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No Netflix Tax? (Sort Of...): The Broadcasting and Telecommunications Legislative Review Panel Releases Its Final Report

By Stephen Zolf

On January 29, 2020, the Broadcasting and Telecommunications Legislative Review (BTLR) Panel submitted its final report to the government on modernizing Canada's communications legislation. By way of brief history, in June 2018, the Ministers of Innovation, Science and Industry and Canadian Heritage appointed the Legislative Review Panel with a mandate to review Canada's communications legislative framework. The Panel was asked to recommend changes to the legislative framework "to maximize the benefits the digital age brings to our citizens, artists and creators, communications industry, and economy as a whole." The BTLR Panel conducted a year-long consultation process and issued an interim Report ("What We Heard") on these deliberations in June 2019.

The BTLR Final Report's 97 recommendations are far too vast to address in a single blog post. This post will focus on the Panel's proposed changes to the *Broadcasting Act*. The Panel has put forward a broad-sweeping set of proposals to rework the legislative "plumbing" in the communications sector with a view, as it describes, to "better prepare the country for an era of constant and rapid technological change."

We will leave for a deeper dive in another post the Panel's recommendations on public and private support mechanisms for creators, its recommendations on the role of the CBC, proposals on copyright and piracy and the new framework for the creation of "diverse, accurate, trusted, and reliable news." Another post will assess the proposals for the telecom sector, including consumer rights, privacy and online safety, which comprise over one-third of the BTLR Report's total recommendations.

The scope of a revised Broadcasting Act

The BTLR Report recommends that the *Broadcasting Act* should be amended to apply to an expanded group of "media content undertakings" involved in the creation and distribution of media content. Canadians now accessing media content are "agnostic" as to the means of delivery and the nationality of the content provider. The inference made from this premise is that new legislation should be similarly non-discriminatory and therefore sweep within the scope of the *Broadcasting Act* and the jurisdiction of the CRTC "...all those providing media content services to Canadians - whether online or through conventional means, whether foreign or domestic, whether or not they have a place of business in Canada..."

The Report expressly acknowledges that "at the heart of our recommendations is a new model which recognizes the realities of a borderless, online world." "For greater certainty" the government should amend the *Broadcasting Act* to clarify that foreign internet streaming services that generate revenues in Canada would be subject to the regulatory ambit of a newly renamed CRTC, the "Canadian Communications Commission" (CCC). And the Panel does not stop there. It recommends that new communications legislation should recognize the fact that news is increasingly being distributed online in audio, video and alphanumeric formats. Thus, the lens of CRTC regulation should be widened to oversee the right of Canadians "to live a connected life: to connect with ideas, opinions, content, news and information, people, cultures, services and economic opportunities locally, nationally and globally. *And to do so in a trusted environment.*"

On this basis, the Panel has put forward perhaps its most controversial proposal: to expand the scope of the *Broadcasting Act* "to include alphanumeric news content distributed by means of telecommunications." In the Panel's view, the CRTC must be able to monitor and address issues concerning news content made available by means of telecommunications, *regardless of format*. This would include online versions of

newspapers. Not surprisingly, this proposal has engendered much discussion and not a little controversy (for example, see here).

A new regime of Canadian content obligations

The Panel envisages an expanded regulatory environment in which all “media content undertakings” would be obligated to support Canadian content, as measured by financial commitments and steps to ensure the “discoverability” of Canadian content. CRTC (or CCC) licensing would continue to apply to “traditional” media content undertakings (i.e. “broadcasters”). Further, all “media content undertakings” would be subject to a new registration requirement (unless otherwise exempt).

Canadian content contribution obligations would vary as a function of the specific type of activity that a “media content undertaking” performs. Notably, the CRTC would not be permitted to impose the same obligations on providers of alphanumeric news content that it could on audio or audiovisual content providers. This is best illustrated in a slightly modified version of a table included in the Panel’s Report (see Figure 3-7):

Activity carried on by a Media Content Undertaking

Financial obligations

“Discoverability” obligations

Media Curation -

provision of a service for dissemination of media content over which it has editorial control (includes “alphanumeric news services”)

Spending requirements (or a levy where spending requirements are not appropriate)

The CRTC would not have authority to impose spending obligations on service providers that disseminate online versions of newspapers

Online versions of newspapers should be entitled to receive support through levies imposed on other media content undertakings

Yes

The CRTC would not have authority to impose spending obligations on service providers that disseminate online versions of newspapers

Media Aggregation -

provision of a service for aggregation and dissemination of media content from media curators (including cable/satellite “BDU”s)

Primary obligation:

Levy

Yes (through requirements to provide links to websites of Canadian sources of accurate, trusted and reliable sources of news; and prominence rules to ensure visibility and access to such sources of news)

Media Sharing -

provision of a service enabling users to share amateur or professional media content (e.g. YouTube, Facebook and other sharing platforms)

Primary obligation:

Levy

Yes (through requirements to provide links to websites of Canadian sources of accurate, trusted and reliable sources of news; and prominence rules to ensure visibility and access to such sources of news)

Where is the Netflix Tax?

The BTLR Panel Report expressly rejects the so-called 'Netflix Tax' (i.e., charging consumers an extra levy on subscriptions to streaming services). However, the Panel recommends that all "media curation undertakings," which would include streaming services such as Netflix, must devote a portion of their program budgets to Canadian programs. But the Panel cleverly leaves it to the streaming services to decide whether any additional Canadian content programming costs would be passed through to consumers. Janet Yale, the Panel Chair, explained that, under its proposed approach, a streaming service would not necessarily have to *increase* its Canadian program budget (and, therefore, potentially increase the retail subscription price to consumers); rather, it would merely need to ensure that a portion of the existing budget is devoted to discoverability of Canadian content (see discussion here).

The role of ISPs in the broadcasting system

The BTLR Report neatly sidesteps a key "third rail" issue by excluding "electronic communications service providers" (ECS) such as telecom carriers and Internet Service Providers (ISP) from the scope of the proposed new Cancon requirements. The ISP community was adamantly opposed to proposals that ISPs should contribute to Canadian content and had suggested that the costs of any such regime would likely have been passed on to consumers.

The BTLR Panel clearly demarcated the role of ISPs as that of performing a "telecom" function that does not contribute to the support of cultural policy objectives. The Chair of the Panel described this as adherence to the principle that "carriage supports carriage" and "content supports content."

A regulatory "get out of jail free" card: legislative exemption power

The Panel acknowledges the potential for "overreach" of its proposed new model for online media content undertakings. It therefore recommends that the CRTC have the power to exempt any entity from both registration and regulation "where regulation is unnecessary or inappropriate to achieve cultural policy objectives." An undertaking that falls below a certain revenue threshold or has a specialized content or format (e.g., gaming services, self-publishing, blogs and podcasts) could be eligible for a blanket exemption from contribution and/or registration, if the "CCC" deems it appropriate.

Has the Panel been too ambitious (or "overreaching," to use its own terminology)? It remains to be seen how such a broad-sweeping set of recommendations will get stickhandled in a minority Parliament.

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