EXPERT PERSPECTIVE

SUPPORTING THE CANADIAN INDEPENDENT PRODUCTION SECTOR UNDER THE 2023 ONLINE STREAMING ACT

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Independent Canadian Production under Bill C-11

Bill C-11, entitled the Online Streaming Act, is now approaching a final determination, having been considered by both the House of Commons and the Senate of Canada.

Perhaps the best-known element of Bill C-11 is its requirement that the CRTC impose Canadian content requirements on online streamers, like Netflix, Amazon Prime, Disney+ and Paramount.

But an important feature of the new legislation is also its support for the Canadian independent production sector.

The existing Broadcasting Act, which dates back to 1991, includes a specific provision relating to the Canadian independent production sector. The CRTC is required to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3." And that policy includes a specific statement that "the programming provided by the Canadian broadcasting system should… include a significant contribution from the Canadian independent production sector."

The Online Streaming Act continues to include that provision, and clarifies that the term "Canadian broadcasting system" would now include foreign broadcasting undertakings that provide programming to Canadians.

That begs the question. How can or will the CRTC support the Canadian independent production sector, particular in its relations with foreign streamers?

How has the CRTC supported independent Canadian producers in the past? And what will be its challenges in the future?

The Rise of Independent Canadian Producers

The rise of independent Canadian production is directly connected to CRTC policies on Canadian drama. When the CRTC imposed a condition in 1979 requiring CTV to air 26 hours of original Canadian drama in the first year of its licence renewal, CTV appealed the decision to the courts. But the Supreme Court of Canada upheld the CRTC decision in 1982.[1] Since then, the Commission has required private broadcasters to support Canadian drama.News, sports and magazine shows have been traditionally produced in-house by the broadcasters, but the riskier and more expensive programs like Canadian drama have typically been farmed out to independent producers.

[1] CRTC v. CTV Television Network, [1982] 1 R.C.S. 530.

The real impetus for Canadian indie producers came in 2010. In that year, the CRTC announced a new policy on so-called “programs of national interest” or PNI. These would consist of Canadian drama, long-form documentaries and selected award shows.Broadcasters would be required to spend a certain percentage of their revenue on PNI programs, and 75% of that spending had to be allocated to independently produced programs.[2]

It is fair to say that the PNI policy has been the principal impetus for the rise in independent production in English Canada. The current PNI requirements for the large English language broadcasters are 5% of revenue for Rogers, 7.5% of revenue for Bell, and 8.5% for Corus. These requirements apply until August 31, 2024, the end of their current licence terms.

Since its inception, the PNI policy, coupled with government subsidies and tax credits, has led to upwards of $2.5B a year in independent Canadian production. This compares with $1.1B a year in broadcaster in-house production of news, sports and magazine shows.[3]

The “Terms of Trade” Dispute

Within a year of the announcement of the PNI policy, the independent Canadian producers sounded an alarm. They were happy to produce the program and sell broadcast rights to the Canadian broadcaster. But with hundreds of producers dealing with only a few broadcasters, this imbalance led to broadcasters requiring the producer to hand over some or all of the library rights to their programs.

The producers responded by seeking to have the CRTC impose “terms of trade” on Canadian broadcasters. This followed a precedent in the U.K. where Ofcom imposed terms of trade on the five UK broadcasters for the benefit of independent producers.[4]Under pressure from the Commission, Bell, Shaw, Corus, Rogers and Astral signed terms of trade agreements with Canadian independent producers in 2011. However, in 2015, the CRTC ruled that it was no longer necessary for the Commission to intervene to require adherence to trade agreements, given the experience gained by both sides in negotiating such agreements.[1] Since then, while some broadcasters have sought to acquire more rights when they agree to help finance a Canadian program, they have been constrained by the CAVCO rules for obtaining tax credits under the Income Tax Act, which require the producer to hold the copyright.

