

July, 2016

Department of Canadian Heritage Consultation:
Canadian Content in a Digital World

Stakeholders in broadcasting, publishing and other cultural industries should consider participating in a wide-ranging series of consultations recently initiated by the federal Minister of Canadian Heritage, Mélanie Joly, to obtain input on “how to strengthen the creation, discovery and export of Canadian content in a digital world.”¹ This proceeding is expected to result in significant changes to the legislation and policies that comprise the “tool-kit” developed over generations and used to promote Canadian cultural products, such as TV programming, films, books, magazines, and music.

A short “Pre-Consultation Paper”² stated that:

- Culture is at the core of creativity and innovation;
- Federal support, specifically the “cultural tool-kit”, is affected by fast-paced technological change. Drivers for such changes are that: the environment is more fluid (traditional lines between “creator” and “user” are blurring); new players and intermediaries have emerged; the world is increasingly interconnected and open; and digital consumption of content is affecting user expectations;
- With the help of an Expert Advisory Group whose work will be done from June, 2016 to January, 2017, the Ministry of Canadian Heritage will lead public, stakeholder and online consultations on strengthening Canadian content creation, discovery and export in a digital world; and

¹ Press release posted at: <http://news.gc.ca/web/article-en.do?nid=1056259>

² April 22, 2016. Pre-consultation paper available at <https://www.canada.ca/en/services/culture/consultations/pre-consultation.html>.

- Pre-consultations will be held to better define the scope of the consultations. At the end of that process, the Department of Canadian Heritage “will develop a scoping document to guide the consultations”.

The members of the Expert Advisory Group were selected on the basis of “their personal experience, expertise and ability to generate and inspire innovative ideas.” They represent a cross-section of the Canadian arts and culture sectors, including English-speaking and French-speaking film, TV and music producers, broadcasters and representatives of organizations such as Ryerson University, the National Film Board, TV Ontario, and the Society for Arts and Technology.

As discussed in the *Globe & Mail*, the review’s scale is the largest since the 1991 amendments to the *Broadcasting Act*, which were enacted “when no one could foresee the arrival of YouTube, Netflix and iTunes.”³ The review was not part of the Liberal’s 2015 election platform, but was initiated by Minister Joly, who said that, as a product of her generation, she “thinks about digital technology first and foremost”.

Minister Joly told the *Financial Post* that although “everything is on the table”, “there will be no Netflix tax.”⁴ With this statement the Minister rejected one of the suggestions that had been floated by various Canadian content producers: a tax on non-Canadian, Internet-delivered services that could generate revenues to support Canadian-content, as one way that existing CanCon rules could be adapted to the digital environment. These suggestions were made during the CRTC’s 2013-2015 “Let’s Talk TV” proceeding.

The Macdonald-Laurier Institute has recently published a paper on copyright that may contribute to this discussion. Written by Richard C. Owens, an intellectual property and technology law specialist, the paper argues that copyright protection should be “of primary concern for a department that is charged with defending the interests of

³ “‘Everything’s on the table’: Changes to Canada’s cultural policies would be the first major overhaul in decades”, *Globe & Mail*, April 23, 2016: <http://www.theglobeandmail.com/news/national/exclusive-canadian-heritage-announces-sweeping-canconreview/article29722581/>.

⁴ “‘No Netflix tax’, but the future of Cancon is up for debate, says Heritage Minister Melanie Joly”, *Financial Post*, June 13, 2016: http://business.financialpost.com/news/no-netflix-tax-but-the-future-of-cancon-is-up-for-debate-says-heritage-minister-melanie-joly?_lsa=ad05-fdc2.

Canada's artists, musicians and authors".⁵ Owens proposes a number of copyright-related recommendations for the Department of Canadian Heritage to consider, and it is possible that some of these may be taken up by participants in the Heritage consultation. For example, Owens suggests that recent jurisprudence relating to the "fair use" of published works by educational institutions has reduced the economic incentives for educational publishers to publish original Canadian materials, threatening jobs in this sector. Owens supports the implementation of the Trans-Pacific Partnership treaty and the extension of basic periods of copyright protection, to reflect the periods offered by Canada's major trading partners. In his final recommendation, Owens states that the Heritage Minister should "look to copyright as a significant pillar of cultural and economic policy and actively champion a stronger [*Copyright*] Act."⁶

Although it is impossible to predict the specific potential outcomes of the ongoing Heritage consultation, the proceeding offers the opportunity for stakeholders with a wide range of perspectives to be involved in updating the federal government's cultural tool-kit for the digital environment. Although there will be no "Netflix tax", changes could include amendments to the *Broadcasting Act*, the *Copyright Act*, the *CRTC Act*, the *Foreign Publishers Advertising Services Act*, the *Investment Canada Act*, the *Telecommunications Act*, the *Radiocommunication Act*, and the various *Income Tax Act* provisions that support the creation and marketing of Canadian content.

Please address any questions about the Canadian Heritage consultation, or any related matters to Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

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⁵ "How to really support Canadian culture: Heritage and the copyright brief", p. 1. July 2016, 20 pages, posted at http://www.macdona-ldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf.

⁶ Owens, p. 16.