IN THE WEEDS: DEFINING A CANADIAN PROGRAM FOR THE DIGITAL AGE

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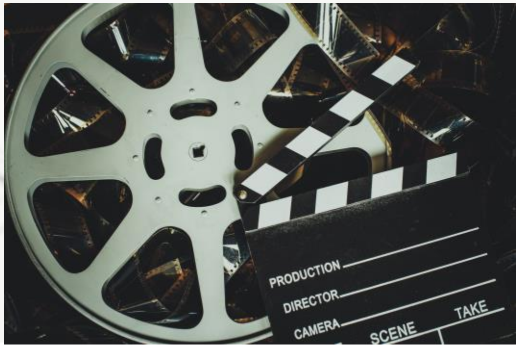
What is “Canadian Content”

- For about fifty years one set of rules, somewhat differently applied in different circumstances, has underpinned the entire Canadian subsidy system: the definition of what constitutes a Canadian program.

- There are, in fact, several definitions, administered by different bodies for different purposes

- Currently before Parliament is Bill C-11, the *Online Streaming Act*. Part of C-11 asks the CRTC to reconsider the definition – and sets out specific and important questions



Why do we care about Canadian content?

- Why do we have the tax credits, subsidies and regulatory obligations?
  - Our market is too small to support high value production costs on its own
  - We like an open border but want to make sure there is a Canadian presence
  - Cultural policy wants Canadian stories
  - Industrial policy wants jobs for Canadians
  - Economic policy wants a GDP lift
  - Competition policy wants a diversity of voices

Do Canadian programs still matter in a globalized world?

- Are the policy goals still relevant and necessary?
  - Cultural, industrial, economic, competition
    - Do we need Government support to meet those goals?
      - Can the market work this out? (Has the market worked this out?)
      - How much regulation is too much?
- How do we support the partnerships Canadian businesses have made with the global production community without giving up our ability to tell our own stories?
- If we continue to want "Canadian" programs in the mix, how do we decide what Canadian means?

A New Take for Canadian Programs?

- Should Canadians own copyright, control exploitation and retain a portion of a program's value?
- Should a Canadian Producer control the production?
- Should key creative positions be primarily held by Canadians?
- Should the costs of a program be spent on Canadians and for Canadian services?
- Should the program subject matter be visibly Canadian?
- Should independent producers play a special role? (And what is an independent producer?)
- Should unrepresented and equity seeking groups play a special role?

How big a change

- Some of these questions are addressed by the current set of definitions
- Some raise brand new issues
- Much controversy underlies any possible changes
- There will be a vigorous public debate, and likely public hearings before this is all resolved
- The results will affect all professional work in production, broadcasting and streaming in Canada – both financially and creatively

Before we start who/ what is a Canadian?

- A Canadian individual is a Canadian citizen or a permanent resident
- A permanent resident is someone who has been given permanent resident status by immigrating to Canada but is not yet a Canadian citizen.
- A person in Canada temporarily, like a student or foreign worker, is not a permanent resident
- A Canadian corporation is a taxable Canadian-controlled corporation based on the requirements of the Investment Canada Act

Today's Certification System – Many Paths

- Path 1: The Canadian Audio Visual Certification Office (CAVCO), a part of the Department of Canadian Heritage, operates the main certification system
- Path 2: The CRTC operates the system currently used by Canadian broadcasters for programs they produce and for BDU contributions to Canadian programming
- Path 3: Telefilm Canada, an independent Crown corporation, operates the system used to certify Co-productions under Canada's many co-production treaties with other countries

- We will deal with each of these in turn

Path 1: Tax Credits - Eligibility

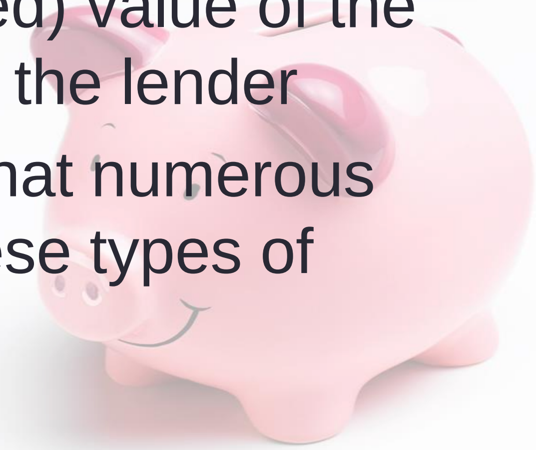
- Programs certified under the CAVCO system and as Treaty Co-productions by Telefilm Canada are eligible for Canadian Content Tax Credits (CPTC)
- Canadian programs and Co-ventures that ONLY have CRTC certification are NOT eligible for Cancon Tax Credits
- BUT, they are eligible for the production service tax credits (PSTC)

