

# Intelligence MEMOS



From: Konrad von Finckenstein and James Mitchell

To: Broadcast Policy Watchers

Date: November 30, 2020

Re: **WE'RE ENTERING A WHOLE NEW WORLD: WHAT C-10 MEANS FOR BROADCASTING IN CANADA**

In response to the Yale Report, the government has introduced Bill C-10, *An Act to Amend the Broadcasting Act (Act)*. It represents a major step by the government in at least two important areas of public policy.

First, the Bill dramatically expands the definition of broadcasting to include streaming, and it gives the CRTC new powers to regulate online broadcasters such as Netflix and Amazon Prime, which today dominate the Canadian broadcasting scene. The vast majority of these online broadcasters are also foreign-owned and provide largely foreign content. To date, these services have been unregulated and largely untaxed.

While it appears that the principal purpose of the new *Act* is to integrate streamers into the broadcasting regulatory regime, the Bill carefully stays away from regulating the Internet, from amending the *Telecommunications Act*, from touching net neutrality, and from imposing any regulation on Internet service providers.

C-10 is a huge step – not just in policy and political terms, but also because it presents a major challenge in terms of feasibility as the *Act* moves to cover online broadcasters.

Up to this point, broadcasters in Canada have had to obtain a licence from the CRTC and comply with its terms. One key provision of the current regime is that licenced broadcasters have to be Canadian owned and controlled.

Under C-10, however, the CRTC has two avenues of regulation. Under s. 9(1) it can establish classes of licences and issue licences for broadcast undertakings other than online undertakings.

Second, under a new section 9.1 the CRTC can make orders and impose conditions regarding online undertakings. Yet online undertakings do not have to be Canadian owned or controlled. The CRTC has full discretion to decide on the appropriate terms and conditions governing the activities of these online undertakings. Presumably they will broadly mirror the terms and conditions of licensed broadcasters.

Finally, under its regulation-making power the CRTC will be able to require registration of streamers. If they have to register, that means they are carrying on business in Canada, which means they will be subject to the GST.

Through this Bill, the government deftly addresses the fact that unlike conventional broadcasters, streamers have so far avoided regulation, and is doing so without intruding on other areas of the Internet. It also bypasses key recommendations of the Yale review panel concerning registration of Internet-based content undertakings. The imposition of content obligations on streamers similar to those imposed on conventional broadcasters levels the playing field.

However, the Bill also raises a series of concerns.

- First, does the CRTC have the resources and competence to address these new and very large tasks?
- Second, converting the obligations of this new, broader class of broadcasters under its licences into orders and conditions is difficult both conceptually and operationally. For example, the Canadian content definitions as used in the *Income Tax Act* are based on the concept that the producer is Canadian-owned and controlled. Beyond this lies a host of problems related to defining 'Canadian content' under the new regime. Should it continue to be largely employment-based (stars, writers, producer, director, etc.) or is it now time to focus instead on plot, themes, location, values, visual identity, etc.?
- Third, how will contributions to the Canada Media Fund be determined? Will online broadcasters be allowed, as broadcasters are today, to set up their own funds into which, say, half of their contributions may be paid? Can contributions be made in kind rather than by monetary transfers? Will they be subject to the same definitions of 'Canadian content'?
- Fourth, how long will it take to set up the new regime of order and conditions for online broadcasters?
- Fifth, while the CRTC is given powers to administer Administrative Monetary Penalties, will that be enough? Will they work? What will happen if foreign streamers do not comply?

A long and arduous process of operationalizing the new scheme lies ahead. Difficult conceptual issues must be resolved, lengthy hearings and court challenges can be expected. And all in the midst of a pandemic that has brought the Internet, and access for all to the forefront of public debate.

The Bill pushes the CRTC into hitherto-uncharted territory. Traditionally dominated by broadcasting issues, it risks being overwhelmed by this challenge.

At a minimum, the new Bill means there is an urgent need to address the mandate, structure and authority of the CRTC.

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