[2] Broadcasting Regulatory Policy CRTC 2010-167, March 22, 2010. The revenue would be the aggregate revenue from all of their broadcast properties except all-news and all-sports services.
[3] See Nordicity Group, The Digital Media Universe: Measuring the Revenues, the Audiences and the Future Prospects, presented at the Digital Media at the Crossroads (DM@X) Conference in January 2023.
[4] See Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers, Office of Communications, June 21, 2007
[5] Broadcasting Regulatory Policy CRTC 2015-86, March 12, 2015, at paragraphs 132-141.

In January 2020, this issue was addressed by the Broadcasting and Telecommunications Legislative Review Panel, which had recommended that the CRTC require foreign streamers to support Canadian content.The Panel included the following discussion: [6]

- 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...
- 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.

To address this issue, the Panel made the following recommendation:

- Recommendation 61: We recommend that the Broadcasting Act be amended to ensure that the CRTC may by regulation, condition of licence, or condition of registration:...
  - ·regulate economic relationships between media content undertakings and content producers, including terms of trade;...

How Terms of Trade are Dealt With Under the Online Streaming Act

In 2021, the Government tabled Bill C-10, which would amend the Broadcasting Act to bring foreign internet streamers under express CRTC jurisdiction. Following the federal election that fall, the bill was reintroduced as Bill C-11, the Online Streaming Act. However, while there was no provision in that bill specifically addressing “terms of trade”, as the Panel had recommended, the bills addressed the issue in a different way, namely, through the definition of a Canadian program.

In particular, Bill C-11 sets out a number of matters that the Commission must consider in defining what is a Canadian program. In the most current version of the bill, section 10(1.1) would be added to the Broadcasting Act and it would read as follows:

- (1.1) **Regulations — Canadian programs**.- In making regulations under paragraph (1)(b), the Commission shall consider the following matters:
  - (a) whether Canadian producers, including independent producers, have a right or interest in relation to a program, including copyright, that allows them to control and benefit in a significant and equitable manner from the exploitation of the program;
  - (b) whether key creative positions in the production of a program are primarily held by Canadians;
  - (c) whether a program furthers Canadian artistic and cultural expression;

[6] Canada’s Communications Future: Time to Act, at pp.144-145. The author was a member of this panel.

- (d) the extent to which persons carrying on online undertakings or programming undertakings collaborate with independent Canadian producers, with persons carrying on Canadian broadcasting undertakings producing their own programs, with producers associated with Canadian broadcasting undertakings or with any other person involved in the Canadian program production industry, including Canadian owners of copyright in musical works or in sound recordings made in Canada; and
- (e) any other matter that may be prescribed by regulation.

Independent Canadian producers are referred to twice in this provision. So it is clear that If Bill C-11 is finally enacted, the criteria for what qualifies as “Canadian content” would need to take into account whether those producers have the necessary rights “that allows them to control and benefit in a significant and equitable manner from the exploitation of the program.” At the same time, the Commission would be required to take account the extent to which online undertakings “collaborate” with Canadian producers.

But before looking at this, it may be useful to look at the issue of program rights in a broader context.

Ownership of Rights Under the Hollywood Model

Independent producers want to maintain full ownership of the rights in the program so that they can benefit from the sale and resale of the program to a number of broadcasters in various territories.Even after the initial broadcast of a program in a territory, it will have value for subsequent broadcasts.With the rise of internet streamers seeking attractive programming, producers are increasingly concerned to maintain the library rights to their programs.

Perhaps the best known film libraries date back to the days of Hollywood, which produced thousands of film titles over the years.But those who remember the companies involved (including Universal, Walt Disney, Twentieth Century Fox, Paramount, MGM, Columbia, and Warner Bros.) might be confused by where those companies and their libraries ended up.

Universal, now called NBC Universal, is now a subsidiary of Comcast. MGM is now a subsidiary of Amazon. Columbia was bought by Sony Group. Paramount was bought by Viacom CBS which recently changed its name to Paramount Global.Disney kept its ownership, but expanded by acquiring the Twentieth Century Fox film library, as well as Pixar, Marvel and Lucasfilm. And the Warner library is now owned by Warner Bros. Discovery Inc. That company also owns CNN and HBO and is a very different company from the original Warner Bros.

