Notes for speech to PIAC conference:

C-10 The Legal Issues, Nov 3, 2021

Thank you, John, for that introduction

This conference is devoted to C 10. An act to amend the broadcasting act.

As we all know we are living in the middle of a digital revolution. The internet has become the great disruptor of every facet of our life including our communication world.

Our gov't unfortunately never realized the full challenge of the internet. It never called a royal commission on the internet to deal with all aspects of the challenge, in short to deal with it holistically. Instead after several consultations it produced the digital charter. It lists several tasks the government will undertake.

As part of this task list the gov't produced two substantive bills C 10, an act to amend the BA and C 11 an act to reform our privacy regime. C 11 seems to never have gone past first reading. C 10 on the other hand had a very controversial passage through the House but it never made it through the Senate.

But now that the gov't has been re-elected, and given the ardent support of the Bloc Quebecois we can expect it to be reintroduced gain shortly.

We do not know what changes the Senate will make, so my remarks are based on the bill as it passed the House

The BA was enacted in 1991 and has not had any substantial amendment since then. It was based on the principle of scarcity. As spectrum for broadcasting was limited access to it was only granted to broadcasters who are licensed and produce product that reflects Canada, its views and values. Through a requirement for Canadian ownership and control of stations and through a host of regulatory devices this system was very successful and produced one of the most diverse broadcasting offering in the world.

And although it contained a large amount of US content, (no surprise there as we live next door to the greatest entertainment producer in the world) it does reflect Canada. The act was broadly enough crafted so that it encompassed cable distribution and even satellite distribution when it they came along.

However, the internet allowed the creation of companies that deliver of broadcast content at any time, in unlimited quantities, anywhere by a host of mediums. We commonly refer to them as streamers. Most prominent among them are Netflix and Prime. s

The rationale for C-10 was loudly proclaimed as integrating the streamers into the Cdn broadcasting system. They are here, they dominate the landscape but they are not licensed, do not contribute in any way to the creation of Cdn content but earn millions by distributing their content in Canada. So, they should come under the umbrella of the broadcasting act and contribute their fair share.

How does the bill integrate streamers?

The bill expanded the definition of 'broadcast undertaking' to include any 'online undertaking'.

Online Undertaking is defined as

> ***..*** *an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus*;

and Program is defined as

> *.. sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text*

Since online broadcasters are not licensed, they only come under the CRTC's purview if they are registered with the CRTC. Hence s. 10(1)(I) provides that:

> *The Commission may, in furtherance of its objectives make regulations…*
>
> *I) respecting the registration of broadcasting undertakings with the Commission*

Under s. 9 of the present act the CRTC is given extensive powers to regulate **licensed broadcasters**. The bill under in a new section 9.1 gives the CRTC authority to **regulate broadcast undertakings** (i.e., registered but not licensed broadcast undertakings; in other words, streamers). In can make:

> *...orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy…*

The types of conditions that may be imposed essentially mirror the conditions being imposed on licensed broadcasters under section 9.

Finally, there is a broad exemption power in s. 9(4) that provides

> *The Commission shall, by order, on the terms and conditions that it considers appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order* ***from any or all of the requirements of this Part, of an order made under section 9.1 or of a regulation made under this Part*** *if the Commission is satisfied that compliance with those requirements* ***will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).***

In short, the CRTC was given full discretion

a) to determine which on line undertaking has to register,
b) what condition to impose on registered online undertakings, and
c) who is exempt from its conditions, to what extent and subject to other conditions?

There are two limitations on this enormous scope, added by the parliamentary committee.

A late amendment added in committee as s. 2.2 provides:

> *2.2 A person does not carry on a broadcasting undertaking for the purposes of this Act whose transmission of programs over the Internet is*
> *(a) ancillary to a business* ***not primarily engaged in the transmission of programs to the public*** *and is intended to provide information or services to clients;*
> *(b) part of the operations of a primary or secondary school board, college, university or other institution of higher learning, a public library or a museum; or*
> *(c) part of the operations of a theatre, concert hall or 15 other venues for the presentation of live performing arts.*

Why this is in section s. 2 [**the definition section**] rather than in section s. 4 [**the application section**] is not clear, but undoubtedly some future court will read a significance into this.

