-paid YouTuber" (18 December 2020), online: <theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber> [perma.cc/ZB57-QZ8B].

5 Katie Mettler, "This 'YouTube Mom' was accused of torturing the show's stars – her own kids. She died before standing trial.", *Washington Post* (13 November 2019), online: <http://www.washingtonpost.com/crime-law/2019/11/13/popular-youtube-mom-who-was-charged-with-child-abuse-has-died > [https://perma.cc/AZY6-8J28].

6 *Ibid*.

7 *Employment Standards Regulation*, BC Reg 396/1995.

8 *Employment Standards Act* RSBC 1996, c 113.

legislation's scope and the recorded entertainment industry regulations. Part III explores possible concerns with regulating child-influencers on social media. Finally, this paper concludes with a recommendation for additional protections and improved regulation on this ballooning area, which is ripe for child-exploitation. I acknowledge there are privacy implications that arise from parents sharing their children's images on social media. However, these concerns are beyond the scope of this paper which focuses on employment standards legislation.

I. BRITISH COLUMBIA'S LEGISLATIVE FRAMEWORK

In B.C., the *Act* governs child employment. Section 9 sets out parameters for hiring children under the age of 16. If a child is under the age of 14, the employer must seek permission from the Director of Employment Standards (the "Director") prior to employment.[9] Although employing children aged 14 or 15 for "light work" requires only written consent from the child's parent or guardian, all other types of work require the Director's consent.[10] Light work is defined by the *Act* as a prescribed work or occupation that is unlikely to be harmful to the health or development of a child.[11] Examples of "light work" include child care, cleaning and tidying, administrative work, and dishwashing.[12] Further conditions may be set for the employment of a child at the Director's discretion.[13] Children under 15 years old working in the recorded and live entertainment industry continue to require written consent from their parent or guardian to work.[14]

Industry-specific rules can be found in the *Regulation*. For example, paragraph 9(2)(a) and subparagraph 9(b)(ii), on the Director's permission requirement, do not apply to children aged 12-16 performing certain kinds of work[15] if the child's immediate family member is a controlling shareholder, sole proprietor or partner of the business or farm that employs the child.[16] Similar exemptions are available for children who are camp assistants, assistant coaches, referees or umpires for other children.[17] However, due to the unique nature of the recorded and live entertainment industries, specific regulations apply to children working in these fields.

The scope of the definition of "recorded entertainment industry" has not been delineated by the Court. The *Regulation* defines "recorded entertainment industry" as "the film,

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9 *Ibid* at s 9(2)(a).
10 *Ibid* at ss 9(2)(b)(i), 9(2)(b)(ii).
11 *Ibid* at s 9(1).
12 *Employment Standards Regulation*, *supra* note 7, s 45.22.
13 *Employment Standards Act*, *supra* note 8, s 9(3).
14 *Employment Standards Regulation*, *supra* note 7, s 45.04.
15 *Ibid* at s 45.21(a). The Director's permission requirement does not apply to children aged 12 to 16 if the employer does not require or allow the child to perform work that is listed in the regulation as work and occupations that are not "light work". For example, working at construction sites, repairing, maintaining or operating machinery, and using, handling, applying or being exposed to a hazardous substance.
16 *Ibid*, s 45.21(b)(i).
17 *Ibid*, s 45.21(b)(ii).

radio, video or television industry"[18] or "the television and radio commercials industry."[19] Children who fall within this definition enjoy additional protections on minimum age, limits on daily hours, split-shifts, time before recording devices, breaks, chaperones, education, and income protection. These apply to actors, background performers, and extras.[20]

Another division of the *Regulation* is for children in the "live entertainment industry," where the scope of each term has also not been delineated by the Court. The *Regulation* defines this as applying to children in the "performing arts industry that provides live entertainment in theatre, dance, music, opera or circus", including both rehearsals and performances.[21] The *Regulation* provides similar rules to those for the recorded entertainment industry pertaining to breaks, chaperones, and hours at work.

In addition to ensuring appropriate working conditions, income protection is an important feature of the regulatory scheme. To protect the child's earnings derived from work in the recorded and live entertainment industries, the *Regulation* mandates that a certain percentage of such earnings over a specified dollar amount must be remitted to the Public Guardian and Trustee ("PGT") to hold in trust. This protects children from potential financial exploitation and ensures that the child's earnings are not entirely spent by their parents or guardians.

