Altering the broadcasting landscape – Canada's *Broadcasting Act* to be amended

November 3, 2020

Long-anticipated legislation to amend the Canadian *Broadcasting Act* -- Bill C-10[1], referred to as the "Broadcast Modernization Act" -- was tabled by the Minister of Canadian Heritage in Parliament on November 3rd. The text of the Bill is available here. The November 3rd government News Release and Backgrounder summarize government priorities. Of these, Minister Guilbeault has highlighted that:

[w]e are proposing major changes to the Broadcasting Act in order to ensure online broadcasting services that operate in Canada contribute to the creation, production and distribution of Canadian stories.

The existing Act was last extensively amended in 1991, long before radio and television stations were referred to as "traditional" broadcasters, and before the term "new media" itself became an anachronism, becoming, simply, "digital media".

To date, the *Broadcasting Act* and the Canadian Radio-television and Telecommunications Commission's (CRTC) regulatory approach have been grounded in a relatively "closed" and outdated system with:

- A **dated definition of "broadcasting" that does not easily fit digital services**;
- A set of Canadian **cultural, social, and economic policy objectives** that do not fully reflect today's priorities (section 3 of the Act);
- A **system of licensing and exemptions** that sets out the obligations and expectations for undertakings broadcasting in Canada (section 9 of the Act);
- An **indirect system of enforcement** primarily through licensing measures (section 9 of the Act), and (much less frequently) CRTC orders enforced by the Federal Court (section 13 of the Act); and
- **Restrictions on foreign ownership** of, and involvement in, "Canadian" broadcasting services (sections 3(1)(a) of the Act, and the Direction to the CRTC (Ineligibility of non-Canadians)).

The proposed amendments to the *Broadcasting Act* would re-set this framework in ways that will alter the business models, strategies and operations of traditional and online broadcasters, digital platforms, content producers and others who create or present audio-visual (AV) content to Canadians.

The following overview sets out three of the proposed areas of amendment that would impact the Canadian broadcasting system most significantly.

What's New – Compared to the Current Regime

(a) A call to require "digital giants" to contribute to Canadian content

1. Regulation of online AV services

In December 2019, the Prime Minister issued a Mandate Letter to the Minister of Canadian Heritage, Steven Guilbeault calling on Minister Guilbeault to:

[…] introduce legislation by the end of 2020 that will **take appropriate measures to ensure that all content providers, including internet giants, offer meaningful levels of Canadian content in their catalogues, contribute to the creation of Canadian content in both Official Languages, promote this content and make it easily accessible on their platforms**. The legislation should also consider additional cultural and linguistic communities. [emphasis added]

The above is one of a series of statements by the Canadian government, from 2017 to today, that online services would be brought within the regulated system.

(b) Current regime

The *Broadcasting Act* applies broadly to the transmission of AV content, by telecommunication or "similar technical systems". The operative definitions of "broadcasting" and "program" date back to 1991, and by the mid-1990s questions began arising about whether the *Broadcasting Act* applied to what was then referred to as "new media". The CRTC held extensive consultations on "new media" in 1997 and 1998, reviewing both broadcasting and telecommunications issues. Stakeholders who intervened argued for and against the application of the *Broadcasting Act* to Internet services. These included legal arguments that the Act did not apply, and policy arguments that it should not apply. Ultimately, the CRTC made a legal decision that "new media" delivery of AV content **is** "broadcasting" for the purposes of the *Broadcasting Act*. But at the same time, it made a policy decision that the Act **should not** apply to new media delivery of AV content. On that basis, the CRTC issued an order (in its current form, the Digital Media Exemption Order) exempting Internet and online services from broadcast licensing and most regulation.

Companies operating outside Canada were not necessarily excluded. The current *Broadcasting Act* expressly applies to undertakings carried on "in whole or in part" within Canada. This means that the current Act could apply to foreign-based broadcasters if part of their operations were carried on in Canada. If they were online streaming and on-demand services, however, they benefited from the CRTC's exemption order, and were largely (but not totally) unhindered by the Canadian broadcast regulatory regime.

(c) Proposed amendments

Under the Bill C-10 amendments:

- The *Broadcasting Act* would make it clear that online broadcasting is within the scope of the Act. "Online undertakings" would become a distinct class of broadcasting undertaking, alongside traditional broadcasters. This new class would cover undertakings for the transmission or retransmission of programs over the Internet for reception by the public.
- The definition of "broadcasting" itself would be clarified so that the Act would clearly apply to on-demand and both encrypted and unencrypted services.
- The Act would continue to apply to undertakings carried on "in whole or in part within Canada."
- Social media services and users would be excluded from regulation under the Act. Canada's 2012 *Copyright Modernization Act* effectively exempted "user generated content" from the copyright regime (section 29.21 of the *Copyright Act*). It would appear that the intent is to allow the same content to be made available – by both users and the services themselves – without being regulated as broadcasting. However, the term "social media service" is not defined in the Broadcasting Modernization Act and the concept of "user generated content" is not

incorporated.

2. The regulatory toolkit

(a) Licences vs. service agreements vs. registration

In its own report to the government in 2018, the CRTC recommended developing new approaches that "engage new players", including non-Canadian online services, in the Canadian system. It proposed replacing licensing with "comprehensive and binding service agreements" for all broadcasters. These agreements would involve a *quid pro quo*, requiring direct financial contributions to the system and support for Canadian content, in exchange for financial benefits such as access to tax incentives and production funds.

