

## C-10 The Legal Issues

### A legal conference on Bill C-10, an Act to Amend Canada's Broadcasting Act

Wednesday, November 3 from 9:00 am to 4:30 pm ET

#### Remarks of Ken Engelhart on Discretion

The main purpose of Bill C-10 is to allow the CRTC to regulate online undertakings. Of course, the CRTC could regulate online undertakings under the current legislation, but they chose not to do so by enacting the Digital Media Exemption Order. I think the CRTC was concerned that if they started regulating Netflix there would be court challenges. Parliament decided to make the matter clear by explicitly introducing online undertakings into the Act.

One of the criticisms of the new Act is that Parliament has left it up to the CRTC to decide which online undertakings to regulate and how to do so. In other words, the critics argue that Parliament has left the CRTC with too much discretion to set Canadian broadcasting policy. However, the same criticism could be levelled against the existing *Broadcasting Act*.

The current *Broadcasting Act* does not tell the CRTC how to regulate broadcasting. It says: "Here is a wish list of often conflicting objectives and the power to issue licenses and pass regulations. Now have at it." Very little of the current broadcasting regulatory system can be found in the Act. That is why the pages of the Broadcasting Distribution Regulations are well thumbed in my copy of the Red Book and the pages of the Act somewhat less so.

The objectives of the current (and proposed) Act do say to the CRTC, we want a lot of Canadian content. But they don't tell the CRTC how to accomplish that. In fact, they don't even tell them how to define Canadian content.

The Commission has exercised its discretion under the current Act by implementing bans, quotas, spending rules and contribution payments that are designed for a closed broadcasting system consisting of linear programming. There are bans: For example, US services that compete with Canadian services cannot be aired in Canada. There are quotas: for example, broadcasters must air a given percentage of Canadian content. There are spending rules: for example, broadcasters must spend 30% of their revenues on Canadian content. There are contribution payments: For example, cable companies must spend 5% of revenues on community channels or local news or payments to Canadian content funds.

This system of bans, quotas, spending rules and contribution payments doesn't work as well in an open system. Because of the Internet, bans don't work so well because it's hard to keep non-Canadian programming out of the country. Saying that 50% of the evening broadcast period must be devoted to the broadcasting of Canadian programming doesn't work so well when PVRs and the Internet let Canadians watch what they want, when they want. Spending rules and contribution payments disadvantage Canadian undertakings when online competitors don't have them.

Bill C-10 is designed to fix some of these problems. Primarily the foreign online services will have to conform to spending rules or contributions that should end or ameliorate the unfair competition faced by Canadian broadcasters or BDUs. In addition, these spending rules and contributions will lead to more Canadian content being created.

Bill C-10 doesn't fix the problem that more foreign programming will keep coming into Canada resulting in less Canadian content being watched. It also doesn't make the quotas for primetime viewing sustainable in an on-demand world.

Parliament certainly thinks that requiring payments from foreign online services, will at least shore up the legacy regulatory system. We don't seem to be asking whether the legacy regulatory system really ever worked that well.

Certainly, Canadians watch a lot of Canadian news, information and sports programming. But I would argue that Canadians would watch Canadian news, information and sports programming with or without CRTC regulations. There is a demand for these services and with or without the regulatory system, that demand will be filled.

But what Canadians mostly watch is dramas and comedies which are referred to as drama in the industry. The online streaming services are of course loaded with drama and comedy programming. The Canadian broadcasting system has not done a good job of creating drama, particularly in English Canada. This has been a big problem for some time, long before Netflix arrived in Canada. It remains a big problem.

According to Numeris, of the top 10 shows watched during the week of October 11 in English Canada, 9 were American dramas and number 10 was the CTV Evening News. Of the next 10, 9 were American dramas and 1 was NHL hockey – the Leafs. Of the next 10, 6 were American dramas, 1 was Saturday Night Live, 2 were CTV evening news, and one was Hockey Night in Canada.

Over the entire 2019-20 broadcast year only 1 Canadian drama cracked the top 20. This is Transplant, a drama about a Syrian refugee to Toronto working as a resident in a Toronto Hospital.

What is the problem? Canada produces great actors, writers, and directors so it's not a lack of talent. There is also no problem with the infrastructure needed to make good tv

shows: camera operators, studios, editing suites etc. In fact, the infrastructure is so good that foreign service productions spend half a billion dollars per year making TV and movies in Canada – more than the amount spent on producing Cancon.

We should consider whether the problem is in fact, the regulatory system itself.

Maybe it's the way we define Canadian content. As Peter said in his paper presented this morning, Richard Stursberg has proposed that we adopt the UK model and define Canadian content as being shows about Canada. Points would be given not for having Canadian writers and directors, but for having identifiably Canadian characters, locations and subject matter. This would certainly enhance national identity and cultural sovereignty, to use the words of s. 3 of the Act. Instead, we make sure that 6 out of 10 of the key personnel such as lead actors, writers and directors are Canadian. The idea here is that if Canadians make the shows, the shows will reflect Canadian values and themes. This definition seemed like a good idea when it was set up, but as noted, it really doesn't seem to result in a lot of popular Canadian drama.

This may be an area where the CRTC has less discretion going forward. As pointed out in Peter's paper, an amendment to Bill C-10 (section 10(1)(b)) requires the CRTC, in defining Canadian content, to consider whether key creative positions are primarily held by Canadians.

Maybe another problem is that the CRTC has used its discretion to require 50% of the evening shows to be Canadian. This means that Canadian broadcasters produce a lot of tv shows that aren't very popular. Maybe the broadcasters should be allowed to spend the same 30% of their revenues on Canadian content but spend it any way they like, produce as many or as few shows as they want and air their shows when they want. Maybe this would lead to more popular Canadian drama shows.

Maybe the small size of the English language Canadian market is too small to produce popular dramas. Maybe we need to aim our programming at international audiences and encourage more Canadian co-productions with other countries. This might involve cooperation between the Commission, the Canada Media Fund and Telefilm.

Maybe we could consider a hybrid model in defining Canadian content. Maybe the rules could either require that the shows are either identifiably Canadian or that they have Canadians in 6 out of the 10 key creative roles.

You may argue that redefining Canadian content to include shows that are identifiably Canadian shows and selling those shows to other countries are inconsistent strategies. But maybe not. That show Transplant, that I mentioned before about a Syrian refugee working as a doctor in Toronto hospital, has been sold to NBC in the US and to the UK, New Zealand and Brazil.

Under both the existing Act and Bill C-10, the CRTC has a lot of discretion in how it promotes Canadian content. The way that the CRTC has exercised that discretion in

the past has not created much in the way of popular Canadian drama and continuing to do the same thing will not lead to a different result. The Commission needs to be more creative in exercising their discretion so that more popular Canadian dramas are produced.