For children in the recorded entertainment industry, the employer must remit 25% of any earnings over $2,000 to the PGT.[22] In the live entertainment industry, the employer must remit 25% of a child's earnings over $1,000 to the PGT.[23]

II. DOES THE ACT APPLY TO CHILD-INFLUENCERS?

Whether B.C.'s legislation applies to child-influencers is unclear. Typically, child-influencers are working with, or for, at least one parent with the work taking place both inside and outside of the household. First, there is the problem of whether this type of relationship is captured by the *Act.* Second, the *Regulation*'s entertainment industry definitions are likely too narrow to include child-influencers within their protections, despite doing substantively similar work.

A. Are Children "Employees" / Parents "Employers" under the Act?

The existing case law defining "employee" is typically decided in the context of whether a person is an employee or an independent contractor. However, legal principles from these cases are relevant in determining what the defining characteristics of an "employee" are at law.

There is no universal test to determine whether a person is an employee.[24] The Court in *671122 Ontario Ltd v Sagaz Industries Canada Inc* quotes Lord Denning "that it may be impossible to give a precise definition of the distinction (p. 111), and similarly, Fleming

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18 *Ibid*, s 45.5(1)(a).
19 *Ibid*, s 45.5(1)(b).
20 *Ibid*, s 45.5(2).
21 *Ibid*, ss 45.15(1); 45.15(3).
22 *Ibid*, s 45.14.
23 *Ibid*, s 45.20.
24 *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 [*Sagaz*] at para 46.

observed that 'no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . .'"[25]

Generally, the Court will search for the total relationship between the parties, considering several factors that help distinguish between independent contractors and employees. These include the level of control in the relationship, the provision of equipment, and financial risk.[26]

However, whether a person is an "employee" under the *Act* is a matter of statutory interpretation based on the specific legislative scheme[27] while also considering the definitions and the purpose of the *Act*.[28] Since employment standards legislation is remedial in nature,[29] an interpretation that favours extending its protections to as many employees as possible is to be preferred over one that does not.[30] The purposes of the *Act* are outlined in section 2:

> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.[31]

The *Act* defines "employee" non-exhaustively as including:

> (a) a person, including a deceased person, *receiving or entitled to wages for work performed* for another,
>
> (b) a person an *employer allows, directly or indirectly, to perform work normally performed by an employee*,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall
>
> [emphasis added].[32]

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25 *Ibid* at para 46.
26 *Ibid* at para 47.
27 See *McCormick v Fasken Martineau Dumoulin LLP*, 2014 SCC 39 at para 25.
28 See *Canwood International Inc v Bork*, 2012 BCSC 578 at para 102.
29 See *Machtinger v HOJ Industries Ltd.*, 1992 CanLII 102 (SCC) at para 31.
30 *Ibid* at para 32.
31 *Employment Standards Act*, *supra* note 8, s 2.
32 *Employment Standards Act*, *supra* note 8, s 1.

> The *Act* defines "employer" as including a person "(a) who has or had control or direction of an employee, or (b) who is or was responsible, directly or indirectly, for the employment of an employee."[33]

Applying these definitions to typical child-influencer work, where the child is working with their parent(s), suggests that this could be an employer-employee relationship. For example, Vancouver-based influencer Michele Phillips featured her young daughter in a sponsored post, sharing two photos of her playing with a Crayola product.[34] The first photo showed the daughter colouring using the product, with the product's packaging sitting on the table clearly facing the camera. In the second photo, the daughter was facing the camera and smiling while holding the product in her hand. While the account belongs to the mother, Michele, her daughter was the sole model used for this advertisement. Conceptualizing this work as modelling for a product photoshoot makes it clear that this child is performing work. Michele's daughter presumably has no control over the work product, has no financial risk, and did not provide her own equipment or tools. The child is there to model the product and be photographed. The mother by contrast, presumably accepts and provides work for the child, stages the shoot, directs the child, takes the photograph, and posts it online. While the mother is also doing work, concerning her relationship with the child, she is the one directing her daughter and arranging the work.

