

March 26, 2021

Scott Simms, M.P.
Chair, Standing Committee on Canadian Heritage
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Chair Simms,

Re: Submission from the Canadian Media Producers Association to the Standing Committee on Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*

The Canadian Media Producers Association (CMPA) welcomes the opportunity to make submissions to the Standing Committee on Canadian Heritage on Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* (Bill C-10).

A STRONG AND VIBRANT FUTURE FOR CANADIAN CONTENT

Canada's independent producers play a critical role in strengthening Canadian identity in the digital age and in establishing a vibrant content marketplace. The Canadian content production sector is also a key contributor to Canada's creative economy, creating more than \$3.22 billion in production activity and 62,700 full-time equivalent jobs in 2019.¹

Our uniquely Canadian industry creates jobs, contributes to GDP, trains and promotes our talent, tells our stories, asserts our cultural sovereignty, and is independent from the dominant market power of our neighbour to the south. Canada's cultural policy framework has helped to deliver both massive hits and culturally important content to domestic and international audiences such as the Emmy-

¹ *Profile 2019: An Economic Report on the Canadian Film and Television Production Industry*, published by the CMPA in collaboration with the Department of Canadian Heritage, Telefilm Canada, the Association québécoise de la production médiatique (AQPM) and Nordicity, p. 4 (*Profile 2019*). The Canadian content production sector does not include in-house broadcaster production (\$1.23 billion) or foreign location and service (FLS) production (\$4.86 billion).

winning *Schitt's Creek*, *Heartland*, *Hudson & Rex*, *Taken*, *True and the Rainbow Kingdom*, *This Hour Has 22 Minutes*, the Oscar-nominated *The Breadwinner*, and countless more.

Canada's broadcasting legislation is the backbone of our current vibrant domestic market. But, we are now at a crossroads. With effective modernized legislation in place, the globalization of content and the growth of digital technologies can be a huge opportunity for Canadians. However, if we fail to impose a new set of rules that empower our domestic industry, this same global digital evolution becomes an existential threat.

The CMPA welcomes the tabling of Bill C-10. It addresses important issues such as online broadcasting and a more inclusive system. But there are three significant omissions from the Bill that are necessary to ensure a healthy domestic market for the creation, production, and commercialization of Canadian content.

Accordingly, we ask that the government add or otherwise modify the following in Bill C-10:

- 1. An express power that would authorize the Canadian Radio-television and Telecommunications Commission (CRTC) to require streaming services and broadcasters to enter into codes of practice with independent producers;**
- 2. A policy objective that the Canadian broadcasting system include, to the maximum extent possible, effective ownership and control by Canadians; and**
- 3. A policy objective that maximizes the use of Canadian creative resources in Canadian programming.**

Finally, we also wish to take this opportunity to share concerns relating to the preliminary draft policy direction.

RECOMMENDATION #1: AUTHORIZE THE CRTC TO REQUIRE CODES OF PRACTICE

There is a massive imbalance of bargaining power between the Canadian creators and producers of content and the companies that acquire it. Our domestic broadcasting sector is highly concentrated and, as a result, broadcasters have significant leverage in their dealings with producers. Foreign web giants like Netflix and Amazon also wield tremendous negotiating power, tipping the balance even further away from the creators and producers of Canadian content. The inequality of bargaining power translates into an intellectual property (IP) rights grab: the deals being negotiated between producers, on the one hand, and streamers and broadcasters, on the other, are unfair and threaten the future of Canada's content sector.

IP is the driving force of the production industry. Producers invest significant amounts of time and money into developing a concept into a viable piece of IP so that it may be picked up by a broadcaster or streaming service. So, when producers are forced to surrender global IP rights in order to sign a deal then what they are really giving up is future revenues that would otherwise allow them to develop the next project, fairly remunerate Canadian creators, and capitalize their companies. As you heard from Valerie Creighton, President and CEO of the Canada Media Fund (CMF), Canadian creators and producers develop the IP but then when a streaming service like Netflix dictates deal terms they do not share in the reward:



*We hear of shows that are developed all the time in the country and then sold to Netflix. Netflix acquires all the rights. A recent show, Warrior Nun, was the top show on Netflix in 168 countries last summer. **It was developed here by a production company. Unfortunately, that company doesn't participate in the back end of that show or was able to retain the rights, just because of the way the system has developed.***²

Codes of practice would enable Canada's independent producers to negotiate deals where they are able to hold on to some of the IP rights in a project they have developed. Codes of practice simply refers to template structures, or a set of baseline terms, under which future individual negotiations can take place in good faith.

