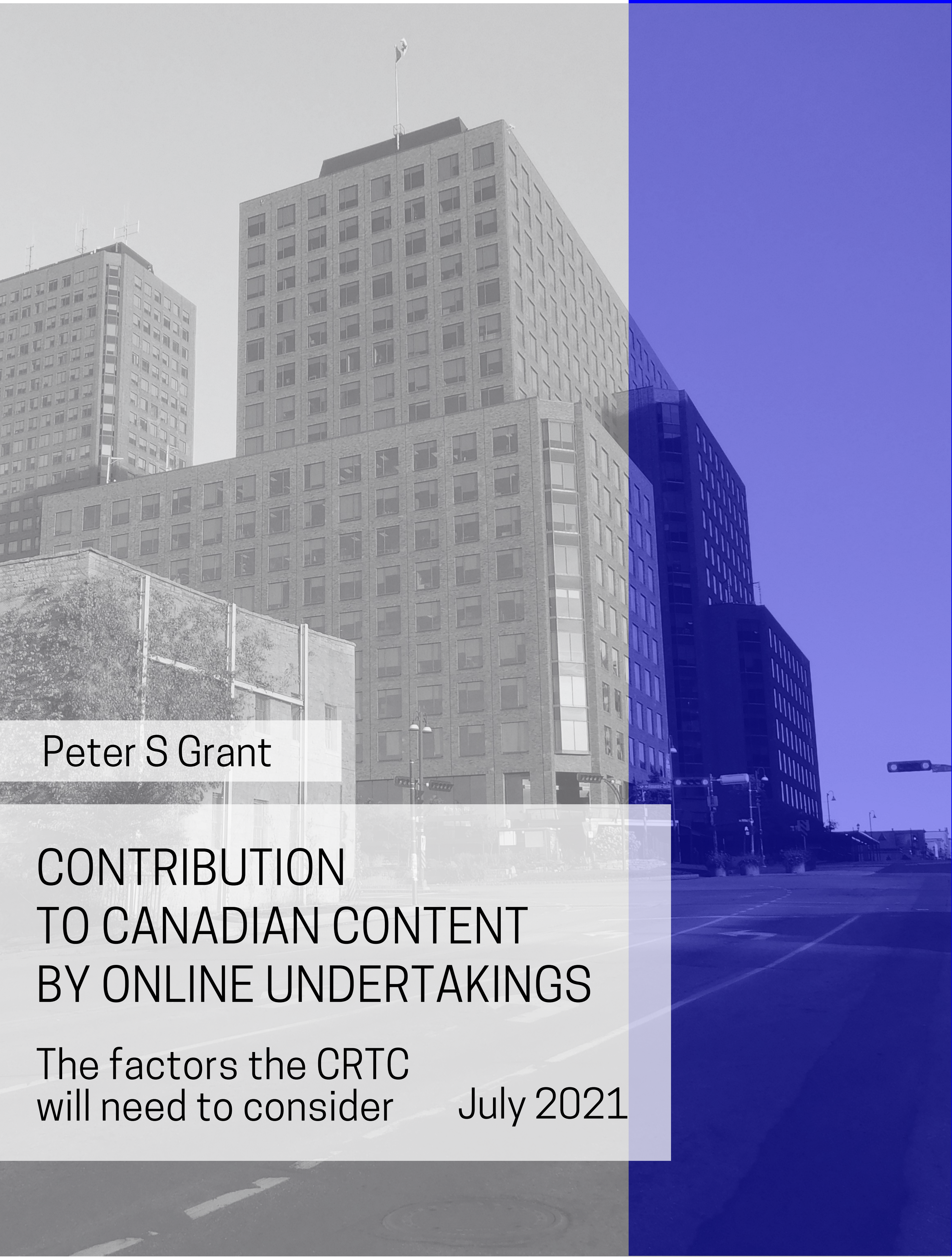

Peter S Grant

CONTRIBUTION TO CANADIAN CONTENT BY ONLINE UNDERTAKINGS

The factors the CRTC will need to consider

July 2021

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Introduction

By June 23, 2021, when the House of Commons adjourned for the summer, it had given third reading to Bill C-10, which would have significantly amended the Broadcasting Act. However, the Bill was stalled in the Senate and with a federal election expected in the fall, the enactment of the legislation became quite unlikely.

Bill C-10 had emerged from the recommendations of the Broadcasting and Telecommunications Legislative Review Panel ("BTLRP"), which issued its Final Report in January 2020 [1]. In that report, the expert panel recommended that "all media content undertakings that benefit from the Canadian media communications sector contribute to it in an equitable manner. Undertakings that carry out like activities should have like obligations, regardless of where they are located." (Recommendation 60.)

If the Broadcasting Act is amended as proposed in Bill C-10, the determination as to who should contribute to the objects of the Act, and how much they should contribute, would be left up to the Canadian Radio-television and Telecommunications Commission (CRTC), which would determine the matter after public hearings. In particular, the CRTC would be expected to set the Canadian content requirements for "online undertakings". These include Netflix, Amazon Prime, Paramount Plus (formerly CBS All Access), Disney+, Crave, CBC/RC GEM, and any other internet streaming services that may enter the field in Canada.