Through all these bewildering changes, a major asset was the value of the film and television libraries involved. For example, Disney paid US$71B to acquire the Twentieth Century Fox film library in 2019, although it has been criticized for overpaying.

The Hollywood studio model is now largely based on showrunners who pitch their project to the studio, which then produces and holds the world copyright for the program. The studio libraries have found new life with the rise of Netflix and the other streamers that need popular programming to offer to their subscribers.

To save on cost, Hollywood studios have increasingly turned to Canada to make their programs. There are now a myriad of productions that are made in Canada by foreign companies that are classified as “service productions” or “foreign location shooting” (FLS). In 2020-21, foreign service productions accounted for $5.3B. By contrast, Canadian film and TV productions by Canadian producers accounted for $2.7B, and broadcaster in-house production was $1.1B. 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 over 90% of FLS projects, the copyright was held by non-Canadian producers.

The extraordinary rise in FLS production 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$0.74). The studio may use a Canadian service producer who is experienced in accessing the tax credits available for foreign productions. But the world copyright ends up with the studio. None of these productions qualify as Canadian content.

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. Some successful Canadian producers have reached a stage where upwards of 20% of their revenue comes from library sales.

This contrasts with the model where production companies are simply work-for hire service companies who operate by charging a production fee, but do not own the production.

Addressing Terms of Trade Through the Definition of a Canadian Program

The new legislation seeks to enhance the rights of independent producers by addressing them in the definition of Canadian content.In particular, the criteria for what qualifies as "Canadian content" would now need to take into account whether producers have the necessary rights "that allows them to control and benefit in a fair and equitable manner from the exploitation of the program."

So how should the CRTC implement this requirement?This is not a simple question.For some years, we have had alternative ways of qualifying a Canadian program. If Bill C-11 becomes law, the CRTC will be asked to clarify what definition should apply, or if different requirements should be imposed.

This is an aspect that gives rise to concerns from the foreign streamers. When they acquire programs to run on their service, they prefer to acquire all the rights to those programs. This is entirely understandable. The value of the Hollywood studios has always been driven by the value of their film libraries.

But before we explore the question of the value of rights, it will be important to understand how the current Canadian content rules deal with copyright ownership. This is a complex question because there are a number of ways for a program to qualify as a Canadian program. Some of them require copyright ownership of the program to be held by the Canadian producer. But some do not.

The Current Canadian Content Rules

Broadcasters in Canada are subject to significant scheduling and expenditure requirements relating to Canadian programs. So the determination as to what constitutes a "Canadian program" is vitally important to them. Under the Broadcasting Act, paragraph 10(1)(b) states that the Commission 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.[7]

Under these rules, producers can qualify their programs as Canadian programs under three different regimes.

[7]For an excellent summary of the current Canadian content rules, see the presentation of Douglas Barrett and Erin Finlay at the DM@X-tra Workshop on March 31, 2022. The link to the slides is here: https://www.digitalmediaatthecrossroads.com/pdfs/IntheWeedsCanadianContent.pdf?v1493316396

1. **The Canadian Content Rules Under the Income Tax Act**

The first regime is set by the Income Tax Act, administered by the Canadian Audio-Visual Certification Office (CAVCO). The rules 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.

This regime qualifies the producer for tax credits based on its Canadian labour costs. Under the CAVCO rules, unless a production is a treaty coproduction, only the Canadian production company can be a copyright owner of the production for all commercial exploitation purposes, for the 25-year period from when the production is completed. This is verified by CAVCO through its review of documents such as exploitation, financing and chain-of-title agreements. The production company (or a prescribed person) must control the initial licensing of all commercial exploitation rights related to the 25-year period beginning when the production is completed and commercially exploitable. And there must be an agreement in writing, with either a Canadian distributor or a CRTC-licensed broadcaster, to have the production shown in Canada within the first two years after it is completed and commercially exploitable.

2. **The Canadian Content Rules Set by the CRTC**

The second regime is based on rules set forth in a number of CRTC policy documents.[8]

The CRTC rules also 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 CRTC rules require that the producer "must control and be the central decisionmaker 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."

