Brief to the Standing Committee on Canadian Heritage on the study of Bill C-10, An Act to amend the Broadcasting Act
March 30, 2021

Background

The Association québécoise de la production médiatique (AQPM) brings together, represents and advises more than 160 Quebec independent film, television and web production companies, representing the vast majority of Quebec companies producing or co-producing for all screens, in French and English.

In 2018-2019, Quebec's independent production companies generated a volume of $875 million in feature film, television and web content production creating the equivalent of more than 16,000 full-time jobs.

A law dedicated to the protection of Canadian cultural sovereignty

For more than 50 years, independent producers in Quebec have been able to offer audiences here and abroad original content in French and English thanks to the determination of a few pioneers like Graham Spry and Alan Plaunt. They were the instigators of the Aird Commission whose 1929 report led to the adoption of the first *Broadcasting Act* in 1932.

The government recognized the need to strengthen national identity and assert Canada's cultural sovereignty by offering local programming to Canadians, who were then being inundated by radio programs from American stations. These principles led to the adoption of the first Broadcasting Act and we feel it is important to recall them at a time when many stakeholders are trying to distort their scope.

Bill C-10 is the first major reform of the *Broadcasting Act* since 1991. It aims to integrate Canadian and foreign online broadcasting services into the regulatory framework so that they can participate in funding and developing national content. It also aims to give the CRTC the necessary powers to ensure that these new players obey the rules. The AQPM is delighted with this historic step forward.

Canadian intellectual property in decline

Since the first Act of 1932, the landscape has changed significantly with the advent of the public broadcaster, the creation of institutions such as the NFB, Telefilm Canada, the Canadian Media Fund, the establishment of the CRTC and the adoption of financial and fiscal measures to support the Canadian audiovisual industry. In 2019, it reached an annual production volume of over $9 billion. This is a considerable figure, which led Troy Reed, Executive Vice President of Corus Entertainment, to say that producers have never made so much money. These words were echoed by Kevin Desjardins, President of the Canadian Association of Broadcasters. They are based on the annual growth in production volume in Canada, but they hide a disturbing reality. In fact, in 2019,

52% of audiovisual content produced in Canada was not Canadian content, but rather content produced in Canada by foreign companies. This is content that is not owned by Canadian interests. The Canadian audiovisual industry has gone from being an industry that controls the ownership of its audiovisual content to one that serves foreign interests.

The rest of the production volume is divided between broadcasters' in-house production, which represents 13% of the total, with sports, news and public affairs programs, and independent production, which accounts for 35% of the total. This means that independent Canadian content, which alone ensures the diversity of television and web programming by offering documentaries, children's programs, drama series, variety programs, and feature films of all genres, represents just over one-third of the annual volume of production made in Canada. Preliminary data indicates that independent production will account for only 31% of overall volume by 2020. The growth in the volume of audiovisual production in Canada in recent years has not benefited Canadian independent producers; on the contrary, their share has been steadily decreasing over the years.

For the AQPM, it is urgent to act to stop this decline. Traditional sources of funding are dwindling, budgets for producing original French-language content are now only a fraction of what is spent on English-language productions, and competition is globalizing and intensifying, jeopardizing the survival of the industry and the companies, workers, artisans and creators who make it up. We must ensure the creation, production, promotion, presentation and distribution of as much rich and diverse Canadian content as possible on all screens, on all platforms. All broadcasting undertakings must contribute to these objectives, which are the basis of the *Broadcasting Act*.

We must therefore adapt the ecosystem to obtain new financial resources and impose obligations on all of its components to allow for the development of production companies, the deployment of our creative resources to their full capacity and the sustainability of our cultural identity. In addition, mass media such as film, television and music are essential for protecting the French language and Indigenous languages.

Canadian content and made-in-Canada content

Let's clarify the difference between Canadian content and made-in-Canada content, as many stakeholders seem to imply that these concepts are interchangeable, or at the very least, should be considered in the same way.