In 2020, the expert panel struck by the federal government to review Canada's communication legislative framework recognized the high levels of concentration in the media industry and concluded that the CRTC ought to be given the explicit jurisdiction to address the resulting imbalance of negotiating power via codes of practice (or terms of trade):

*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.*³

We agree.

Among other things, codes of practice would support key cultural and economic objectives:

- right imbalances in negotiating power by providing **all stakeholders** with an **equitable** share in the risks and rewards of a production;
- provide safeguards for **Canadian ownership and control of the content created and produced by Canadians**; and
- support a **virtuous cycle of investment** and reinvestment in Canadian companies and Canadian content.

We know from other jurisdictions that codes of practice help to ensure strong, vibrant domestic production industries with high-quality content. The domestic production sectors in the United Kingdom

² Valerie Creighton (CMF) to the Standing Committee on Canadian Heritage, Monday, February 22, 2021. Available online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/CHPC/meeting-16/evidence>.

³ Broadcasting and Telecommunications Legislative Review Panel, *Canada's Communications Future: Time to Act*, [https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/\\$file/BTLR_Eng-V3.pdf](https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf), p. 144.



(UK) and France owe a great deal of their successes to their own versions of codes of practice.⁴ In the UK, codes of practice were first introduced in 2005 and within eight years, the capitalization of the domestic independent production sector more than doubled, from approximately £1.3 billion to £3.1 billion. This change also helped to usher in one of the golden ages of British content because independent production companies were able to retain a meaningful portion of the returns for their IP and invest in future films and television shows, thereby creating the virtuous cycle of investment.

As European countries modernize their legislative and regulatory frameworks to implement the Audiovisual Media Services Directive (AVMSD),⁵ many are considering approaches that ensure domestic independent producers will be able to retain a portion of their rights when working with foreign web giants. For example, France has approved a framework under which the government will require streaming services to invest up to 25% of their domestic revenues in French content, of which either 66% of the television content must be done through independent producers to whom rights will revert within 36 months or 75% of the film content must be done through independent producers who will get their rights back after 18 months.⁶ This approach is currently being reviewed by France's media regulator prior to final approval but the new rules are expected to be enshrined by July 2021.

Yet here in Canada, the Canadian Association of Broadcasters (CAB), and Corus Entertainment (Corus) in particular, are arguing against codes of practice. They claim that domestic creators and producers "have enjoyed growth over the past decade as they benefited from the broadcasting system"⁷ and that this "amendment would further benefit producers who are now enjoying record profits at the expense of Canadian broadcasters, who are seeing record declines."⁸

⁴ Under section 285 of the *UK Communications Act*, every licensed public service channel (i.e. BBC, ITV, Channel 4, and Channel 5) must draw up, and from time to time revise, a code of practice setting out the principles it will apply when agreeing to terms for the commissioning of independent productions. These terms then became "Terms of Trade" agreements and were first introduced in the UK in 2003. Terms of Trade agreements essentially set out a framework of principles which govern the way the public service channels do business with independent production companies. Since 2010, the transfer of rights between independent producers and broadcasters in France are regulated by interprofessional agreements, which provide a general framework for the exploitation of rights. France's independent production quotas and protection of producer's rights apply to all models of channels including public, commercial, pay, cable, and theme channels.

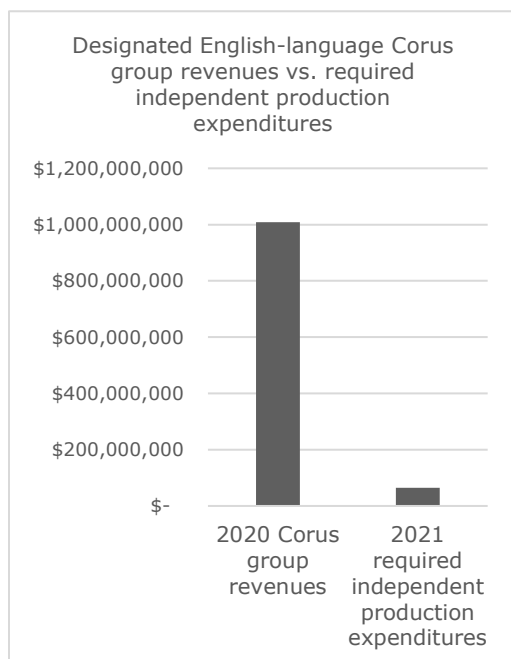
⁵ On November 14, 2018, the European Parliament and the Council of the European Union released Directive 2018/1808, also known as the Audiovisual Media Services Directive (AVMSD). Among other things, the Directive requires that each European Union (EU) member state implement domestic legislation to require streaming services to (a) ensure that at least 30% of their catalogue of audiovisual works is composed of "European works"; and (b) "ensure the prominence of those works." Additionally, the Directive permits EU member states to require streaming services to make financial contributions to the production of "European works." EU members states have until December 19, 2021, to report on their implementation of the Directive.