Although Bill C-10 appears to be doomed, it is quite likely that the bill – or an amended version of it - will be reintroduced in the fall of 2021 after the federal election if the Liberals are returned to power. If so, and if it is approved in both the House and the Senate, it would likely come into force in 2022.

In this paper, I examine the factors the CRTC would need to consider in setting the Canadian content requirements for online undertakings under the new legislation if it is enacted.

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[1] Canada's Communications Future: Time to Act, Final Report of the Broadcasting and Telecommunications Legislative Review Panel, January 29, 2020 ("BTLRP Report"). The author of this paper was a member of the Panel.

In addressing these matters, I have based my comments on the text of Bill C-10, including all the amendments made up to the time the Bill was given third reading by the House of Commons on June 21, 2021 [2]. On March 11, 2021, The Government also provided a draft of the policy advice it intended to give the CRTC in regard to this matter, and I have also taken this into account.

If the legislation does come into force, the CRTC will be guided by its past experience. Many of the factors it will need to consider have been encountered before.Other factors will be novel and will require detailed examination by the Commission.

In the analysis that follows, I will focus on the imposition of Canadian content requirements on online undertakings. In this area, the CRTC has no direct experience since it decided to exempt internet programming services from regulation back in 1999. However, it has a long history in imposing Canadian content requirements on conventional Canadian television broadcasters which can provide lessons on what pitfalls to avoid.

Which Online Undertakings Should Be Regulated?

Bill C-10 specifically included "online undertakings" as a new category of broadcasting undertaking under the Broadcasting Act.That term was defined to mean "an undertaking for the transmission or retransmission of programs over the internet for reception by the public by means of broadcasting receiving apparatus." Given this definition, it is clear that the revised Act would catch streaming programming services like Netflix, Disney+, Amazon Prime, Paramount Plus, CraveTV and CBC Gem. It would also catch Spotify.

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[2] For the text of Bill C-10 as passed by the House of Commons on June 21, 2021, go to: https://parl.ca/DocumentViewer/en/43-2/bill/C-10/third-reading

In the bill as originally tabled, section 4.1 of the amended Broadcasting Act would have excluded users of social media services or social media services themselves in respect to the content posted by their users. However, the government reconsidered the matter and during the hearings of the Standing Committee on Canadian Heritage, this provision was removed from the bill and replaced with section 2(2.1) which excludes "a person who uses a social media service to upload programs for transmission over the Internet and reception by other users of the service — and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them." Thus the providers of the social media service – like Facebook, Twitter, YouTube or Instagram -- would be covered by the Act, but not the persons who upload content.

Subsection 9(4) of the revised Act also gives the CRTC a wide power to exempt broadcasting undertakings of any class from the requirements of the Act "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 deciding who to regulate and who to exempt, the CRTC will be subject to policy directions from the government. A draft policy direction on this issue was circulated by the government on March 11, 2021.On the question of which online undertakings to regulate, the draft read as follows:

> The CRTC is directed to impose regulatory requirements on such classes of online undertakings as it may define, only if the CRTC is satisfied that meeting any such requirements would contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the Act. In this regard, the CRTC is directed not to impose regulatory requirements in respect of:
>
> a) broadcasting services that do not have a material effect on Canada's economy, national identity, or cultural fabric; and
>
> b) video games.

In the Final Report of the BTLRP, it was recommended that CRTC jurisdiction not apply to "undertakings that disseminate media content, not for the sake of that media content, but ancillary to a different primary purpose… Examples of excluded content include travel sites, real estate sales sites, hospital health provision sites, and the myriad of e-commerce sites that send media content to the public via telecommunications as part of a different business." [3]

Apart from these obvious exclusions, the Commission could also exempt online undertakings that fail to reach a certain level of advertising and/or subscription revenue in Canada. In the BTLRP Report, for example, the Panel recommended that as an urgent matter, the government should direct the CRTC to regulate online programming undertakings, but only those that had more than $10 million in Canadian revenue during the previous year [4].By applying a minimum revenue threshold of this kind, the Commission can focus on only the online undertakings that have a "material effect on Canada's economy".

Expenditure Requirements

For many years, Canadian broadcasters have been subject to scheduling rules for Canadian programming. However, in a streaming on demand environment, scheduling rules to support Canadian programming become irrelevant, since the ultimate user chooses each program and the time of transmission. Instead, it is recognized that the objectives of the Act would best be served through expenditure rules [5]. The CRTC already has a framework for expenditure requirements that will likely be a model for its approach towards online undertakings. Those requirements have been applicable since 2011 to the four major private television ownership groups in Canada: Bell Media, Corus Group, Rogers Media and TVA Group [6].