Stakeholders such as Netflix, the Motion Picture Association-Canada and even IATSE, which is an American union although it has a significant number of technicians in Canada, emphasized the important contribution of American studios and platforms to the Canadian audiovisual industry. The economic contribution of these players is undeniable, whether through employing technicians, renting filming locations, spending on accommodation, catering, visual effects, etc. But these investments benefit first and foremost these foreign companies that recognize the quality of the infrastructure and the experience of Canadian technicians to produce American content. These foreign shoots in Canada are referred to as "service productions". The federal government, as well as certain provincial governments, already recognize the economic contribution of these foreign companies by granting significant tax breaks to attract them. However, this is not a cultural contribution to our identity consistent with the objectives of the *Broadcasting Act*. We must therefore be careful not to distort the objectives of the Act to include foreign content made in Canada.

Several discussions during the Committee's hearings focused on the Canadian content of productions. It was suggested that an American production would be more Canadian if it had a handful of Canadian actors in it and the CN Tower in the background, while a work would be less Canadian if the streets of Montreal were made to look like New York City for a "movie of the week" for American broadcasters.

What criteria should be used to certify a work as Canadian content? Beyond the use of Canadian talent in key creative positions (writers, directors, lead performers, cinematographer, music composer, art director, editor) and the payment of 75% of production and post-production costs to Canadians or Canadian companies, it comes down to the role of the producer. Under the current rules, a production is certified as "Canadian" if the primary decision maker in the production of the work from its development to its commercial exploitation is a Canadian production company.

This is a common rule for all industries. A British vaccine made in India is still a British product because the decision-making centre and the intellectual property are owned by a UK company. Just because it is made in India using Indian laboratories and technicians does not mean that the vaccine becomes Indian, or a Japanese car made in Ontario or Quebec factories will never become a Canadian car. What determines the territorial certification of a product is the nationality of the person who controls the decisions and owns the intellectual property. The producer-owner can then take the economic benefits generated by the production they helped create, reinvest them in research and development to allow the creation of new productions and benefit Canadian creators and the community.

The same should be true for "Canadian cultural product" and the current definition of "Canadian content" should not be challenged in a way that undermines this principle. Foreign companies may "produce content in Canada" but that does not make it "Canadian content". Only the production of "Canadian content" should be covered by the *Broadcasting Act*.

The importance of recognizing and preserving the role and intellectual property of independent producers in adapting the audiovisual ecosystem to include online businesses is a key aspect of the reform currently underway in France. Under the reform, online platforms such as Netflix would be required to invest up to 25% of the revenues generated in France into original French-language productions. As well, 66% of television productions (75% for feature films) must be made with local independent producers. Online platforms will enjoy 36 months of exclusive rights for TV series and 18 months for feature films, after which independent producers will recover all rights to their works.

A bill with shortcomings

Although the AQPM is pleased with the tabling of Bill C-10, it must point out that fundamental aspects are missing, particularly with regard to the adequate protection of original French-language content, Canadian talent and the intellectual property of Canadian production companies. With respect to Canadian content, we must ensure that it is predominantly produced by Canadian creators, that it is owned by Canadian companies and that original French-language content plays an important role.

Bill C-10 also excludes key players in the new media reality, such as online distribution companies and companies that provide Internet and cell phone services, just as it excludes part of social media activities.

The CRTC is responsible for administering the broadcasting policy for Canada. It is therefore the guardian of the objectives set out in section 3 of the Act and how they are applied through the obligations imposed on broadcasting undertakings. This fundamental role must be supported by serious government oversight, which is missing in the bill.

The Minister of Canadian Heritage wants the bill to end the regulatory asymmetry between traditional broadcasters and online undertakings. Bill C-10 provides for the *fair and equitable treatment* of broadcasting undertakings providing similar services. The AQPM is concerned that traditional broadcasters will see this as an opportunity to reduce their existing obligations. If we want to include new players in the broadcasting ecosystem in order to bring in new sources of revenue to produce and showcase more Canadian content in original English, French and Indigenous languages, better funded content and diversified genres, the government should quickly affirm its intentions in this regard. The draft direction to the CRTC recently released the Minister of Canadian Heritage confirmed the AQPM's fears, since it clearly expresses a desire to relax the existing rules. This sends a message that could prove disastrous for creators, producers and workers covered by the *Broadcasting Act*. The government's plans are all the more worrisome since they it come at the very moment when the CRTC must decide on the conditions for the renewal of the CBC/Radio-Canada's licence and on the regulation of commercial radio stations.