⁶ Nick Vivarelli, "Europe's New Rules of Engagement With Streamers Making Slow But Steady Progress," *Variety*, March 5, 2021. Available online: <https://variety.com/2021/digital/news/europe-avms-streamers-1234915013/>.

⁷ Kevin Desjardins (CAB) before the Standing Committee on Canadian Heritage, February 19, 2021. Available online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/CHPC/meeting-15/evidence>.

⁸ Troy Reeb (Corus) before the Standing Committee on Canadian Heritage, February 26, 2021. Available online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/CHPC/meeting-17/evidence>.





With respect, any declines experienced by Canadian broadcasters have nothing to do with fair deals for IP developed by creators and producers.⁹ As stated by the CAB, it is the online distribution of content that has changed things for Canadian broadcasters and “meant more competition of advertising dollars and for consumers’ time and attention [...] particularly from global internet conglomerates.”¹⁰ In any case, the regulatory framework has already been flexibly established to deal with this very issue: as broadcaster revenues decline so too do required contributions to certain types of programs, including independent productions, because they are based on a percentage of revenues for a designated group of television services. For example, the designated English-language Corus group is required to spend only 6.375% of its previous year’s gross revenues on independent productions.¹¹ Put another way, of the more than \$1 billion in revenues generated by this group in 2020,¹² only approximately \$64 million is required to be invested in independently-produced projects in 2021.

As well, the notion that Canadian independent production companies are somehow reaping record profits at the expense of Canadian broadcasters is simply not true. Without IP retention, the average profit margin for production companies is only 0.9%. However, production companies are on average more than ten times more profitable when they retain ownership of their content.¹³ Even so, this margin does not compare with that of Corus Television, which reported a segment profit margin of 46% for Q1 in 2021.¹⁴

The CRTC’s authority to require codes of practice is more important than ever as Canadian creators and producers work more and more with foreign web giants and as these services are required to contribute to Canadian programming. Codes of practice will ensure those contributions are meaningful and help to ensure a strong and vibrant domestic industry.

⁹ The CRTC’s most recent *Communications Monitoring Report* reveals that broadcasting television revenues were \$6.9 billion in 2018, down only 1% from 2017. Also, that while “there was a slow decline in [local] television revenues from 2014 to 2018: on average, total [local] television revenues decreased annually by 1.8%” but that “during the same five-year period, discretionary services still reported a slight average annual revenue growth of 0.6% per year, largely due to the more robust subscription revenues.”

¹⁰ CAB press release, “The Crisis in Canadian Media and the Future of Local Broadcasting – CMI Report Backgrounder.” Available online: https://www.cab-acr.ca/english/media/news/20/cmi_report_backgrounder.pdf.

¹¹ Rogers Sports and Media is only required to spend 3.75% of its previous year’s gross revenues on independent productions and Bell Media 5.625%.

¹² Aggregated annual returns for the designated English-language Corus group. Available online: <https://crtc.gc.ca/eng/industr/ann.htm>.

¹³ Nordicity (2016). *The Profitability of Canadian Media Producers*. Prepared for the CMPA.

¹⁴ Corus, First Quarter 2021 Report to Shareholders, page 8. Available online: https://assets.corusent.com/wp-content/uploads/2021/01/12051001/21q1_s_iuyinvfq_98dg21fsw.pdf.



For all of these reasons, we ask for additions to sections 9.1 and 10 of the *Broadcasting Act* to confirm the CRTC's express power to require codes of practice. For ease of reference, we enclose our proposed amendments in Appendix A.

RECOMMENDATION #2: MAXIMIZE CANADIAN OWNERSHIP AND CONTROL

Noticeably absent from Bill C-10 is the first policy objective in the *Broadcasting Act* today, namely, that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.”¹⁵ We understand that this objective was deleted to take into account the inclusion of foreign companies in the Canadian broadcasting system. However, with this deletion, there is no longer an anchor in our broadcasting legislation for the importance of Canadian ownership and control. The CMPA is strongly of the view that **the objective of effective Canadian ownership and control of the broadcasting system should be reinforced by explicitly extending it to Canadian programs.**

The ownership and control of content is significant in the face of the current global arms race for content. The U.S. web giants, and the studios commissioning foreign location and service (FLS) productions have leveraged “own and control” strategies brilliantly,¹⁶ such that U.S. streaming services are increasingly at the centre of global original content production. As a result, our vibrant domestic production industry is in danger of turning into a mere branch plant of the U.S.—one that is dictated by U.S. audience programming choices, that is overly dependent on the U.S. dollar and political environment, and that is overwhelmed by U.S. culture.