The specific details of the contractual arrangement between the parties is a relevant consideration in this analysis. Whether the brand itself contracts with the mother, who then uses her child for the work, or contracts with the child directly through the mother, is a relevant consideration. If the brand contracts with the child, it would likely be subject to the *Infants Act*[35] provisions on contracting with infants.[36]

A similar conclusion can be reached with YouTube video content. As mentioned above, Everleigh Labrant's YouTube channel is stylized as her personal account featuring a variety of lifestyle and toy-related videos. A video titled "Everleigh Spends 24 Hours in Backyard Bounce House!!!" masquerades as a video-blog when it is an advertisement for a friendship bracelet-making kit. In the first two minutes of the video, Everleigh opens the toy's packaging, shows all the components to the camera, and explains that she is using the product to "surprise her friend" who is coming to visit her. While you can hear her father providing commentary and guiding her from behind the camera, Everleigh is the sole subject of the video.[37] This is akin to an actor/director relationship on a film or commercial set.

While it is unlikely that the entire video was formally scripted, this is not organic content and should be considered work. Everleigh is acting in this video. She is sharing specific talking

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33 *Ibid*.

34 See Michele Phillips, "I'm always looking for fun…" (23 March 2023), online: <instagram.com/p/CqJ5OfkrntE/?img_index=1> [perma.cc/JQ54-DCER].

35 *Infants Act*, RSBC 1996, c 223, ss 18–27.

36 *Ibid*, ss 18–27, 40(1.1)(a).

37 See Everleigh, "EVERLEIGH SPENDS 24 HOURS IN BACKYARD BOUNCE HOUSE!!!" (9 July 2021), online: <youtube.com/watch?v=NVkfCq25iY8>.

points about the sponsored product, and she is speaking directly to the camera to the viewers. It is unlikely that this video would exist were it not for commercial purposes.

While influencing is analogous to traditional entertainment industry jobs, the parent-child relationship complicates the analysis. When considering the legislative scheme and the *Regulation*, the language in other provisions indicates the parent is typically contemplated as a separate entity from the employer or employee.

For example, there are rules in the *Regulation* pertaining to the child's chaperone in the recorded and live entertainment industries. A chaperone can be either the child's parent or guardian if they are not working as an actor or performer in the production, performance, or rehearsal[38] or can be a person over the age of 19 designated by the parent or guardian. However, this designated person cannot be the child's employer, tutor, or employee.[39] Another regulation with a similar distinction is the conditions of employment for children which states that "a person must not employ a child…unless the person has obtained the written consent of the child's parent or guardian."[40]

Given these distinctions, the application of these provisions contemplates three distinct parties: (1) the child; (2) the parent or guardian; and (3) the employer. Each party has different, and at times, competing interests. The *Act* requiring parent or guardian consent prior to employing a child suggests that the parent or guardian is there to mediate the employer/employee relationship and advocate for the interests of the child. Furthermore, the fact that the chaperone cannot be the child's employer underscores the competing interests at play and the need for someone to mitigate possible harm to the child.

An interesting issue also arises when considering that some of these accounts are created for monetization even before a child is born. Alessi Luyendyk's Instagram account was created while she was still in the womb.[41] Alessi, who is now four years old, has 302,000 followers and is used for sponsored content and brand partnerships. While policy considerations are likely to militate against finding an employer-employee relationship between a pregnant person and a fetus, this phenomenon provides context as to how a child's social media presence may be exploited.

B. Is this Work in the "Recorded Entertainment Industry"?

If child-influencers are in an employer-employee relationship as contemplated by the *Act*, it is unlikely that they would receive the additional protections for children working in the "recorded entertainment industry," despite doing similar work. The *Regulation* has additional protections for children working in recorded and live entertainment. However, these definitions have a limited scope. Since this is not live entertainment, film,

38 *Employment Standards Regulation*, *supra* note 7, s 45.13(1)(a), 45.19(1)(a).

39 *Employment Standards Regulation*, *supra* note 7, s 45.13(1)(b), 45.19(1)(b).

40 *Ibid*, s 45.04.

41 Samantha Schnurr, "Arie Luyendyk Jr. and Lauren Burnham's Unborn Child Already Has Instagram" (15 November 2018), online: <www.eonline.com/ca/news/987702/arie-luyendyk-jr-and-lauren-burnham-s-unborn-child-already-has-instagram> [perma.cc/RKQ7-TJ9J].

radio or television, the only term child-influencer work could fall into is the "video" industry.[42] However, this term is not further defined in the *Regulation* or the *Act*, and its scope has not been defined in Canadian jurisprudence. In addition, it is unlikely that this covers modelling work. Therefore, while child-influencers may be covered under the *Act* and *Regulation* generally, it is unlikely that they would benefit from the specialized entertainment industry protections, including the income protection provision.