The AQPM wishes to point out that it is a member of the Coalition for the Diversity of Cultural Expressions. It therefore supports the amendments developed by the Coalition that will be included in this brief, but proposes a different wording for the framework of contractual practices between independent producers and programming undertakings as well as with online companies. This new wording is consistent with the proposal of the Canadian Media Producers Association (CMPA). The AQPM also wishes to introduce an amendment to include telecommunications carriers (Internet and mobile telephony) in the ecosystem. The CRTC will then have to determine the level of obligations to be respected, as it does for other companies, taking into account the nature of their services. Cable companies already contribute 5% of their revenues to the funding of Canadian content through monetary contributions to the Canada Media Fund. The AQPM believes that all undertakings that deliver and benefit from audio and audiovisual content to Canadians should contribute to its funding.

Amendments proposed by the AQPM

1) Maintain Canadian ownership of the Canadian broadcasting system

Like many stakeholders, the AQPM believes that the Canadian character of the broadcasting system must be maintained. The bill rejects this principle under the pretext that the regulations will now include foreign companies. These companies were already included, but were simply exempted from any regulatory obligations. The principle of Canadian ownership should prevail and the presence of foreign companies providing online programming does not compromise it.

The AQPM believes that the government's direction to the CRTC SOR 97-192 limiting the acquisition of a broadcasting undertaking by non-Canadians does not provide sufficient assurance in the absence of a clear provision in the *Broadcasting Act*. A direction can easily be changed and

its legality could be challenged because a regulatory directive derives its legitimacy from a provision in an enabling statute. In the absence of such a provision, its validity could be challenged.

Proposed amendment:

- **Retain the current subsection of the Act in section 3(1)(a), adding:**
  (a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians, although foreign online undertakings may also provide broadcasting programming to Canadians;

2) Include all undertakings in the regulatory framework

Online distribution companies: Several stakeholders stressed the importance of including online distribution companies in the regulatory framework in order to ensure that the broadcasters currently distributed on a mandatory basis are also offered by online distribution services. These "must carry" broadcasters include are TV5, UNIStv, AMI-tv and APTN, which feature extensive Indigenous programming, programming produced in minority communities and in regions outside major centres, and programming reflecting racialized communities and people with disabilities.

Online distribution services such as Roku and Hulu+ occupy a growing share of the marketplace and the CRTC should issue mandatory carriage orders for them as it does for traditional distribution undertakings.

Social media: Social media have become indispensable for consuming music and audiovisual content. While the current bill appears to capture some of the broadcasting activities of these platforms, it leaves a significant amount of user-generated professional content untouched. They need to be included within the parameters of the bill so that the CRTC can compel them to provide the relevant information to oversee their activities and develop the appropriate regulatory framework.

Telecommunications carriers: Companies that provide internet or wireless telephone services should, as do broadcasting distribution undertakings (cable, satellite and fibre television services), support and contribute to the funding of Canadian audiovisual productions. However, telecommunications carriers are completely outside the regulatory framework. So as they gain ground on regulated broadcasting undertakings and capture a growing share of the market and revenues, the flow of investment in the creation of Canadian television productions is drying up.

However, the Supreme Court has determined that telecommunications carriers are not subject to the *Broadcasting Act* and are therefore exempt from the contribution obligation imposed on broadcasting distribution undertakings through the *Broadcasting Distribution Regulations*. We recommend that a distinction be made between the different activities of telecommunications carriers to include those related to content distribution under the *Broadcasting Act*.

In addition, an amendment to the *Broadcasting Act* should explicitly empower the CRTC to require telecommunications carriers to make a financial contribution to a recognized fund for the production of Canadian audio-visual content or music development, such as the Canada Media Fund or Musicaction. This contribution would be calculated on a portion of the revenues from

residential services in recognition that a portion of the bandwidth is not used for audio or audiovisual content.