In *Canada's communication future: Time to act ,* the expert panel appointed to review legislative framework governing the entire telecommunications, broadcasting and online new media sectors recommended that a system of registration be implemented for all online AV content providers, in parallel to the existing licensing system. Depending on the type of online AV undertaking carried on, registrants would be required to make financial contributions through programming expenditures or levies, but would also be entitled to participate in initiatives to support the creation, production and discoverability of Canadian content.

(b) Current regime

Depending on the nature of the broadcasting service, under the existing regime, the CRTC's regulatory requirements are attached to prescriptive licences and licence renewals. Obligations have included licence fees; Canadian content exhibition; Canadian programming expenditures (CPE); filing financial and subscriber information with the CRTC; limits on advertising for some services; accessibility requirements (e.g., closed captioning and described video); and compliance with programming standards. Compliance, commitments by broadcasters, and changes to requirements have been examined most closely at the time of licence renewal.

(c) Proposed amendments

Under the Bill C-10 amendments:

- Various provisions of the Act would be updated to ensure "fairness and equity" between broadcasting undertakings providing services "of a similar nature", considering size and other differences. This reflects the Government's stated objective of correcting a perceived "regulatory imbalance" between online and traditional broadcasters.
- The concept of "conditions of licence" which, by definition, only applied to licensees, would be replaced with a power given to the CRTC to issue orders that would impose "conditions of service".
- In particular, the CRTC would have significant new powers to make orders imposing conditions of service in relation to:
- Discoverability of Canadian programs;
- Oversight of agreements for the distribution of programming directly to the public between traditional broadcasting undertakings and telecommunications common carriers;
- Oversight of agreements between distribution undertakings and their subscribers;
- Accessibility of programming;
- Carriage of emergency messages;
- Information gathering in respect of ownership and control, financial, commercial, programming, mandatory

expenditures and audience measurement;

- The CRTC's regulation-making powers would be extended to:
- Online undertakings, including the power to impose fees to recover the costs of the CRTC's activities under the Act;
- Include a power to require the registration of broadcasting undertakings with the CRTC;
- Include the power to require expenditures on Canadian AV content, Canadian talent, and to support the participation of public interest groups in proceedings before the CRTC.
- The CRTC would have the flexibility to apply the principle of proportionality to the manner in which it regulates the broadcasting system and to determine whether its orders and regulations should apply to all or some classes of broadcasting undertakings.
- The federal Cabinet would have the power to make regulations in relation to the implementation, including any exceptions, from the new AMPs regime.
- The CRTC would be enabled to impose conditions of service on persons having "programming control" over a broadcasting undertaking to ensure that the programming is of high standard.
- The CRTC would be enabled to exercise powers to ensure that the Canadian broadcasting system includes new and current events programs produced by Canadians and that reflect Canadian viewpoints, including those of Indigenous persons and Canadians from racialized communities and diverse ethnocultural backgrounds.

3. Funding for Canadian content

(a) A long-standing question: Where does the money come from?

As with all countries seeking to support "home grown" broadcasting content, Canada's funding structure, and funding sources, have evolved over time. In Canada as elsewhere, domestic broadcast services, distributors and producers and have called for other businesses, such as foreign broadcast services and other businesses, to "pay their share". Businesses that are not currently subject to the formal contribution systems have pointed to the valuable support and contributions they already make to the system, such as local production, and investment in the delivery of Canadian content to Canadians.

(b) Current regime

The Canada Media Fund (CMF) is the primary source of funding within the current system. The CMF is funded in part by Canada's broadcast distributors (cable, satellite and IPTV), and by radio and television broadcasting companies, under CRTC regulations and policies. There are no contributions by unlicensed online streaming services, or Internet or wireless service providers.

(c) Proposed amendments

According to the government's estimates , if the CRTC were to require online broadcasters to contribute to Canadian content at a similar rate to traditional broadcasters, the new regime:

could result in online broadcasters being required to invest more than $800 million [almost $600 million USD] in our creators, music and stories by 2023.

Under the Bill C-10 amendments:

- As noted above, the CRTC would have new powers to require broadcasters, distributors and online undertakings,

to make expenditures to:

- develop, finance, produce or promote Canadian content;
- support, promote or train Canadian creators of AV content; and
- support public interest participants in CRTC proceedings.

- The CRTC would be empowered to impose performance objectives on broadcasting undertakings for these expenditures, and require the submission of expenditure information.
- Existing expenditure requirements and performance objectives would be carried over for broadcasters operating under the current regime; however that is likely more to ensure continuity of spending than an indication that current structures and recipients will remain the same. It can be expected that Canadian funds, recipients and programs would all be subject to review in the coming months, as an influx of news "online undertaking" spending enters the system.

4. What's next

Traditional and online broadcasters, distributors, and content producers have a great deal riding on how Canada shapes its regulatory regime, including the extent to which Canada follows or diverges from trends now emerging in other countries, such as the EU's Audiovisual Media Services Directive, and proposed new regimes in Australia and France. The way Canada's broadcasting landscape is altered will depend not only on how the Bill proceeds, but also from government directions to the CRTC and from the regulator's own policy decisions, in the months to come.

For the latest information and developments in regulatory law across Canada, see our **Canada Regulatory Review** blog. For the information and observation on the newest developments in entertainment and media law, see our **Entertainment and Media Law Signal** blog.

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1 Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 2nd Sess, 43rd Parl, 2020.

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