C. Other Canadian Legislation[43]

i. Ontario

Ontario's legislation pertaining to child performers contains much broader definitions than the *Act*. The definition of "recorded entertainment industry" in Ontario's *Protecting Child Performers Act* ("*PCPA*") is broader than B.C.'s. Ontario's *PCPA* exists "to promote the best interests, protection, and well-being of child performers."[44] A child performer is defined as a child under 18 who "performs work or supplies services for monetary compensation in the entertainment industry as a performer, including as a background performer."[45] As in B.C., the broader entertainment industry is broken down into two groups: the recorded entertainment industry and the live entertainment industry.

However, in Ontario, recorded entertainment industry means "the industry of producing visual or audio-visual recorded entertainment that is intended to be replayed in cinemas, on the *Internet*, on the radio, as part of a television broadcast, or on a VCR or DVD player or a similar device, and includes the industry of producing commercials" [emphasis added]. This definition has remained the same since the *PCPA* was enacted in 2015.

The Court has not delineated the scope of this definition. However, including "internet" broadens the definition to encompass content created for sharing on social media. Still, the issue of categorizing the child/employee-parent/employer relationship remains outstanding as it is not addressed in the *PCPA*. In the Hansard debates of Bill 17, which spurred the creation of the *PCPA,* the focus was clearly on actors and more traditional performers such as dancers.[46] There was no mention in the debates of the *PCPA* extending to influencers on social media.

ii. Alberta

Alberta takes a different approach that provides even less clarity than the *Act*. In Alberta, the *Employment Standards Code*[47] outlines the rules for employing children under the age of 18. Per subsection 65(2), no person under the age of 15 may be employed without

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42 *Employment Standards Regulation*, *supra* note 7, s 45.5(1)(a), 45.5(1)(b).

43 Ontario and Alberta were compared as they are the two other common-law provinces outside of B.C. with the largest populations. Ontario and British Columbia also account for most of Canada's entertainment industry and would be most likely to have child performer protections.

44 *Protecting Child Performers* Act, SO 2015, c 2, s 2.

45 *Ibid,* s 1.

46 See "Protecting Child Performers Act, 2014 / Loi de 2014 sur la protection des enfants artistes", 2nd reading, *Legislative Assembly of Ontario*, 41-1, No 22 (30 October 2014), 1610.

47 RSA 2000, c E-9.

written consent from their parent or guardian and approval of the Director, subject to the regulations.[48] Alberta's *Employment Standards Regulation*[49] further states that the Director may only issue a permit to someone under 12 if it is for "employment in an artistic endeavour."[50] The definition of artistic endeavour does not include any mention of the internet or social media.[51] In addition, tying the entertainment industry to "art" further distances the definition from business-driven influencer content. The regulations also limit the hours that a child can work; however, a permit may authorize increased hours.[52] There are no provisions pertaining to chaperones or income protection.

D. Hollywood: California's Legislative Framework

In the United States of America, the broader, more general federal *Fair Labor Standards Act*[53] governs minimum wage, overtime, hours worked, and employer recordkeeping. Child acting was deliberately excluded from the *Fair Labor Standards Act* protections, and the career is subject to state-based laws.[54] Therefore, child-influencer work is likely excluded from the federal act as well.

California has been credited with spearheading child actor protections with the *California Child Actor's Bill*, also known as the Coogan Act.[55] Created after child actor Jackie Coogan's parents spent nearly all of his film earnings without his consent, the Coogan Act is intended to protect child actors and their hard-earned money.[56] Similar to B.C., the Coogan Act mandates that 15% of the child's earnings must be put into a blocked trust account, colloquially referred to as a Coogan account. There are also similar restrictions in the Code as to work hours, education, and working conditions for child actors.

Notably, "entertainment industry" is defined in subchapter 2, Employment Of Minors In The Entertainment Industry, as:

> any organization, or individual, using the services of any minor in: Motion pictures of any type (e.g. film, videotape, etc.), using any format (theatrical film, commercial, documentary, television program, etc.) by any medium (e.g. theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances where minors perform to entertain the public.[57]

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48 *Ibid,* s 65(2).

