

Entertainment Law

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#CreativeCanada: A Vision for Canada's Creative Industries

On September 28, 2017, the Honourable Mélanie Joly, Minister of Canadian Heritage (the “**Minister**”), delivered a speech in Ottawa entitled *#CreativeCanada: A Vision for Canada's Creative Industries*. The speech, streamed live on Facebook, outlined the Government of Canada's vision for Canada's cultural and creative industries in a digital world. The Minister described a new policy approach, called *Creative Canada*, for Canada's creative sector aimed at promoting the consumption of Canadian culture at home and abroad at a time when digital technologies are rapidly transforming Canada's cultural landscape. The Minister stated Creative Canada's efforts will be focused on (i) investing in Canadian creators and their stories; (ii) discovering and distributing Canadian content at home and abroad; and (iii) strengthening public broadcasting and supporting local news.

The highlight of the Minister's speech (described in further detail below) was the announcement of an agreement (the “**Netflix Agreement**”) between the Government of Canada and Netflix Inc. (“**Netflix**”) under which Netflix agreed to establish “Netflix Canada”, a new permanent Netflix film and TV production facility in Canada, and to invest a minimum of CDN\$500 million over five years in original productions in Canada for distribution across the Netflix world digital platform. Notwithstanding the many submissions by Canada's broadcasters and other cultural businesses for a so-called “level playing field” with non-Canadian internet streaming services such as Netflix, the government declined to introduce any new Canadian taxes or other Canadian financial contribution requirements on non-Canadian owned digital services which target Canadian consumers, such as Netflix, YouTube, Apple or Amazon Prime. The government

instead plans to seek commitments from, and pursue agreements with, these global internet companies to invest in Canadian production and distribution and ensure these online players contribute to Canadian programming and talent in both official-language markets.

Background to Creative Canada

Creative Canada initiatives were preceded by the *Consultations on Canadian Content in a Digital World*, a public consultation process launched in September 2016, concerning the current system of “Canadian content” entertainment industry incentives (the “**Consultations**”). The Consultations were conducted by Ipsos Public Affairs (“**Ipsos**”) on behalf of the Department of Canadian Heritage (“**Heritage**”) and involved a multi-modal approach that provided several different avenues for Canada's creators, cultural stakeholders and citizens to engage in a dialogue with Heritage. On February 21, 2017, Ipsos released its Consultation Report entitled *What we heard across Canada: Canadian Culture in a Digital World*. The Consultation Report summarized the Consultations and highlighted certain key themes.

Creative Canada Highlights

Among the highlights of Creative Canada are the following initiatives:

1. Netflix Agreement

The Netflix Agreement, concluded under the *Investment Canada Act* (the “**ICA**”), will see Netflix create “Netflix Canada”, its first physical production facility outside the U.S. According to the joint press release issued by Heritage and Netflix, Netflix has undertaken to:

- Establish a permanent, multi-purpose film and television production presence in Canada;
- Invest at least CDN\$500 million over the next five years in original productions in Canada that

will be distributed across Netflix's global platform. As part of this investment, Netflix will continue to work with Canadian producers, production houses, broadcasters, creators and other partners to produce original Canadian content in both English and French;

- Support Canadian French-language content on the Netflix platform through a market development strategy for Canada. Centered on a CDN\$25 million investment, this strategy will include "pitch days" for producers, recruitment events and other promotional and market development activities; and
- Ensure Canadian film and television productions are highlighted and promoted on the global platform of Netflix.

The press release did not elaborate on what constitutes "original productions in Canada". To date, Netflix has filmed its Netflix original productions on location in Canada (e.g., *A Series of Unfortunate Events* shot in Vancouver), and has also licensed productions and partnered with Canadian producers and broadcasters on "Canadian content" productions (e.g., *Alias Grace* produced by Halfire Entertainment, which is broadcast in Canada by the Canadian Broadcasting Corporation).

In her speech, the Minister emphasized the agreement with Netflix was only the first agreement with a foreign-owned digital platform operating in the Canadian market. The Minister has begun meeting with other foreign players "to establish ties and bring them to the table" with a view to negotiating similar agreements that would support the creation of content that showcases Canadian talent, culture and history.

2. Increasing Federal Contribution to the Canada Media Fund (CMF)

The CMF supports the development, production, and promotion of Canadian-owned and controlled television and digital media content. The CMF is supported by a combination of annual investments from the Government of Canada, along with contributions (as a percentage of revenues) from CRTC-licensed cable, satellite, and IPTV television service providers. As Canadians have increasingly moved towards watching content online, the contributions from the Canadian cable and satellite sector to the CMF have begun to decrease in proportion to declining revenues. To

maintain the current level of annual funding of the CMF, beginning in 2018 the government will increase its annual contributions to the fund by unspecified amounts and for an unspecified time period.