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[3] Canada's Communications Future: Time to Act, at pp.131-132.
[4] Canada's Communications Future: Time to Act, at p.173.
[5] For a CRTC discussion of this issue, see Let's Talk TV, The way forward - Creating compelling and diverse Canadian
programming, Broadcasting Regulatory Policy CRTC 2015-86, March 12, 2015, at paragraphs 213-225.
[6] See Broadcasting Decision CRTC 2017-147 (TVA), Broadcasting Decision CRTC 2017-149 (Bell Media), Broadcasting Decision CRTC 2017-150 (Corus Group) and Broadcasting Decision CRTC 2017-151 (Rogers Media), May 15, 2017.

The expenditure requirements were imposed by conditions of licence at the time of licence renewal. The key requirement is that each group must spend at least 30% of its aggregate revenue in the previous year on Canadian content programming.The revenue includes both advertising and subscription revenue and applies to all the television programming services owned or controlled by the company, other than their news or sports services. Once that number is determined, the company must expend at least 30% of that amount on Canadian content programming in the following year [7].

There is also a second expenditure requirement relating to "programs of national interest" (PNI). These are defined to mean Canadian content programs from program categories 7 (Drama and comedy, 2(b) (Long-form documentary), and specific award shows that celebrate Canadian creative talent. In singling out PNI programs for attention, the CRTC stated that "drama is thus the genre of programming that Canadians choose to watch more than all others.Drama programs and documentary programs are expensive and difficult to produce, yet are central vehicles for communicating Canadian stories and values" [8].

The PNI requirements differ for each ownership group, reflecting the differing nature of the programming services under their umbrella. As a proportion of the aggregate revenue in the previous year, the current PNI requirement for Bell Media is 7.5%, for Corus Group is 8.5%, for Rogers Media is 5% and for TVA Group is 15% [9]. The conditions of licence for each group also require that at least 75% of the PNI spending go to independent producers.

Given this framework, what level of Canadian content expenditures would be appropriate to impose on online undertakings like Netflix? The most obvious level to apply would be the 30% level. In other words, Netflix would be subject to a condition that it measure its subscription revenue in Canada each year and then expend at least 30% of that amount on Canadian content programming in the following year.

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[7] The conditions of licence also provide that the company can underspend by up to 5% in any year provided it makes up the shortfall the following year. Overspending in any year can be deducted from the following year's requirement.
[8] Broadcasting Regulatory Policy CRTC 2010-167, at paragraph 71.
[9] Broadcasting Decision CRTC 2018-335, August 30, 2018.

However, this is a subject of debate. In an appearance before the Standing Committee on Canadian Heritage on February 26, 2021, Netflix argued that a 30% level would be too high. Since its schedule is almost entirely made up of drama or comedy programs that would qualify as PNI if made by Canadians, it has argued that a ratio of 5.0% to 7.5%, i.e. closer to the PNI ratios applied to the Canadian broadcasters, would be more appropriate to use.

It is certainly true that the program mix on Netflix, Disney+ or Amazon Prime is quite different from that of the Canadian broadcast groups, who include news, sports and magazine shows in their schedule, as well as drama and documentaries. However, that does not mean that the PNI ratios should apply to the foreign streamers like Netflix. Those PNI levels are lower than 30% simply because the Canadian broadcasters spend the rest of the 30% on other types of Canadian content, particularly news and sports.

If one wanted to look at Canadian television broadcasters that don't carry news or sports programming, one might focus on smaller companies. For example, Blue Ant Media operates eight subscription programming services that only carry drama, documentaries, and magazine shows. It is currently subject to a condition that at least 21% of its previous year's revenue be spent on Canadian content [10]. Another example is WildBrain Television which operates three subscription services, including Family Channel. It is subject to a condition that at least 22% of its previous year's revenue be spent on Canadian content [11].

However, to come up with a Canadian proxy that more clearly resembles Netflix, Amazon Prime or Disney+, a better approach might be to imagine a Canadian broadcaster that carries nothing but drama, comedy and long-form docs. In that regard, it would also be appropriate to focus only on Canadian subscription services, not free-to-air services, since the internet services are subscription services. To develop an appropriate Canadian proxy for Netflix, Amazon Prime or Disney+, therefore, one could focus on the drama, comedy and long-form doc spending by 130 Canadian English-language discretionary TV services available only by subscription. These numbers are all available from the CRTC.

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[10] Appendix 2 to Broadcasting Decision CRTC 2018-291, August 21, 2018.
[11] Broadcasting Decision CRTC 2018-228, July 5, 2018

Looking at the 2019 numbers, those 130 Canadian services spent $564.2M on drama, comedy, and long-form docs, of which $225.4M (or 39.9%) was on Canadian PNI programming in those categories. The total revenue of the 130 services in 2019 was $4,233.1M, and their total program expenses were $3,079.6M or 72.8% of revenue.

Accordingly, to derive an appropriate Canadian content spending requirement for Netflix, Amazon Prime or Disney+ based on an equivalent Canadian proxy, one would take 39.9% of 72.8%. That generates a Canadian content spending requirement for the foreign streaming services of 29.0% of revenue. That would be a more defensible number.