49 Alta Reg 14/1997.

50 *Ibid,* s 51.3(a).

51 *Ibid,* s 51(b).

52 *Ibid,* ss 52(3)–(5).

53 *Fair Labour Standards Act*, 29 USC § 203 (1938).

54 See Marina A. Masterson, "When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers" (2020) 169: 577 U Pa L Rev at 587; See also Joan Reardon, "New Kidfluencers on the Block: The Need to Update California's Coogan Law to Ensure Adequate Protection for Child Influencers" (2022) Case W Res L Rev 73: 165 at 170.

55 US, SB 1162, *California Child Actor's Bill*, 1999-2000, Reg Sess, Cal, 1939 (enacted).

56 See SAG-AFTRA, "Coogan Law" (n.d.), online: < sagaftra.org/membership-benefits/young-performers/coogan-law> [perma.cc/B7E6-69KR].

57 *Supra* note 53, §11751.

This definition is much broader than that of B.C., Ontario, and Alberta, but still does not expressly include social media. Given its breadth, it is feasible that these "kidfluencers" would be subject to California laws. However, there has been little action by states to protect child-influencers and enforce these provisions outside of the traditional entertainment industry.[58]

E. France: Paving the Way

In 2020/2021, France enacted a new law giving child-influencers the same protections as other children working in the entertainment, advertising, and modeling industries.[59] This law was specifically created to fill the identified gaps above, regulating child-influencers on social media sites such as YouTube, TikTok and Instagram. Where a child is in a "labor relation" – for example, when they receive orders or directions from the video producer, prior government authorization must be sought.[60] France has also chosen to expand these protections to situations where there may not be a specific labour relationship, but the child is still spending a significant amount of time on the content or deriving significant income from it. This broadens the scope of its application. The new law also extends income protection to child-influencers.[61]

As France's legislation is still new, there is no information on the law's success or effectiveness. At the time of this article, France is still the only country that specifically regulates this kind of work. However, regardless of its impact, it has certainly shined a global spotlight on the issue and has likely contributed to the shifting public perceptions of child-influencer work.[62]

Since the law's introduction, France has continued paving the way for legislation respecting children and social media. In 2023, a new bill was introduced which would increase privacy protection and children's image rights for content posted on social media.[63]

III. CONCERNS WITH REGULATING CHILD-INFLUENCERS

A. Regulating Social Media in Canada

It is possible that declining to legislate with respect to social media is a politically motivated choice. There is a gap in both the *Act* and the *Regulation* when considering child-influencers. Attempting to fit the influencer-career into a legislative scheme created for traditional

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58 Masterson, *supra* note 54 at 588.

59 See Amelie Blocman, "[FR] Law to Protect Child YouTubers and Influencers" (2020), online: <merlin.obs.coe.int/article/9026> [perma.cc/T6ND-G9B2].

60 See Nicolas Boring, "France: Parliament Adopts Law to Protect Child "Influencers" on Social Media" (30 Oct 2020), online: <loc.gov/item/global-legal-monitor/2020-10-30/france-parliament-adopts-law-to-protect-child-influencers-on-social-media> [perma.cc/62D4-THU6]; See also *Loi* n° 2020-1266 du 19 *octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne*, JO, 20 October 2020, 1266 at art 7124-1.

61 *Ibid*.

62 See Rachel Caitlin Abrams, "Family Influencing in the Best Interests of the Child" (2023) 2:2 CJIL 110.

63 See Ysé Rieffel, "French MPs examine bill on children's right to privacy on social media" (5 March 2023), online: <lemonde.fr/en/france/article/2023/03/05/french-mp-proposes-bill-to-protect-children-s-privacy-on-social-media_6018268_7.html>.

employer-employee relationships is already difficult, let alone considering the added dimension of a parent-child relationship. Therefore, while it is important to recognize influencing as a career, it could be a political decision to withhold legislating in the realm of social media.

The federal government has already decided to exclude social media in its legislative efforts. In February 2022, the Minister of Canadian Heritage introduced Bill C-11, also known as the *Online Streaming Act*.[64] To provide some context for the Bill and its amendments to the *Broadcasting Act*, the Canadian Radio-television and Telecommunications Commission ("CRTC"), through the *Broadcasting Act* regulations[65] requires a certain percentage of Canadian content to be broadcast each day on each medium.[66] Among other things, Bill C-11 amended the *Broadcasting Act*, broadening its application to "online undertakings." Online undertaking is defined in the Bill as "an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus."[67] Thus, this amendment extended the Canadian content requirements, the *Broadcasting Act,* and the regulations to these online undertakings including streaming services such as Netflix, CraveTV, and Prime Video. On its face, this definition conceivably includes the distribution of content on social media as well.