Amendments for social media and online distribution companies:

- **Delete sections 2.1 and 4.1 (1) of the bill;**
- **Amend paragraphs (b) and (e) of section 9.1(1) of the bill:**
  (b) the presentation of programs and programming services for selection by the public, including the discoverability of Canadian programs and programming services;
  (e) a requirement for a person carrying on a broadcasting undertaking to carry , on the terms and conditions that the Commission considers appropriate, programming services specified by the Commission;

- **Amend subsections (g) and (h) of section 10(1) of the bill:**
  (g) respecting the carriage of any foreign or other programming services by broadcasting undertakings;
  (h) for resolving, by way or mediation or otherwise, any disputes arising between broadcasting undertakings concerning the carriage of programming services;

Amendments for telecommunications common carriers:

- **Amend subsection (4) of section 4 of the bill:**

For greater certainty, this Act does not apply to telecommunications common carriers - as defined in the *Telecommunications Act* - except for their content distribution activities.

- **Add section 11.2 to the Regulations-Expenditures section of the bill:**
  The Commission may make regulations respecting the expenditures to be made by a telecommunications common carrier for its content distribution activities into a recognized Canadian fund for audiovisual production or voice music development other than a fund administered by the Commission.

3) Ensure the creation, production and presentation of original French-language content

Like many stakeholders, the AQPM would like to see the provisions of the bill strengthened to better recognize the importance of supporting the creation, production and presentation of original French-language content. Recognition of linguistic duality is no longer enough, as past experience has shown. Broadcasters took advantage of the ambiguity of the CRTC's requirements to include dubbed French content in the calculation of their obligations. It was only after an appeal to the Governor in Council at the time of the renewal of the licences of large groups of private francophone broadcasters that the situation was corrected.

The inclusion in the Canadian regulatory framework of foreign online services that offer content in some thirty different languages through dubbing or subtitling has rekindled fears that confusion will again arise. The lack of interest shown to date by Netflix, for example, in supporting the production of original French-language content reminds us of the need for section 3 of the *Broadcasting Act* to include a specific provision to unequivocally affirm the importance of original French-language content.

In addition, the government recognizes, in its plans to modernize the *Official Languages Act* unveiled last February, the need to protect and promote French not only in official language minority communities, but also in Quebec. It even states its desire to establish "substantive equality" between Canada's two official languages and emphasizes the role of the CRTC in the creation and broadcasting of original French-language content.

The proposed amendments are supported by all the member associations of the Coalition for the Diversity of Cultural Expressions. They consist of adding an objective to this effect to section 3 of the Act and accompanying it with corresponding amendments to the CRTC's mission (section 5) and to the conditions of service that will be imposed on broadcasters and online undertakings (section 9.1).

Amendments:

- **Add a new paragraph to section 3(1)(i) after paragraph (i):**
  recognize and support Canada's linguistic duality by giving prominence to the production and broadcasting of original French-language programs, including those of francophone minorities;
- **Add the following to section 5(2)(e)**:
  (e) facilitates the provision of Canadian programs created and produced in both official languages as well as in Indigenous languages to Canadians;
- **Add a new paragraph to section 9.1 (1), under new paragraph (b)**
  (c) the proportion of original French-language programming, ensuring that it represents a significant proportion of Canadian programming;

4) Ensure maximum use of Canadian creative resources and allow for fair contract negotiations

The bill reduces the requirement to use Canadian talent in section 3(1)(f) of the Act. This is a key element in ensuring the maximum use of Canadian creative resources. The section already recognizes that it is possible to impose such a requirement in an appropriate manner for various broadcasters, including online services. However, the section refers only to the creation and presentation of Canadian content and does not address the production stage. It is essential that the use of independent Canadian production companies be preserved.

We also need to help independent producers retain their intellectual property when negotiating with online and traditional broadcasters by ensuring that the CRTC can put in place a code of practice to guide them. The United Kingdom and France already favour this type of framework. In this regard, the AQPM supports the proposal submitted by the Canadian Media Producers Association (CMPA).

Amendments:

- **Retain the current subsection of the Act in section 3(1)(f), adding**
  (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than

French and English, renders that use impractical, in which case the undertaking shall make the greatest practicable use of those resources.