Similarly, rather than reinstating the original social media exemption found in s. 4.1(1) of the original bill, to address the concerns regarding user generated content and freedom of speech the parliamentary committee also added the following provision regarding the non-applicability of orders under 9.1

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> *9.1(3.1) Orders made under this section, other than orders made under paragraph (1)(e.2)*[contributions], *(i.1)*[discoverability] *or (j)*[financial information], ***do not apply*** *in respect of programs that are uploaded to an online undertaking that provides a social media service by a user of the service — if that user is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them — for transmission over the Internet and reception by other users of the service.*
>
> *Interpretation (3.2)*
> *For greater certainty, paragraph (1) (i.1) [* discoverability of Canadian creators of programs] *shall be construed and applied in a manner that is consistent with the freedom of expression enjoyed by users of social media services provided by online undertakings.*

The approach of Bill C -10 is still archaic and fundamentally wrong. It tries to fit the streamers [one of the many use's internets] into the restraints of the Broadcasting Act.

The internet is the great enabling and disrupting technology of our time. It is an incredible source of innovation.

It seems perverse to try to fit the internet into a system such as the present broadcasting act that tries to regulate activity to produce a wanted outcome. After all the internet, the well spring of innovation produces new disruptive outcomes that no one can foresee.

However, assuming the government will stay on its present misguided approach to the internet and manages to enact C-10 in its present form; the CRTC could implement this bill with minimum damage to the internet and without inviting retaliation from the US.

How would this be done?

Exercising the tremendous discretion given to it under C-10 the CRTC should:

1) Require registration only of those online undertakings

a. that charge a subscription fee, or
b. offer their programs for free but with embedded advertising and
c. compete directly with conventional licensed Canadian broadcasters and distribution undertakings

2) Exempt any online undertaking that has an annual Canadian revenue of less than $100 million from the registration requirement and from any conditions made pursuant to s.9.1 so as to not unduly stifle innovation.

Any limit would be arbitrary but consistent with the theme of directly competing with the internet, $100M would seem appropriate)

2) For greater certainty specifically exempt any user generated content used by an online undertaking from the discoverability obligations imposed on such online undertakings.
3) Exempt from any obligations regarding discoverability or offering of Canadian programming, an online undertaking offered exclusively in a language other than English or French as well as any online undertaking devoted by its mandate exclusively to content from one country, e.g., Brit box,

4) Only impose only obligations or conditions on online undertakings pertinent relevant in the context of competition with licensed Canadian broadcasters. These would be

(a) the proportion of programs to be offered that must be Canadian programs;

(b) the discoverability of Canadian programs;

(e) the carrying of programming services specified by the Commission; principally 9(1)(h) programs such as APTN or the Weather Network

(f) access by persons with disabilities to programming, including the identification, prevention and removal of barriers to such access;

(h) the carriage of emergency messages;

(i) the provision to the Commission of ownership and affiliation information; and

(j) the provision to the Commission financial or commercial information regarding their Canadian activities

Other powers under s. 9.1 should not be used, they are not relevant to competition with licensed broadcasters and impose unnecessary burdens.

6) Make regulations regarding the fees to be paid by on line undertakings calculated on the same basis as presently those imposed on licensed broadcasters but discount them to the extent licensed broadcasters enjoy benefits not available to registered online broadcasters.

7) Make regulations (broadly equivalent to those imposed on licensed broadcasters) regarding expenditures to be made by online undertakings for developing, financing, producing or promoting Canadian audio or audio-visual programs

8) Revoke the hybrid video on demand exemption order under which Canadian streamers Illico and Crave TV presently operate. Having one rule for domestic streamers and another for foreign ones would violate CUSMA and would invite unilateral retaliation by the US.