However, the Bill specifically excluded people using a "social media service to upload programs for transmission over the Internet and reception by other users of the service" from the scope of this definition.[68] This ensures that while streaming services would be captured as broadcasting undertakings, social media users would not be subject to those same rules.

In speaking about the Bill at its second reading, the Minister of Canadian Heritage, the Honourable Pablo Rodriguez clearly states:

> [W]e will not regulate users or online creators through the bill or our policy, nor digital-first creators, nor influencers, nor users [...] Our new approach to social media responds to concerns about freedom of expression [...] This legislation does not touch users, only online streaming platforms. Platforms are in; users are out.[69]

However, there was also a specific carve-out in the Bill, wherein the CRTC can make regulations considering "the extent to which a program, uploaded to an online undertaking that provides a social media service, directly or indirectly generates revenues."[70]

These provisions indicate that Parliament is alive to the reality of revenue generation through social media content. In this case, Parliament specifically chooses to exclude social media content from the expanded amendments due to backlash and freedom of expression concerns.

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64 Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 1st Sess, 44th Parl, 2021, (third reading 21 June 2022).

65 See *Radio Regulations*, SOR/86-982; See also *Television Broadcasting Regulations*, SOR/87-49.

66 *Radio Regulations*, *ibid* at s 2.2; *Television Broadcasting Regulations, ibid* at s 4.

67 Bill C-11, *supra* note 64 at cl 2(2).

68 Bill C-11, *supra* note 64 at cl 2(3).

69 "Online Streaming Act", 2nd reading, *House of Commons Debates*, 44-1, No 32 (16 February 2022) at 1615 (Hon Pablo Rodriguez).

70 Bill C-11, *supra* note 64 at cl 4.

However, the Bill seems to leave the option open to regulate monetized social media content in the future at the CRTC's discretion.

Therefore, it is possible that the B.C. Legislature has made a choice not to regulate social media influencers under the *Act*. However, if this is a specific exclusion, the *Act* should be amended to reflect this exemption. Otherwise, we exist in a gray area of protections for children vulnerable to exploitation.

B. Parental Authority & the United Nations Convention on the Rights of the Child

There are important considerations that factor into the decision of whether to regulate child-influencers on social media. Child-influencing is more complicated than broadcasting. The parent-child relationship adds another dimension to the complexity of regulating this area. However, the risk of child abuse means that the stakes are also much higher.

The United Nations Convention on the Rights of the Child (the "Convention"), to which Canada is a signatory, is an important consideration in this decision. Specifically, article 32 entrenches a child's right to be protected from economic exploitation, hazardous work, work that interferes with their education, and work that could be harmful to their health, physical, mental, spiritual, moral or social development.[71] In implementing this, the state should take legislative, administrative, social, and educational measures to, in particular, provide a minimum age of employment, regulation of hours and conditions of employment, and appropriate penalties and sanctions for effective enforcement.[72]

While there is employment standards legislation throughout Canada, these statutes fall short of protecting working children on social media. Child-influencers are often performing the same substantive work as actors and models but are not receiving the same protections of working conditions, hours, or income protection. Whether the existing *Act* applies to child-influencers is ambiguous and amendments are required to clarify the Legislature's stance on this growing area of work. Canada is compelled by the Convention to fill these gaps.

However, on the other hand, the parent-child dimension to child-influencing further complicates the decision to regulate. This work often takes place in the child's home, managed by the child's parent(s) or guardian(s). Parental authority is a valid consideration weighing on the side of continued deregulation of this area. Article 5 of the Convention states that state parties shall respect the responsibilities, rights, and duties of parents to provide direction and guidance in the exercise by the child of the rights set out in the Convention.[73]

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71 See *United Nations Convention on the Rights of the Child*, UNTS 1577 (entered into force 2 September 1990) at Art 32.

72 *Ibid*.

73 *Ibid* at Art 5.