What should the expenditure rules look like for online music services? In that case, a similar comparative analysis would need to be done.For example, an internet music service like Spotify might be compared to a Canadian pay audio music service like Stingray or to a satellite subscription radio service like SiriusXM Canada. Stingray's pay audio service is subject to the following condition of licence: "The licensee shall contribute each year at least 4% of the gross annual revenues earned by its pay audio service to eligible third parties associated with Canadian content development." [12] SiriusXM Canada has a similar licence condition: "During each broadcast year, the licensee shall contribute at least 4% of gross revenues from its satellite subscription radio undertakings reported in its annual returns for the previous broadcast year to eligible initiatives for the development of Canadian content development (CCD)." [13] Accordingly, Spotify could be required to spend 4% of its annual Canadian revenue on CCD initiatives.

Finally, what should the expenditure rules look like for social media sites, like Facebook, Twitter, YouTube or Instagram? The content on these sites is largely provided by users, and the sites are typically supported by advertising. The operators of these sites do not have control over the selection of the programming for transmission, although they may control its retransmission.

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[12] Broadcasting Decision CRTC 2020-313, August 27, 2020.
[13] Broadcasting Decision CRTC 2019-431, December 19, 2019.

Given these circumstances, one might compare the operator of a social media site to a cable operator that does not originate programming but carries programming provided by others. Since 1997, cable operators in Canada have been subject to a flat 5% levy to support Canadian content programming, most of which has been earmarked for the Canada Media Fund [14]. So a similar 5% levy might be appropriate to apply for the Canadian revenue of social media sites, to be paid to an appropriate fund.

How much would all these expenditure requirements imposed on online undertakings support Canadian programming? In its summary of Bill C-10, the Department of Canadian Heritage stated that "if the CRTC requires online broadcasters to contribute to Canadian content at a similar rate to traditional broadcasters, online broadcasters' contributions to Canadian music and stories could amount to as much as $830 million by 2023."

Supporting Indigenous and Official Language Minority Communities

Under Bill C-10, section 3(1)(d), it is stated that "the Canadian broadcasting system should…

> (iii.1) provide opportunities to Indigenous persons to produce programming in Indigenous languages, English or French, or in any combination of them, and to carry on broadcasting undertakings,
>
> (iii.2) support the production and broadcasting of original programs in French,
>
> (iii.3) enhance the vitality of official language minority communities and support and assist their development by taking into account their particular needs and interests — in particular that French is a minority language in Canada and that English is a minority language in Quebec — including through supporting the production and broadcasting of original programs by and for those communities."

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[14] See Public Notice CRTC 1997-25, March 11, 1997.When the CRTC licensed satellite DTH systems on December 20, 1995, the Commission also imposed a 5% levy to support Canadian programming.For the current levy requirement on cable BDUs, see s.34 of the Broadcasting Distribution Regulations.

In its draft policy direction, circulated by the government on March 11, 2021, the government addressed the need to support diversity. It proposed to direct the CRTC to make certain that its methodology "ensures that an appropriate portion be directed to the creation of French-language programming, … recognizes the systemic obstacles faced by Indigenous creators, … and reflects the importance of supporting racialized and ethno-cultural communities".

In the current 30% expenditure rules that apply to Bell, Corus, Rogers and TVA, the CRTC has already addressed certain of these issues. In particular, the conditions of licence provide that the broadcaster can get a 50% credit against its Canadian programming expenditure requirements for expenditures made on Canadian programming produced by an Indigenous producer; and a 25% credit against its Canadian programming expenditure requirements for expenditures made on Canadian programming produced by an official language minority community (OLMC) producer.

Given this precedent, the CRTC may wish to apply this approach to the streaming services. However, in a submission dated April 14, 2021, the Coalition for the Diversity of Cultural Expressions expressed caution:

> These measures have not had the desired effect for Francophone minority communities, as the Alliance des producteurs francophones du Canada (APFC) has said. For example, in its Decision CRTC 2017-1431, the Commission acknowledges that its expectation regarding the use of OLMC production has remained largely unfulfilled, but nonetheless it chose to renew this expectation by granting designated groups Canadian program expenditure credits of 50% for Indigenous productions and 25% for OLMC productions, up to a combined maximum of 10%. In 2018-2019, only two projects by producers from French-language minority communities were accepted by the four private French-language groups (Bell Media, Québecor Media, V Media and Corus). Moreover, this type of incentive results in a decrease in the amount of money invested in Canadian content, since a dollar actually spent counts as a dollar and a half. Creators and producers lose out with this type of measure.

Given this concern, the indigenous and OLMC creative community will want the Commission to focus on requirements for the streamers rather than incentives.

Avoiding Gaming of the System

In determining how the expenditure requirement would work, the CRTC will need to avoid any potential for “gaming the system.” Over the years, the Commission has been confronted with a number of accounting issues that have undermined its expenditure requirements and it has largely addressed them. For example, at one time broadcasters were able to claim Canada Media Fund financial support as if it were their own, until the CRTC eliminated that in 2010 [15]. The Commission has also made it clear that loans to producers that may be repaid should not count as expenditures [16].

One can also expect that the expenditures will count only for the years in which they were made. If a streaming service promises funding only when the project is completed and expects the producer to finance it with bank loans in the meantime, the expenditure should only count in the year in which the money was actually paid by the streaming service to the producer.