In the case of programs produced by a Canadian broadcaster, e.g. news and public affairs programs, no formal certification is required, unlike programs produced by an independent Canadian producer.

In the latter case, the Commission does not require that the Canadian producer actually own the copyright in the program. The CRTC has also allowed situations where the Canadian producer is in a co-venture with a foreign producer, and the rights end up in the hands of that foreign producer.

[8] See Public Notice CRTC 2000-42, March 17, 2000, as amended by Broadcasting Regulatory Policy CRTC 2010-905, December 3, 2010.

In the last few years, there have been a number of productions that qualified as a Canadian program but were co-produced by a subsidiary of a Hollywood studio which held onto the rights. Those productions did not meet the CAVCO rules and so did not qualify for the higher tax credits available under the Income Tax Act. However, the US co-producer considered it more important to hang onto the rights so it would be able to include the program in its library.And because the production still qualified as a Canadian program, it commanded a higher price from Canadian broadcasters.

3.**The Rules under Canada's Co-Production Treaties**

Canada has official co-production treaties with about 60 countries and many of these treaties have been in place for decades. These treaties were impelled by a desire by these countries to work together to finance expensive films that could compete with Hollywood. To address this, Canada and these foreign countries support local co-productions, where the expense can be shared and the production can be treated as a national production in both countries and qualify under their domestic broadcast quotas.

Each of the signatory countries has a certification office; Canada's is housed in Telefilm Canada. For a co-production to be certified, the certification office of each country must sign-off and once approved the co-production is entitled to "national treatment" in each country. That includes access to the Cancon Tax Credits (but only on the Canadian side of the production). The copyright and distribution rights for these programs are divided on the basis of the source of funding, and each treaty specifies a minimum percentage to come from each country (typically 20%-30% of the budget). The general idea is to have the copyright ownership, the per country budget spend, the split of creative and key crew roles, the production activity allocation (shooting, post etc.) and the distribution rights all divided according to the funding coming from each country.

How Will the Definition of a Canadian Program Need to Change?

Let's assume that Bill C-11 becomes law. If so, paragraph 3(1)(f.1) of the Broadcasting Act would read as follows:

- (f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;

[8]Voir l'Avis public CRTC 2000-42, 17 mars 2000, tel qu'amendé par la Politique réglementaire de radiodiffusion CRTC 2010-905, 3 décembre 2010.

It is expected that to comply with this policy, the CRTC will require foreign streamers to allocate a percentage of their Canadian revenue to the production of Canadian programming. And in exchange for this financial support, those streamers will seek to acquire the rights to show the program on their streaming service, just as Canadian broadcasters acquire exclusive broadcast rights for the Canadian programs they support. In a previous essay, I have explored what these expenditure requirements might look like. [9]

There have been examples of this model working in the past. In the past few years, for example, Netflix has purchased streaming rights for a number of Canadian drama programs that have previously been broadcast by Canadian broadcasters. In 2017-19, it acquired the right to stream 27 episodes of Anne with an E, produced by Northwood Entertainment. The same program was sold to the CBC, and Netflix allowed the Corporation to have an advance window of 2 weeks before it made the same program available on its streaming service.

If Bill C-11 is enacted, however, expenditures by the foreign streamers on Canadian programs would increase dramatically. In June 2022, the Minister of Canadian Heritage suggested that the expenditure requirement would lead to at least $1B a year of new Canadian content production.[10]

In this scenario, what would happen if the current CRTC rules for defining what is a Canadian program stay the same?

In that event, the producer of the program would need to be Canadian. The 6 point test would also need to be met and either the director or writer and one of the lead performers would need to be Canadian. But foreign streamers commissioning and paying for a Canadian program would want to be able to own the copyright and/or all the exploitation rights. While this would not be possible under the CAVCO rules which entitle the producer to a higher level of tax credits, the current Cancon rules set by the CRTC are more flexible and by using the co-producer model, the foreign streamer could acquire the copyright and/or the exploitation rights. In that scenario, the Canadian co-producer would end up simply being a work-for-hire service producer.