Path 1: Tax Credits

- The federal Canadian Content Tax Credit (CPTC) is currently 25% of qualified labour expenditures.
- In many Canadian provinces there are provincial tax credits that can stack on top of the federal credit
  - For example, the Ontario credit (OFTTC) is 35% of eligible Ontario labour expenditures
- Added up, it’s a significant benefit to film and television producers

Path 1: How Tax Credits Work

- When a production is complete, the prodco establishes a year end, audits the cost of the production and files a tax return, claiming the appropriate credit
- Because these credits are fully “refundable” the Canada Revenue Agency will issue payment for the full amount
- To cash flow the actual cost of a production, the producer generally borrows the (slightly discounted) value of the credit, and assigns the CRA payment to the lender
- Such payments are sufficiently secure that numerous Canadian banks compete to provide these types of interim financing loans



Path 1: CAVCO Certification

Four Pillars:

- Production Control
- Copyright and distribution rights
- Creative positions
- Production spend

PRODUCTION CONTROL

Production Control

- To be certified as a domestic Canadian production, everyone receiving a producer credit must be Canadian.
- The producer must be the central decision-maker, from the development stage until the production is ready for commercial exploitation.
  - For example, the producer must hold final decision-making authority over both creative and financial aspects of the production
- Note: There are some complex technical exceptions for certain producer functions

Production Control

- What policy goal(s) is the Production Control Pillar trying to support?
- Is it still relevant?
- Does it work?

COPYRIGHT AND DISTRIBUTION RIGHTS

Copyright and Distribution Rights: The first part

- Unless a production is a treaty coproduction, only the Canadian production company can be a copyright owner of the production for all commercial exploitation purposes, for the 25-year period from when the production is completed
- This is verified by CAVCO through its review of documents such as exploitation, financing and chain-of-title agreements.

Copyright and Distribution Rights: The second part

- The prodco (or a prescribed person) must control the initial licensing of all commercial exploitation rights related to the 25-year period beginning when the production is completed and commercially exploitable
- There must be an agreement in writing, with either:
  - a Canadian distributor or
  - CRTC-licensed broadcaster

to have the production shown in Canada within the first two years after it is completed and commercially exploitable

Copyright and Distribution Rights

- What policy goal(s) is the Copyright and Distribution Rights Pillar trying to support?
- Is it still relevant?
- Does it work?

KEY CREATIVE POSITIONS

Key Creative Positions: The Points

- In the famous points test, a production must achieve a minimum of 6 out of 10 points to be considered Canadian under both CAVCO and CRTC rules.
- The writer gets 2 points; the director gets 2 points; either the writer or the director must be Canadian
- The highest paid performer gets 1 point; the 2nd highest paid performer gets 1 point; one of these two must be Canadian
- For live action productions the other 4 points go to the Director of Photography; the Art Director; the Music Composer and the Picture Editor
- Animation is slightly different

Key Creative Positions

- What policy goal is the Key Creative Positions Pillar trying to support?
- Is it still relevant?
- Does it work?

Key Creative Position: Criticisms

- The points system has often been criticized because it is easily possible to take a minimalist approach
- This is done by having, say, an American writer, lead performer and composer
- The 6 points would then be achieved with a Canadian director, supporting lead, director of photography, art director and picture editor
- For this reason, many sources of Canadian subsidy, such as the Canada Media Fund not only require that a program be certified, but that it achieve a full 10 out of 10 creative points

PRODUCTION SPEND

Production Spend

- At least 75% of all costs for production services (subject to some exclusions) must be payable to Canadians; and
- At least 75% of the total of all costs for post-production, including laboratory work, sound rerecording, sound editing and picture editing, must be incurred for services provided in Canada.

Production Spend

- What policy goal is the Production Spend Pillar trying to support?
- Is it still relevant?
- Does it work?