- **Add the following subsections to sections 9.1 and 10:**

9.1 (1) The Commission may, in furtherance of its objects, make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1), including conditions respecting

(k) the commercial relationship between programming undertakings or online undertakings and Canadian independent production companies, including by requiring programming undertakings or online undertakings to enter into a code of practice with a society, association or corporation that carries on the business of negotiating minimum terms and conditions for the benefit of Canadian independent production companies.

10 (1) The Commission may, in furtherance of its objects, make regulations:

(l) respecting the commercial relationship between programming undertakings or online undertakings and Canadian independent production companies, including by requiring programming undertakings or online undertakings to enter into a code of practice with a society, association or corporation that carries on the business of negotiating minimum terms and conditions for the benefit of Canadian independent production companies.

5) Regulate the CRTC

The CRTC has the difficult task of interpreting the law in order to establish a regulatory framework that ensures compliance with the objectives set out in section 3. It is important to supervise this work not only by government directives that intervene upstream in the process, but also by establishing an appeal to the Governor in Council for conditions of service if the CRTC seems to be deviating from its mission.

We also recommend, as did the CDEC, that service orders be for a maximum of seven years so that they are predictable for the parties involved and can be updated regularly. The process of granting service orders and establishing the regulatory framework should be subject to a public hearing process.

As CRTC Chair Ian Scott stated to the committee on March 26, the CRTC will need to establish a framework that is symmetrical and fair to all undertakings. The AQPM is concerned about an interpretation that could encourage a race to the bottom by relaxing the current obligations of conventional broadcasters. We recommend that section 5(2) of the Act be clarified to remind the CRTC that it must take into account not only the nature and diversity of the services provided, but also their size and their impact on the creation and production ecosystem.

Among the desired flexibilities, some traditional broadcasters want fewer constraints on the type of programs they must present. There is a fear that more niche programs such as one-off documentaries or those that are more expensive to produce such as fiction or animated series will be neglected by traditional broadcasters. The AQPM and the CDEC would like to reiterate the

importance of this type of programming and the need for the CRTC to ensure diversity in programming.

Amendments:

Appeal to the Governor in Council for Terms of Service:

- **Add the following definition to section 2(1):**
  decision: includes a determination made by the Commission in any form; (décision)
- **Amend section 28(1) of the bill:**
  28 (1) If the Commission makes a decision, the Governor in Council may, within one hundred and eighty days after the date if the decision, on petition in writing received within forty-five days after that date or on the Governor in Council's own motion, by order, set aside the decision or refer the decision back to the Commission for reconsideration and hearing of the matter by the Commission, if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3 (1).

Duration of Orders and Transparency of Process:

- **Amend section 9.1(1) of the bill:**
  9.1 (1) The Commission may, in furtherance of its objects, make orders such terms not exceeding seven years imposing conditions on the carrying on of broadcasting undertakings and that the Commission considers appropriate for the implementation of the broadcasting policy, set out in subsection 3(1), including conditions respecting :
- **Add a new subsection after subsection 9.1(1):**
  The Commission may, in the performance of its duties, amend an order made under this section as to its term or as to its conditions. The Commission may renew an order for a term not exceeding seven years on the conditions referred to in subsection (1) and may suspend or revoke the order.
- **Add a paragraph (e) to section 9.1(1) under paragraph (d):**
  (e) the expenditures set out in section 11.1 (1)
- **Amend section 18(1):**
  18 (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with
  (a) the issue of a licence, other than a licence to carry on a temporary network operation;
  (b) the suspension or revocation of a licence;
  (c) the establishing of any performance objectives for the purposes of paragraphs 11 (2) (b) and 11.1 (5) (b); and
  (d) the making of an order under subsections 9.1 (1) and 12 (2).

Avoid a race to the bottom:

- **Amend clauses 5(2)(a.1) and (h) of the bill** :
  5(2)(a.1) take into account the nature and diversity of services rendered by broadcasting undertakings, as well as their size and impact on the Canadian creative and production

ecosystem and any other difference between the undertakings that may be relevant in the circumstances;
5(2)(h) take into account the variety of broadcasting undertakings to which this Act applies.

- **Add a paragraph (b) to section 9.1(1) under paragraph (a):**
  (b) the proportion of programming to be devoted to particular genres in order to ensure diversity of programming;