9) Establish new rules for subsidizing Canadian content. The current subsidy rules, principally CAVCO, Telefilm and CMF, have been heavily criticized as being de facto employment rules for Cdn talent instead of encouraging the production of content reflecting Canada.

More importantly they require the producer has to be Canadian owned and controlled and a Canadian must be the owner of the IP rights. Streamers (other than Illico and Crave TV) are not Canadian owned and certainly will want to own the IP rights for productions meeting the Canadian Content Rules.

Consequently, there is a need to establish new rules as to what qualifies as Canadian content for online broadcasting undertakings.

The CRTC should take advantage of the authority granted in s 11.1 which provides:

11.1 (1) *The Commission* ***may make regulations respecting expenditures*** *to be made by persons carrying on broadcasting undertakings for the purposes of*

> ***(a) developing, financing, producing or promoting*** *Canadian audio or audio-visual programs for broadcasting-by-broadcasting undertakings;*
>
> ***(b) supporting, promoting or training*** *Canadian creators of audio or audio-visual programs for broadcasting-by-broadcasting undertakings; or*
>
> ***(c) supporting participation*** *by persons, groups of persons or organizations representing the public interest in proceedings before the Commission under this Act.*

(2) *The Commission* ***may make an order respecting expenditure*** *to be made by a particular person carrying on a broadcasting undertaking for any of the purposes set out in paragraphs (1)(a) to (c).*

(3) *A regulation made under this section may be made applicable to all persons carrying on broadcasting undertakings or to all persons carrying on broadcasting undertakings of any class established by the Commission in the regulation.*

(4) *Regulations and orders made under this section may provide that* ***an expenditure is to be paid*** *to any person or organization, other than the Commission,* ***or into any fund****, other than a fund administered by the Commission.*

Thus, the CRTC should write new rules, by either

a) restating existing rules such as the CMF rules but eliminating the requirements for Canadian ownership and Canadian owned IP right, or
b) establishing entirely new rules, focusing on the true reflection of Canada in the films, rather than the employment of Canadian

talent, using as a model the British Film Institute system. Such rules could include a point system where a product qualifies as British if it garners 18 of 35 points, the points being accumulated under four rubrics: cultural content, cultural contribution, cultural hubs and cultural practitioners. Of course, there would no requirement for Canadian ownership of the producer, the product or the IP rights.

10) Establish a new fund or order the CMF to establish a segregated sub fund into which streamer contributions would be paid and which would be accessible to streamers wanting to produce qualifying content.

The present subsidy regime is not accessible foreign owned streamers. If obligations are imposed on foreign streamers, particularly regarding Canadian content production, but they have no access to subsidy funding this would be considered inconsistent with the provisions of CUSMA.
While such actions are possible under the cultural exception, that provision also allows the US or Mexico unilaterally to retaliate with 'measures of equivalent commercial effect'.
Peter Grant from whom you will hear later feels the present regime would be protected by the subsidy provision in Article 15.2 paragraph 3 (d) of the services Chapter of CUSMA. With respect I do not agree. A regulatory requirement to pay into a pot into which only domestic producers can access in my view do not qualify as subsidy.
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In summary by exercising its broad rights under C-10 boldly and in an innovative way the CRTC by taking the 9 steps outlined above could deal effectively with the major objections against the bill; e.g., stifling innovation, limiting free speech, discriminating against US streamers while generating significant funds for CDN productions.

Let me repeat, I do not like this approach at all. I just outline it to indicate all is not lost if C-10 in its present form is sensibly implemented. Whether it has the resources, talent and courage to do so remains to be seen.

I would much prefer to see such steps as I have described in the legislation rather than leaving it to the discretion of the CRTC. It has a habit of being overly cautious, regulating by exemption and paying too much heed to domestic producers. The present of regulatory capture is ever present.

Hopefully the new Minister would reflect on the key purposes of c -10 i.e., to integrate streamers and introduce a redrafted bill reflecting the above observations thereby limiting the collateral damage an implementation of c 10 could cause.

Thank you

P.S. All underlying and bold facing of citations are mine.

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