Furthermore, there may be implications for a parent's section 7 *Canadian Charter of Rights and Freedoms* ("*Charter*") rights.[74] In *B (R) v Children's Aid Society of Metropolitan Toronto*,[75] the Supreme Court held that "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as a medical care, are *part of the liberty interest of a parent*"[76] [emphasis added]. It is presumed at common law that parents act in the best interests of their child, recognizing that parents are in the best position to care for their children and make all necessary decisions to ensure their wellbeing.[77] The Court elaborated on its section 7 analysis, holding that it is also presumed that "parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself."[78] As such, when the state does intervene when parents are not acting in the best interests of their child and where it is necessary, it should also be justified. Whether this would take precedence over a child's exploitation on social media is unclear but is a relevant consideration, nonetheless.

However, University of Saskatchewan law professor Mark Carter argues that special parental *Charter* rights "can only operate to diminish recognition of children as full rights-bearing members" of Canadian society.[79] In his article, he advocates for changes in the way parental rights are conceptualized, with children being recognized as the only rights-holder in the parent-child relationship. In this conception, the parent would act as agents for children in the exercise of their rights, and not as the "exerciser".[80] In this framework, the individual child's rights, and ideally their consent, would likely be a heavily weighted consideration with respect to allowing or prohibiting child-influencer work.

The traditional parent-child relationship as conceived by the court does not account for the parent also acting as the child's employer in this way. Therefore, when parents are making decisions for their children, conflicts arise, particularly in the case of child-influencers who are the sole provider for the family, or whose entire family is in the business of social media influencing. There are also external pressures, such as content deadlines or relationships with brands or advertisers, that the parent/employer must manage.

IV. RECOMMENDATIONS

Acting in a video is work. This is true whether the final product is on social media or projected at a movie theatre. However, the two are not treated the same under B.C.'s *Employment Standards Act*. This difference is concerning when the person doing the work is a child. Working children need legal protection because they are vulnerable to exploitation.

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74 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

75 1995 CanLII 115 (SCC).

76 *Ibid* at 317.

77 *Ibid*.

78 *Ibid*.

79 Mark Carter, ""Debunking" Parents' Rights in the Canadian Constitutional Context" (2008) 86:3 Can Bar Rev 479 at 480.

80 *Ibid* at 481.

This is why there are limits on hours, age, chaperones, and income protection provisions in place for children working in the recorded and live entertainment industry.

The *Act* is not equipped to deal with the reality of child-influencer work. Additional regulations should be created to address this unique parent-child working relationship, given the unconventional nature of the job. These changes should follow the path that France has paved with their new laws.

The *Act* and the *Regulation* should be amended to specifically include child-influencer work. There ought to be a division in the *Regulation* for child-influencers, just as there are divisions for the recorded entertainment industry and the live entertainment industry. First, the *Regulation* should require approval from the Director of Employment Standards prior to children engaging in influencer work. Adopting regulations that mirror the approach taken in France would better protect child-influencers, while allowing for additional protections imposed or removed by the Director on a case-by-case basis. This flexibility reflects the nature of the work, given that a child engaging in the occasional photograph for a brand shoot on their mother's Instagram account is a very different situation from a child on YouTube earning millions of dollars.

Second, the provisions pertaining to working hours, breaks, split shifts, minimum age, and income protection should be extended to child-influencers. Without clear guidelines, children could spend days producing influencer content and not be entitled to any of the earnings. While some of these restrictions may be difficult to enforce because influencer work often takes place in the home, alleged violations could be reported using the *Act's* complaint's investigation process.

V. CONCLUSION

Child-influencer work reveals a gap in B.C.'s *Employment Standards Act* coverage. There needs to be clarity as to whether the *Act* and the *Regulation* apply to these "kidfluencers." Regulating social media is an important choice that the legislature should be transparent about. In situations such as the *Broadcasting Act*, it is understandable why the federal government would choose not to extend those provisions to social media users. However, when it involves children working in potentially exploitative jobs, the stakes of choosing not to regulate are much higher.

In the best-case scenario, parents are in the best position to ensure their child is taken care of when they are performing this flexible and lucrative work on social media. However, in the worst case, children are being coerced into working long, unmonitored hours with no income protection or money being set aside for them whatsoever. There are also significant privacy concerns and safety threats that come with being a public figure. Whether or not the *Act* applies to child-influencers is unclear. However, what is clear is that it is time for the legislature to take a position. Child-influencer work is work.