Where broadcasters had multiple programming services with differing expenditure rules, they would attribute most of the Canadian program costs to the service with the highest expenditure requirement even though the program was bought for multiple services. In 2010, the CRTC eliminated that misallocation problem by imposing the expenditure requirement on the entire group of services, other than all-news or all-sports [17]. It then became irrelevant as to how the cost of the program was allocated between these services.

In the case of online undertakings, a difficult accounting issue arises when a foreign-owned streaming service purchases the rights to stream the program in other territories besides Canada. In that case, if the CRTC expenditure requirement only applied to the purchase of Canadian rights, the service would have every incentive to allocate most of the purchase price to Canada. Nor could this be effectively audited, since this kind of allocation is a judgement call and there would be every incentive for the online undertaking to ascribe most of its payment for the Canadian rights.

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[15] Broadcasting Regulatory Policy CRTC 2010-167, March 22, 2010, at paragraph 59.
[16] Broadcasting Decision CRTC 2020-205 and Broadcasting Order CRTC 2020-206, June 29, 2020.
[17] Broadcasting Regulatory Policy CRTC 2010-167, March 22, 2010, at paragraph 41ff.

In looking at this question, it may also be argued that foreign services should be encouraged to buy rights to air Canadian programs in foreign territories. That helps to finance the program and enhances the reputation of Canadian creators abroad.

Because of these two issues – preventing gaming of the system and supporting the export of Canadian programs – there would be good reasons for the CRTC to give credit for Canadian content program expenditures made by an online undertaking whether or not the rights relate to streaming in Canada. In other words, if an online undertaking pays for the right to stream a Canadian program in other territories besides Canada, it should be able to claim the full payment it makes to the Canadian producer against its Canadian content expenditure obligation. Unlike the allocation of price between territories, the total purchase price actually paid to the independent producer for the rights is readily auditable. So this arguably should be the basis for the Canadian program expenditure requirement imposed by the CRTC.

This approach was also proposed in the Final Report of the BTLRP which stated: [18]

> We recognize that program expenditures of media curation undertakings, including foreign entities, could include the acquisition of rights to distribute the program in other territories. In this regard, credit for the acquisition of rights to Canadian programs should count toward spending obligations in the year in which the payments are actually made. This approach would avoid problems related to expense allocation and enhance the opportunities for Canadian programs to reach a global audience.

There is another good reason for the CRTC to give credit for Canadian content program expenditures made by an online undertaking where the expenditure related to exploitation of the program in a different country than Canada. By doing so, the CRTC will be strengthening the position of Canadian independent program producers. Those producers will wish to maximize the revenue from the sale of rights in different territories and if a foreign streamer operating in Canada can get credit for paying for foreign rights even though the Canadian rights have been sold to a different broadcaster, the producer ends up being benefited by having a broader range of potential buyers.

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[18] Canada's Communications Future: Time to Act, at pp.146-147.

It is interesting to note that the recommended approach already applies where a Canadian broadcaster makes a program itself. In that case, the entire cost of the program counts towards its Canadian expenditure requirement. But since the broadcaster owns the copyright in the program, it can freely sell it in other territories. For example, in April 2021, Corus Entertainment sold the foreign rights to over 200 episodes of its Canadian programming relating to home renovation, real estate and food genres to Hulu, the U.S. streaming service. Although Corus received revenue from this sale, it was still able to count the entire cost of production towards its 30% Cancon expenditure requirement. Similarly, although Blue Ant exploits its Canadian nature programming around the world, and receives revenue from doing so, the entire cost of production counts towards its 21% expenditure requirement.

In summary then, if a media curation undertaking, whether foreign or domestic, is prepared to pay for foreign as well as domestic rights to Canadian programs, this should count towards its expenditure requirement.

This approach also provides a considerable benefit for the foreign streamers. In complying with a requirement to spend a certain percentage of its previous year's Canadian revenue on Canadian content productions, those expenditures can come out of their global program budget as well as their domestic program budget.

What Qualifies as Canadian Content

This brings me to a key question, what should count as "Canadian content"?

Under section 10(1)(b) of the Broadcasting Act, the CRTC may make regulations "prescribing what constitutes a Canadian program for the purposes of this Act."It has done so in the Discretionary Services Regulations and the Television Broadcasting Regulations, 1987. The Canadian content rules have been largely in their current form for over 20 years [19].

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[19] See Public Notice CRTC 2000-42, March 17, 2000, as revised by Broadcasting Regulatory Policy CRTC 2010-905, December 3, 2010. The CRTC rules also automatically extend to any productions that qualify as Canadian film or video productions under section 125.4(1) of the Income Tax Act, which governs federal tax credits. The criteria for such productions, found in section 1106(4) of the Income Tax Regulations, broadly duplicate the CRTC rules, although they also qualify treaty co-productions.

They require a minimum of six points out of 10 for the key creative functions, and at least 75% of the services costs must be paid to Canadians. In addition, at least one of the director or screenwriter positions and at least one of the two lead performers must be Canadian.