Path 2: Certification at the CRTC

- A way for Canadian broadcasters to log Canadian content to meet their regulatory obligations to the CRTC
- May be expanded to obligations of streamers and play a significantly more important role, particularly if BDU-like obligations are placed on streamers

Path 2: Certification at the CRTC

- Somewhat more lax than CAVCO certification and does not qualify a production for Canadian content tax credits (CPTC)
- However, these productions DO qualify for the Film or Video Production Services Tax Credit (PSTC) at 16% of qualified labour expenditures (vs 25% for the CPTC). And there are similar Tax Credits in many Provinces.

Path 2: Certification at the CRTC

- **s.3(1)(e)** each element of the Canadian broadcasting system shall contribute in an appropriate manner **to the creation and presentation of Canadian programming**
- Currently, BDUs (cable, satellite) are required to contribute ˜5% of their gross revenues derived from broadcasting activities to **Canadian programming**
- 80% goes to Canada Media Fund (CMF) and the remainder to Certified Independent Production Funds (CIPFs)
- Amounts to roughly $200 m/year to CMF, but on the decline b/c of cord-cutting

Path 2: CRTC Definition of "Canadian program"

- producer must be Canadian, central decision-maker from development to ready for commercial exploitation
- 6/10 points
- 75% production costs paid to Canadians; 75% of post-production and lab costs paid for services provided in Canada by Canadians

- Certified under eligible program category

A hint of a *mildly* different approach?

- Bill C-11 appears to ask the CRTC to consider a largely status quo approach (such as whether key creative positions should be held by Canadians).
- But there is also this: "**Whether a program should further Canadian artistic and cultural expression**"
- What does this mean? Does it lead to thinking about story, or simply to creative means?
- We won't know until the CRTC has an chance to do the job assigned to it under the new Act

Are Indigenous and equity- and sovereignty-seeking communities adequately considered?

- This is an excellent question with no obvious answer
- Many would argue that the proper place for dealing with these communities is in the targeted subsidy system
- In a revised points system could there be a reward/ incentive/ requirement for being a member of and/or working with and/or represented onscreen these communities?
- How would that work?
- What else?

Path 3: Certifying Treaty Co-productions

- Canada has official co-production treaties with roughly 60 countries (but not the United States)
- Many have been in place for decades
- Each of the signatory countries has a certification office; Canada's is housed in Telefilm Canada
- For a co-production to be certified, the certification office of each country must sign-off
- Once approved the co-production is entitled to "national treatment" in each country
- And that includes access to the Cancon Tax Credits (but only on the Canadian side of the production)

How do they work?

- The main driver is the source of financing
- The treaty specified minimum from each country ranges from 20%-30% of the budget
- If for example, 30% of the financing is coming from one party to the co-production, say France, it is considered a "70/30 Canada-France Co-production"
- With that principal established, the general idea is to have the copyright ownership, the per country budget spend, the split of creative and key crew roles, the production activity allocation (shooting, post etc.) and the distribution rights all divided according to the 70/30 formula
- It is definitely not an exact science, but a workable one

THAT'S NICE - THANKS. WHAT'S MISSING?

What is missing?

- We have no requirement that Canadian programs tell a Canadian story
- Many certified programs have no Canadian setting or symbols and are primarily made for a US audience
- On the flip side, many ‘not-certified’ programs *feel* Canadian
- By contrast, the system in the UK focusses its point system on the setting and content of the story; there are few/no ownership, distribution or production control rules
- So, it would appear that *The Crown*, a series owned and controlled by Netflix, would qualify as UK content
- Is this good or bad? Does any of it matter anymore?

Where do we go from here?

- Once Bill C-11 is passed, the CRTC will take over to make all of the detailed decisions the Act requires
- There be at least one major public hearing and perhaps several
- The Commission has a long history of welcoming public participation
- Once the process starts, there will be a DM@Xtra event which will provide a tutorial on how to intervene effectively
- The questions we are asking today are “live”
- The answers are not at all clear and if you wish, you have an opportunity to make a real impact.

The Big Questions

- Should Canadians own copyright, control exploitation and retain a portion of a program’s value?
- Should a Canadian Producer control the production?
- Should key creative positions be primarily held by Canadians?
- Should the costs of a program be spent on Canadians and for Canadian services?
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