3. New Funding for Creative Export Strategy

A new investment of CDN\$125 million over five years will support a new Creative Export Strategy, with the stated goal of opening up new foreign markets and opportunities for creative entrepreneurs in Canada. The strategy includes the development of new tools to facilitate access to information on federal export programs, the targeting of key markets where there are strong market opportunities to promote Canadian creative content, and the launch of a new Creative Export Fund in 2018 to strengthen Canada's creative brand worldwide. As part of the strategy, Canada will sponsor international creative industry events, such as Gamescom this past summer and the 2020 Frankfurt Book Fair, and will launch the first federal cultural trade mission in Canada's history, taking Canada's leading creators and companies to major foreign markets to make deals and forge new business relationships.

4. Creating a new Creative Industries Council

Headed by the Minister and the Minister of Innovation, Science and Economic Development, a new Creative Industries Council will be launched to advise the Government of Canada on ways to enhance collaboration between industries and amplify the growth of creative industries in the country.

The Council's stated goal is to focus on concrete objectives for accessing new foreign markets and coordinate Canada's international presence in the creative industries. Further details will be announced in the coming months.

5. Refreshing the Mandate of the Canadian Broadcasting Corporation (CBC)/ Radio-Canada

The Minister will work with the CBC to renew its mandate to achieve its stated commitment of becoming more local, more digital, and more innovative in its Canadian content creation. The government reiterated its strong support for the public

Canadian broadcaster, committing \$675 million of new funds to CBC/Radio-Canada and launching a transparent and independent process for selecting the next CBC leadership to reflect Canada's diversity and talent.

6. Reviewing Canada's *Broadcasting Act*, *Telecommunications Act* and *Copyright Act*

A review of the *Broadcasting Act* and *Telecommunications Act* will seek to address the digital shift in content creation. The review will, among other things, aim to support diverse content and information for Canadians, as well as affordability and access to telecommunications services. Creative Canada provides that the review may assess whether the powers of the CRTC to regulate broadcasting are well-suited to the changing realities of broadcasting.

A Parliamentary review of the *Copyright Act* will begin in the fall of 2017. As content increasingly moves to digital formats, many creators struggle to receive payment for use of their work, even while demand for their content is increasing. The review will ensure the Canadian copyright regime is serving its purpose, and is allowing Canadian content creators to leverage the value of their creative work.

7. Investment in "Creative Hubs"

In its 2017 federal budget, the Government of Canada announced a CDN\$300 million investment to be made over ten years to create cultural spaces through the Canada Cultural Spaces Fund, CDN\$1.3 billion for cultural and recreation infrastructure through agreements with Infrastructure Canada, and CDN\$80 million to support the modernization and construction of community educational infrastructure in official-language minority communities.

A portion of this investment will be made available for "creative hubs" to create shared spaces for content creators, entrepreneurs, and small business start-ups. Examples of current creative hubs include Ottawa's Arts Court, Montréal's Société des arts technologiques, Vancouver's Centre for Social and Economic Innovation and Toronto's Artscape Daniels Launchpad.

8. Modernization of the Canada Music Fund and Canada Book Fund

Changes to the Canada Music Fund and Canada Book Fund will take place over the coming year to reflect developments in the music and print industries.

To recognize the various ways in which music is now released, funding from the Canada Music Fund will support multiple music formats and encourage greater innovation and risk-taking. Further details about this plan will be released in the future and new guidelines will be in place for 2019-2020.

Adjustment to the Canada Book Fund will support innovative approaches to marketing and promotion of Canadian books. It will also support the development of Canadian content for online learning platforms.

9. New Eligibility Requirements for the Canadian Periodical Fund

Creative Canada includes a more open and "platform-agnostic" approach regarding eligibility for funding through the Canadian Periodical Fund. The Canadian Periodical Fund is the Government of Canada's primary support for Canadian periodicals. As many publications shift towards "digital only" publication and distribution, the new eligibility approach will reflect that Canadians increasingly access periodicals online. Factors beyond subscription numbers, such as original editorial content expenses, will be considered to determine eligibility for funding.

10. Support for Local News

In a memorable quote, the Minister emphasized the government has no desire to support declining business models, particularly in the traditional print journalism industry: "Our approach will not be to bail out industry models that are no longer viable."

Rather, the government's focus will be on supporting innovation, experimentation and the transition to digital. Regarding the latter, the Minister has approached internet companies that aggregate and share news and she announced a new partnership between Facebook and Ryerson University, specifically Ryerson's Digital Media Zone and the Ryerson School

Goodman's^{LLP} Update

of Journalism, to create the first Canadian digital news incubator. Participants in the incubator will receive start-up funding and mentorship to develop and accelerate their ideas. The Minister stated the intention is to foster several other such incubators.

Conclusion

Creative Canada outlines the government's proposed approach to "create a space for Canadian voices" in the digital environment. Both the Netflix Agreement and the Facebook/Ryerson incubator highlight the government's preference to negotiate with non-Canadian players rather than impose new taxes or introduce other similar measures to "level the playing field" with the Canadian incumbents. Whether this approach will ultimately succeed remains to be seen. In the meantime, much of the heavy lifting re: the protection of "Canadian content" will need to await the proposed reviews of the *Broadcasting Act*, *Telecommunications Act* and *Copyright Act*, and the report by the CRTC to the government on how they see the Canadian system evolving.

For more information, you may access a copy of the Minister's speech as well as the policy framework. If you have any questions about Creative Canada, please contact any member of our Entertainment Law Group.