The current rules also require that the producer "must control and be the central decision-maker of a production from beginning to end. The producer must be prepared to demonstrate full decision-making power by submitting, upon request, ownership documents, contracts or affidavits. The producer must also submit, upon request, an independent legal opinion confirming that financial and creative control of the production is Canadian. Any person fulfilling a producer-related function must be Canadian." To satisfy the requirement of control, Canadian producers ensure that their agreements with directors and writers assign all the rights necessary for the producer to be able to sell and exploit the production in all media and territories for the duration of the copyright [20].

Bill C-10 continues to leave the determination of what constitutes a Canadian program to the Commission. However, in an amendment added to the Bill at the last minute, section 10(1)(b) adds a requirement that in making that determination, the CRTC must consider:

(i) whether Canadians own and control intellectual property rights over Canadian programs for exploitation purposes, and retain a material and equitable portion of their value,
(ii) whether key creative positions are primarily held by Canadians,
(iii) whether Canadian artistic and cultural content and expression are supported,
(iv) whether, for the purpose of subparagraph (i), online undertakings and programming undertakings collaborate with
(A) independent Canadian producers,
(B) a Canadian broadcaster producing its own content, or
(C) a producer affiliated with a Canadian broadcaster, and
(v) any other matter that may be prescribed by regulation.

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[20] The agreements with directors and writers are subject to the terms of the collective bargaining agreements with the DGC and WGC. For example, directors have carved out their entitlement to directors' royalties in Europe and writers have maintained a right to the copyright in the script itself. In the case of music composers, however, no such collective agreement exists, and composers all too often find producers insisting on taking the publishing rights to the music although these should normally be assigned by the composer.

In addition, the CRTC is subject to policy directions from the government on this issue and, as noted above, a draft policy direction was circulated by the government on March 11, 2021. On the issue of Canadian content, the draft read as follows:

> The CRTC is directed to examine how it defines Canadian programs, in both the audio and audiovisual sectors, for the purposes of broadcasting undertakings' regulatory obligations. This definition is to be flexible, encourage the contribution of Canadians in a broad range of key creative positions, support Canadian ownership of intellectual property, and reflect the fact that global, not just Canadian, broadcasting undertakings are included in the regulatory system. The CRTC is directed to take into account the government of Canada's other Canadian contentpolicies of relevance to the Canadian broadcasting system as they develop over time, including audiovisual tax credits.

Should Canadian Content "Look Canadian"?

There is an active debate on whether the Canadian content rules should be tightened to require that the subject-matter be Canadian or that the film or program "look" Canadian. At present, no such requirement applies.

In his recent book [21], Richard Stursberg has argued that Canada should adopt the British rules, which provide tax credits if the program is seen as British.Points are given if the characters are identifiably British, if the program is clearly set in Britain, and whether it is based on British subject matter. However, notwithstanding the British rules, a recent study has shown that the UK content produced for the streamers is noticeably less British in content, and the programs have been "cleansed of local identity [22].

The contrary argument that the program need not "look Canadian" to qualify as Canadian content is a strong one and should carry the day. Adopting a system that dictates the look or content of a program would unfairly limit the freedom of expression of Canadian writers.

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[21] Richard Stursberg, The Tangled Garden: A Canadian Cultural Manifesto for the Digital Age (James Lorimer, 2019)
[22] "Outsourcing culture", Enders Analysis, March 2021.

Our writers have created an enviable body of work that may not have specific Canadian references but clearly reflect a Canadian perspective.If a Canadian writer wants to create a sci-fi script, or a story set in a different time or place, no government agency should condition its acceptance on the highly subjective test as to whether the program “looks” Canadian.

That being said, in the year before the pandemic there was a disturbing decline in the use of Canadian writers in PNI productions. All too often, the projects turned to non-Canadian writers and showrunners. This may well continue as the foreign-based streamers decide which Canadian programs to broadcast.

To address this issue, the BTLRP Report recommended that a reasonable percentage of the drama and long-form documentaries be 10-out-of-10 productions. “There is no question,” the report noted, “that productions in which all key creative positions are occupied by Canadians — which have a Canadian writer, a Canadian director, and Canadian lead actors — are more likely to reflect a Canadian perspective [23] To achieve this aim, the Report recommended that “where media curation undertakings include new Canadian dramas and long-form documentaries in their offerings that count toward their regulatory obligations, the CRTC should set an expectation that all key creative positions be occupied by Canadians on a reasonable percentage of those programs. If the expectation is not met over time, the CRTC should consider converting it to a requirement.” [24]

An alternative way of increasing the use of 10-out-of-10 productions would be to use the approach currently used by the CRTC to encourage Indigenous productions or minority language productions. Under this approach, the CRTC could give a credit – say 25% -- for expenditures made by broadcasters on 10-out-of-10 PNI productions. This would create a significant incentive to use Canadian writers instead of non-Canadian showrunners, but it would not be a requirement.

However, given the misgivings expressed earlier about the use of the incentives approach, there will be pressure to make the use of Canadian writers a requirement for a reasonable percentage of the Canadian content productions whose rights are acquired by the streamers.