Viewed in this light, the longstanding policy counter-weight that our broadcasting system be effectively owned and controlled by Canadians, and the cascading policies and regulations that implement that important policy objective, need to be strengthened, not diluted or jettisoned altogether.

As an example, currently, the Canadian broadcasting system requires that—in order to count as a contribution to Canadian content—the content must be produced by Canadian companies.

The CRTC certifies content as “Canadian” where (among other indicia) the producer is Canadian and is responsible for monitoring and making decisions about the program, where the production earns a minimum of 6 of 10 points based on the key creative functions that are performed by Canadians, at least one of either the director or screenwriter and at least one of the two lead performers are Canadian.¹⁷ For the purposes of the Canadian Production Tax Credit (CPTC), the Canadian Audio-Visual Certification Office (CAVCO) requires that only the Canadian production company (or a

¹⁵ *Broadcasting Act*, S.C. 1991, c. 11, s. 3(1)(a).

¹⁶ FLS productions are feature films and television programs filmed in Canada by foreign producers or by Canadian service producers. Netflix agreeing to spend \$500 million on production in Canada and Disney shooting *Spin* in Toronto's High Park are all examples of FLS production. In comparison, Canadian or domestic production consists of feature films and television programs made by Canadian production companies or Canadian broadcasters that showcase Canadian creators, talent, and ideas. In order to be considered Canadian, these projects must be certified as Canadian content by CAVCO or the CRTC.

¹⁷ https://crtc.gc.ca/eng/cancon/c_cdn.htm



“prescribed person”) be the full copyright owner of a program for all commercial exploitation purposes.¹⁸

And there are good reasons for these requirements.

First, a significant amount of financing for Canadian content production comes from government funding, including the CBC, federal and provincial tax credits, and the CMF.¹⁹ The Canadian government does not fund the production of Canadian content in order for the value of it to be handed over to foreign companies.

In addition, **Canadian ownership and control of programs means that Canadians can reap the benefits of content they create and that profits are returned to Canada, creating a virtuous cycle of content production.** This virtuous cycle fuels a healthy domestic content industry.

Canada fought hard to exempt the cultural industries in the recent renegotiation of the North American Free Trade Agreement (NAFTA), now the Canada-United States-Mexico Agreement (CUSMA). As Prime Minister Trudeau said, “waiving the exemption for cultural industries would be tantamount to giving up Canadian sovereignty and identity.”²⁰ Guaranteeing that Canadians effectively own and control the Canadian broadcasting system, and the content that is deemed to be certified Canadian content, is the ultimate assertion of our cultural sovereignty. It allows us to tell uniquely Canadian stories to ourselves and the world and truly expresses the diverse voices of Canadian creators, without undue interference from foreign interests.

The CMPA appreciates that there may need to be a more flexible approach to regulation as we shift from a closed Canadian broadcasting system (which is entirely owned and controlled by Canadians) to an open Canadian broadcasting system (where foreign streaming services will be participating). But in order to take full competitive advantage of an open system, legislators, policymakers, and regulators must ensure that Canadians own, and are thus able to reap the benefits of, the programs created, developed, and produced by Canadians. While we welcome FLS production and the opportunities it provides in terms of training and jobs, it is simply not the same as a homegrown industry. In any case, FLS production is already booming—no regulatory intervention, or further incentivization, is necessary.²¹

¹⁸ Generally, (except in the case of a treaty co-production), in order to be certified as a Canadian production, CAVCO requires that only a Canadian production company (or a prescribed person) can be a copyright owner of the production for all commercial exploitation purposes for the 25-year period beginning when the production is completed and commercially exploitable. No other person or entity can place any restriction on the ability of the production company to exercise full copyright ownership rights in the production during this period. <https://www.canada.ca/en/canadian-heritage/services/funding/cavco-tax-credits/canadian-film-video-production/application-guidelines.html#a4>.

¹⁹ https://cmpa.ca/wp-content/uploads/2020/04/CMPA_2019_E_FINAL.pdf

²⁰ Mahan Abedi, “Trudeau says no NAFTA without cultural exemption — is it really that important?” Global News, September 5, 2018. Available online: <https://globalnews.ca/news/4428229/nafta-cultural-exemption-canada/>.