Although the program would only qualify for the lower tax credits available for foreign location shooting, foreign streamers would likely prefer this model. One might expect them to come up with projects initiated by Hollywood showrunners that meet the 6 point test and use a Canadian director and a Canadian lead actor.The project would then be co-produced by a Canadian “work-for-hire” service company who will assign the copyright and/or the library rights to the foreign streamer.

[9] See Peter S. Grant, “Contribution to Canadian Content by Online Undertakings: The Factors the CRTC Will Need to Consider”, July 2021.It can be accessed on the website of the Coalition for the Diversity of Cultural Expressions at https://cdec-cdce.org/en/

[10] Statement of Heritage Minister Pablo Rodriguez to Heritage Committee, June 6, 2022.

This of course would be inconsistent with the intent of Bill C-11. Thus, once Bill C-11 becomes law, the CRTC will need to review its definition of a Canadian program to ensure that producers have the necessary rights that are called for in the legislation.

The simplest way to achieve this would be to amend the CRTC definition to match the current CAVCO requirements for tax credits under the Income Tax Act. Under those requirements, the Canadian producer must own the copyright in the program, and must control the initial licensing of all commercial exploitation rights related to the 25-year period beginning when the production is completed and commercially exploitable.

The current rule that allows situations where the Canadian producer is in a co-venture with a foreign producer, and the rights end up in the hands of that foreign producer, would therefore need to be revoked.

If required to expend money on Canadian content, streamers like Netflix, Disney+ and Amazon Prime, will seek to acquire the exclusive right to show the program not only on their Canadian streaming service but in countries around the world. But if a Canadian producer sells off those rights for, say, 25 years, what does that do to its right “to control and benefit in a fair and equitable manner from the exploitation of the program.” To maintain the right for the Canadian producer to receive meaningful library revenue, it may be necessary for the CRTC to impose a limit on the initial licensing period for streamers. There is precedent for this. The Ofcom Terms of Trade limit UK broadcasters from acquiring more than a 5 year licence from independent producers. So the CRTC could impose a similar maximum term of 5 years for broadcast rights granted to the streamers. This would ensure that meaningful library rights are retained by the Canadian independent producer.

Conclusion

Once the Online Streaming Act becomes law, Canadian independent producers will uniquely benefit from the requirement for foreign streamers to support Canadian production.

By virtue of the CRTC rules, only a Canadian-controlled company can produce a Canadian program. So we will not likely see a repeat of the UK situation, where a majority of the successful independent UK producers ended up being bought by foreign companies.

However, unless the Cancon rules are tightened, there is a risk that the foreign streamers will tend to support work-for hire service companies who assign the copyright to them and operate by charging a production fee on commissions.

If the rules are tightened, the independent Canadian producers will grow and prosper. At the same time, because the foreign streamers are required to support them, they will be encouraged to produce Canadian programs that have US if not global appeal. In that regard, Canadian independent producers have already distinguished themselves in producing programs like Degrassi, Murdoch Mysteries, Schitt's Creek and many others that have reached audiences around the world. But they will be challenged to do more.

There is a risk that foreign streamers seeking to support Canadian programs with global appeal may tend to favour the use of LA-based showrunners instead of Canadian writers, and to avoid stories that are seen as too Canada-specific. However, if the Canadian producer seeks subsidy support from the Canada Media Fund, the 10 out of 10 rule will apply, and a Canadian writer will be required.

It should also be noted that in its 2020 report, the Broadcasting and Telecommunications Legislative Review Panel stopped short of recommending that Canadian programs "look Canadian". However, it did recommend that where the streamers "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."[11]

Once Bill C-11 becomes law, there will be a lively debate on how to define what is a Canadian program. And as indicated above, this will be crucial in determining the future for independent production in Canada.

[11] Canada's Communications Future: Time to Act, at p.151 (Recommendation 67)

ABOUT THE AUTHOR

Peter S. Grant retired from McCarthy Tétrault LLP in 2020 after heading its communications law group for many years. He was one of six experts appointed to the Broadcasting and Telecommunications Legislative Review Panel, which tabled its report in January 2020. This essay was written in October 2022.