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[23] Canada’s Communications Future: Time to Act, at p.151.
[24] Canada’s Communications Future: Time to Act, Recommendation 67.

Requiring the Producer to be Canadian

Another matter that may give rise to discussion is the requirement that the producer be Canadian owned. This rule distinguishes audio-visual productions that qualify as "Canadian content" from the myriad of productions that are made in Canada by foreign companies that are classified as "service productions" or "foreign location shooting" (FLS). In 2018-19, foreign service productions accounted for $4,858M, Canadian film and TV productions by Canadian producers accounted for $3,225M, and broadcaster in-house production was $1,234M [25]. The foreign location and service production segment largely consisted of feature films and television programs filmed in Canada by foreign producers or by Canadian service producers. For the majority of FLS projects, the copyright was held by non-Canadian producers; however, for approximately 5% to 10% of projects, the copyright was held by Canadians [26].

The extraordinary rise in FLS production (growing by 13.9% a year for the past 8 years) has nothing to do with CRTC regulation.It is stimulated by the high quality of Canadian production services, the availability of significant provincial and federal tax credits, and the low Canadian dollar (currently worth US$0.81). However, none of these productions qualify as Canadian content. Support for FLS production has been a highly successful industrial policy. But it should not be confused with Canadian content, which is fundamentally a cultural policy.

As noted above, a central tenet of the Canadian content definition is that it must be produced by a Canadian owned-and-controlled company. Some foreign streamers may want to argue that this rule is too strict. If the production meets the creative function point test as to whether it is written, directed and/or performed by Canadians, why should we care if it was financed and owned by a foreign company? And why do we insist that the copyright be held by Canadians?

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[25] Profile 2019, Economic Report on the Screen-Based Media Production Industry in Canada, at p.7.
[26] Profile 2019, at p.5.

In challenging the Canadian rule, the US studios might point to the United Kingdom, where a number of successful UK independent production companies have ended up being sold to US companies. In fact, a majority of the leading production companies in the UK are now foreign-owned [27]. For example, Working Title, which produced hits like Notting Hill, Bridget Jones's Diary and Bean, is now owned by NBCUniversal. And Warner Brothers produced and owned the Harry Potter movies.

In contrast, France takes a different view. To be a French film, a film must be produced and financed by a French producer. For example, the French hit Amélie, which had a French director, writer and star, and was produced by a French company, received significant support from the French box office levy. But when three years later, exactly the same creative team came up with A Very Long Engagement, they were denied any such support. Why?Because this time, the film was financed by Warner Brothers. So ownership did matter.

Canada follows the French approach. The producer must be a Canadian company for its productions to qualify as Canadian content under the CRTC rules. And although tax credits are available for foreign productions shot in Canada, the tax credits are higher if the producer is owned by Canadians. Going back to first principles, one can argue that if one wants to have a diverse and successful group of Canadian producers – producers with the experience to develop and nurture a wide range of Canadian creative talent – then requiring Canadian ownership as a requisite for Canadian content status makes sense. Section 10(1)(b)(i) of the revised Act – quoted above – also appears to recognize this in requiring Canadian ownership of intellectual property as a consideration in defining Canadian content.

That requirement does not necessarily preclude the sale of a Canadian producer to a foreign entity. But in that event, the company will need to take the Canadian ownership rules into account when it comes to the creation of Canadian content programs. So when Entertainment One, Canada's largest independent producer/distributor, was sold to Hasbro last year, it was careful to say that eOne's Canadian film and TV operations would "remain as a separate Canadian-controlled unit within the combined business."

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[27] Mark Sweney, "British indie producers a victim of own success as foreign owners swoop," The Guardian, August 10, 2014.

The “Terms of Trade” Problem

In a perfect world, there would be a number of independent Canadian producers who could support script and concept development, be able to access tax credits and/or funding support, and be able to finance Canadian productions through the sale of broadcast rights for a variety of windows.By maintaining ownership of the program, the producer benefits from the revenue from additional sales if the program turns out to be successful. That additional revenue from successful shows in the producer’s library can help finance the inevitable failures, as well as script and concept development for the next project.

This model contrasts with the Hollywood studio model which is largely based on showrunners who pitch their project to the studio, which then produces and holds the world copyright for the program. In the case of FLS service productions made in Canada, the studio may use a Canadian service producer who is experienced in accessing the Canadian tax credits. But the world copyright ends up with the studio.

In moving to a Canadian content model, the Canadian producer will hold the initial exploitation rights to the program. The problem for Canadian producers is that in selling these rights to broadcasters, including foreign streamers, there is an imbalance in negotiating power. This was identified in the BTLRP Report: [28]

> The media content industry is characterized by high levels of concentration, compared with the number of creators seeking access. For example, there are over 500 independent Canadian producers of television programs in Canada but fewer than a dozen major potential buyers. The situation is similar in the United Kingdom, and its regulator Ofcom has addressed the imbalance of negotiating power by prescribing terms of trade between independent producers and broadcasters. The CRTC did the same in Canada from 2011 to 2016 but discontinued the requirement as part of its Let's Talk TV policies in 2015.