²¹ FLS production has been the key driver of growth in the film and television production industry in Canada over the last decade. Between 2013/14 and 2018/19, FLS production accounted for 88% of growth (\$3.03 billion of \$3.46 billion). See *Profile 2019* at page 6.



For all of these reasons, Canada's broadcasting policy must codify a requirement that the broadcasting system shall maximize effective ownership and control by Canadians. For ease of reference, we enclose our proposed amendments to section 3(1)(a) in Appendix A.

RECOMMENDATION #3: MAXIMIZE CANADIAN CREATIVE RESOURCES IN CANADIAN PROGRAMMING

In addition to Canadian ownership and control, another essential element of Canadian programming is Canada's creative talent. Canadian writers, directors, performers, and other creators work with Canadian producers to create uniquely Canadian content filled with stories, views, and expressions as diverse and varied as our country.

While we agree that an amendment to section 3(1)(f) is needed, we propose that it ought to maintain the current commitment to "maximum use, and in no case less than predominant use, of Canadian creative and other resources" in the creation and presentation of Canadian programming (as opposed to all programming due to the recognition of non-Canadian broadcasting undertakings in our system).²² Without these important changes, Bill C-10 may inadvertently weaken the importance of Canadian creative talent in Canadian programming.

Simply put, **Canadian creators and producers are both integral to the definition of Canadian programming.**

PRELIMINARY DRAFT POLICY DIRECTION

The CMPA is also providing over-arching comments on the preliminary draft policy direction released by the Minister of Canadian Heritage. We are deeply concerned with the emphasis on de-regulation and incentivization as well as the following directions to the CRTC:

- An examination of the definition of Canadian programs for the purposes of broadcasting undertakings' regulatory obligations, particularly in order to make the definition "flexible" as well as simply "encourage" the contribution of Canadians in key creative positions and "support" the Canadian ownership of intellectual property (section 7). This language will necessarily dilute the current requirements in the definition of Canadian programming for Canadian ownership and talent. These requirements ought to be maintained to ensure a strong and vibrant domestic production sector where Canadians are able to create and own their own programming.
- The implementation of a new regulatory framework must include a transition period to ensure stability in the system (section 14). As regulatory obligations for online undertakings are introduced, it must first be clear that these contributions are flowing before any changes are

²² We wish to note that the Writers Guild of Canada (WGC), Directors Guild of Canada (DGC), and Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) support these proposed amendments to 3(1)(f).



made to the current system. Otherwise the broadcasting and production sectors may be severely harmed.

The CMPA understands that this policy direction is a preliminary draft and that amendments are expected. We look forward to further discussing our concerns with government as this process continues.

CONCLUSION

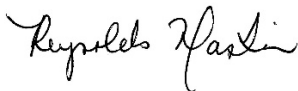
The CMPA supports the passage of Bill C-10, but asks that the government make the following amendments to this landmark bill to ensure a strong and vibrant future for Canadian content:

1. **An express power that would authorize the CRTC to require streaming services and broadcasters to enter into codes of practice with independent producers;**
2. **A policy objective that the Canadian broadcasting system include, to the maximum extent possible, effective ownership and control by Canadians; and**
3. **A policy objective that maximizes the use of Canadian creative resources in Canadian programming.**

While the CMPA is submitting proposed wording for amendments to Bill C-10 based on our recommendations, we are willing to consider other language in order to achieve these vitally important outcomes.

We thank the Standing Committee for this opportunity to provide our written submissions on Bill C-10. We welcome any questions or comments you may have about our recommendations.

Sincerely,



Reynolds Mastin
President and CEO

The CMPA is the national trade association for English-language independent producers. We represent more than 500 companies engaged in the development, production, and distribution of content made for television, film, and digital platforms. The CMPA works to promote the continued success of the Canadian production sector and to ensure a future for the diverse content made by Canadians for both domestic and international audiences.



Appendix A

Proposed Amendments to BILL C-10 from the Canadian Media Producers Association (CMPA)

The following subsection shall be **added** to section 3:

3 (1) It is hereby declared as the broadcasting policy for Canada that

- (a) the Canadian broadcasting system shall include, to the maximum extent possible, effective ownership and control of broadcasting undertakings and programs by Canadians;

The following subsections shall be **added** to sections 9.1 and 10:

Conditions

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

- 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 deal terms and conditions for the benefit of Canadian independent production companies;

Regulations generally

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

- 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 deal terms and conditions for the benefit of Canadian independent production companies;