Intelligence MEMOS

From: Konrad von Finckenstein and James Mitchell

To: Ministers of Innovation, Science and Economic Development and Canadian Heritage

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Re: MAKING BILL C-10 WORK

The government has introduced Bill C-10, an *Act to Amend the Broadcasting Act* with the main aim of regulating online over-the-top digital services commonly called streamers; Netflix, Amazon Prime and their proliferating, largely US, competitors.

Bill C-10 is an effort to level the playing field between traditional broadcasters and the streaming services not currently subject to the same CRTC oversight and regulation. However well-intentioned, Bill C-10 is an awkward way of proceeding, as the *Act* was largely designed for over-the-air broadcasters, together with cable distribution of their signals along with specialty channels.

Streamers, in our view, are something of a force fit into this regime, for reasons set out below. However, Bill C-10 is now before committee and in all likelihood will be enacted in substantially its present form. What additional steps can and should the government take to make this effort effective?

The Bill amends the current definitions of 'broadcasting' and 'broadcasting undertakings' to bring streamers within the scope of the *Act*.

It gives the CRTC new powers to require streamer registration and to impose conditions if they wish to operate in Canada. These powers are extraordinarily broad, and the Bill leaves it up to the commission to determine their necessity, their scope and associated compliance requirements.

These powers basically mirror the Commission's powers to impose conditions on licenced broadcasters, except that registered streamers would not have to be Canadian owned and controlled.

If this rather awkward approach is to work, we believe two additional measures are necessary.

First, Governor in Council (i.e., Cabinet) should direct the CRTC as follows:

- The Commission's power to impose conditions on registered streamers should be exercised with a light hand and limited to the minimum required to achieve regulatory fairness. (This would leave much room for scope in application by the CRTC, but the government's intention would be clear.)
- The requirement for streamers to register as online broadcasting undertakings should only be applied to companies having gross revenues from Canada in excess of, say, $80 million per year. This is necessary to prevent stifling innovation by new entrants.
- Only streamers that compete directly with conventional licenced Canadian broadcasters and distribution undertakings should be required to register.
- Given that the policy goal is to protect and promote Canadian content, online broadcasting undertakings dedicated exclusively to a foreign language with no content reflecting Canadian scenes or themes should not be required to register.
- Conditions should be limited to:
  a. prescribing fees for administration by the CRTC;
  b. providing information and data for CRTC regulation;
  c. establishing audit requirements;
  d. stipulating the percentage of Canadian content that must be offered in online programming in this country;
  e. prescribing the percentage of gross revenue that streamers have to spend on Canadian content production or contribute to Canadian content production;
  f. prescribing discoverability methods for Canadian content.
- All conditions imposed on online broadcasting undertakings must be so structured as not to enable the US or Mexico to implement "measures of equivalent commercial effect" under the cultural exception of the Canada-United States-Mexico Agreement.
- Accordingly, the conditions for registered streamers must be applied on a national treatment basis. Foreign streamers must be treated on the same basis as Canadian streamers. This would mean, for example, that Canadian streamers such as Illico and CraveTV would have to comply with the same conditions as Netflix or Prime.

Second, if streamers are required to register in Canada, distribute Canadian content and contribute to Canadian production, national treatment requires that they would also have access to funding for Canadian production. Currently, that funding is only available for Canadian-controlled firms and the intellectual property rights to productions must be held by Canadians. Making such benefits also available to foreign streamers for their Canadian content will require consequential amendments to both the *Income Tax Act* and the *Telefilm Canada Act*.

It is widely understood that current Canadian content rules are basically employment rules for Canadian directors, actors and other production personnel. To avoid having foreign streamers avail themselves of a modified rule set to produce ersatz 'Canadian' productions (i.e., essentially foreign films using Canadian actors or directors), the rules should be changed to a system that would allocate points for films or TV shows using Canadian themes or Canadian scenes, or that are based on Canadian authors, or that are filmed in Canada. In short, a focus on content rather than on employment quotas.

None of the above steps will be easy, and some of the rule changes proposed above would be strongly opposed by some elements of the Canadian film and video industry, but unless Bill C-10 is abandoned and a totally different approach to streamers is adopted, this would appear the only feasible way to force fit streamers into the *Broadcasting Act*.

Bottom line: by bringing the streamers onto a more level playing field, Bill C-10 is a step in the right direction, but it is too much to expect the CRTC to do all this without direction, and legislative and regulatory help from the government.

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