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[28] Canada’s Communications Future: Time to Act, at p.144.

> With the emergence of even more dominant global media content undertakings, it is essential that the CRTC be given the explicit jurisdiction to regulate the economic relationships between media content undertakings and content producers, as well as between media content undertakings. The CRTC should be able to determine or approve terms of trade to ensure that independent producers are treated fairly. The CRTC should also have the authority to resolve disputes between media content undertakings.

Bill C-10 did not address this issue by giving the CRTC specific jurisdiction to impose terms of trade. Instead, as noted earlier, the Commission would be required in setting the Canadian content rules to consider "whether Canadians own and control intellectual property rights over Canadian programs for exploitation purposes, and retain a material and equitable portion of their value. "

This provision was sought by the Canadian program producers in order to strengthen their hand in negotiations with foreign streamers. In that connection, Netflix, in comments filed with the Standing Committee on Canadian Heritage on February 23, 2021, stated that "Netflix does not have a single model for rights agreements and negotiates these terms on a case-by-case basis with producers. "

If legislation based on Bill C-10 comes into force, this is one area where the Commission may need to become involved.

Freedom of Expression Under Bill C-10

In the debate surrounding Bill C-10, some argued that the Bill could limit Canadians' access to the content of their choosing and pose a challenge to freedom of expression, which would violate the Charter of Rights and Freedoms and be unconstitutional. While these statements made good headlines, they were both factually and legally incorrect.

In that regard, this author was one of the signatories to an open letter dated June 3, 2021, to the Prime Minister of Canada from over a dozen Canadian communications lawyers that addressed this issue. That letter included the following passage:

> Opponents of the Bill have argued that giving the Commission any powers over [social media] services could amount to censorship. This is simply false and completely ignores the following:
>
> - The Commission is not being given any powers to infringe on Canadians' Charter rights. This is clearly outlined in the Department of Justice's update to the Charter Statement and we agree with their conclusion.
> - Bill C-10 would restrict the powers the Commission would have over social media services to: mandating financial contributions to support Canadian programming or the recovery of regulatory costs; discoverability, so Canadian creators can be more easily discovered and promoted online; registration, so the Commission knows which services are operating in Canada; and audit powers, to ensure compliance with all of these powers; and
> - Users who upload content to these social media services would not be subject to the Act, as specified in proposed Section 2.1.

Moreover, the Commission would not have the power to constrain the content on social media services, set program standards for these services or the proportion of programs on these services that must be Canadian. Furthermore, the Commission itself is subject to the Charter and, as an additional protection, Section 2(3) of the Act already provides that the statute "shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". Consequently, any attempt by the Commission to implement policies inconsistent with freedom of expression could be immediately challenged on the basis of this section, as well as any Charter arguments that might be available.

It is clear from the foregoing that any concerns about Bill C-10 infringing freedom of expression are misplaced.

The introduction of legislation based on Bill C-10 is long overdue. That legislation will represent a huge step forward for the CRTC in terms of bringing online undertakings into the system. At the sametime, it is also clear that the Commission will need all its resources to achieve the right balance in its decisions on these matters.

About the Author

Peter S. Grant is Adjunct Professor at the Schulich School of Business, York University.

On May 1, 2020, Mr. Grant retired as Counsel at McCarthy Tétrault LLP in Toronto, after practising law with the firm for over 50 years. He was the past chair of its Technology, Communications and Intellectual Property Group.

Peter Grant is an expert on communications law, entertainment law, copyright law, and cultural and trade policy. In the communications field, he is the co-author of numerous articles and publications, including the Canadian Broadcasting Regulatory Handbook, the 14th edition of which was published in 2017. The handbook is the standard reference in Canada on the Broadcasting Act (Canada) and the regulations and policies of the Canadian Radio-television and Telecommunications Commission (CRTC). In the copyright field, Peter is the principal author of the Guide to the Copyright Board of Canada, published in 2020. He is also the author of Communications Law and the Courts in Canada, the third edition of which was published in 2020.

In 2004, Douglas & McIntyre published Blockbusters and Trade Wars: Popular Culture in a Globalized World, a book co-authored by Peter Grant and Chris Wood. The book focuses on the economics of popular culture, the efforts to provide diversity of expression around the world and the impact of technology and trade law on the dissemination of cultural products. The book has been called "brilliant and sweeping" by the Toronto Star.

In 2013, the Porcupine's Quill published Mr. Grant's autobiography, entitled Changing Channels: Confessions of a Canadian Communications Lawyer. The book was called "a must read for law students, lawyers (of all seniority) as well as students and practitioners of public policy" in the Journal of Parliamentary and Political Law.

From 1993 to 2020, Mr. Grant was appointed to act as the Broadcasting Arbitrator in federal elections, with the approval of all parties in the House of Commons.

Mr. Grant was one of six experts appointed by the federal government to the Broadcasting and Telecommunications Legislative Review Panel in 2018. That Panel issued its Final Report on January 27, 2020, entitled Canada's Communications Future: Time to Act.