Bill C-11

A Fatally Flawed Gateway to Government Censorship

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Canadian Taxpayers Federation

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About the Canadian Taxpayers Federation

The Canadian Taxpayers Federation is a federally incorporated, not-for-profit citizens' group dedicated to lower taxes, less waste and accountable government.

The CTF was founded in Saskatchewan in 1990 when the Association of Saskatchewan Taxpayers and the Resolution One Association of Alberta joined forces to create a national organization. At the end of 2020, the CTF had over 235,000 supporters nationwide.

The CTF maintains a federal office in Ottawa and regional offices in British Columbia, Alberta, Prairie (Saskatchewan and Manitoba), Ontario, Québec and Atlantic Canada. Regional offices conduct research and advocacy activities specific to their provinces in addition to acting as regional organizers of Canada-wide initiatives.

CTF offices field hundreds of media interviews each month, hold press conferences and issue regular news releases, commentaries, online postings and publications to advocate on behalf of CTF supporters. CTF representatives speak at functions, make presentations to government, meet with politicians and organize petition drives, events and campaigns to mobilize citizens to effect public policy change

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Any Canadian taxpayer committed to the CTF's mission is welcome to join at no cost and receive emailed Action Updates. Financial supporters can additionally receive the CTF's flagship publication The Taxpayer magazine, published three times a year.

The CTF is independent of any institutional or partisan affiliations. All CTF staff, board members and representatives are prohibited from donating to or holding a membership in any political party. In 2019-20, the CTF raised $4.8 million on the strength of 39,792 donations. Donations to the CTF are not tax deductible as a charitable contribution.

Canadian Taxpayers Federation

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Foreword

The government wants the power to regulate the internet. Then it wants to decide what content qualifies as Canadian. And, based on that determination, it wants to make it easier for you to find that content.

All of that raises questions about Bill C-11 and Ottawa's push to give the Canadian Canadian Radio-television and Telecommunications Commission (CRTC) the power to regulate the internet.

Do Canadians want the government to regulate the internet? Until now, the answer has always been no. This isn't about terrorism or child pornography – criminal law already applies to those evils and the people involved are prosecuted. This is about whether the government should decide what shows up and what gets buried on Canadians' online platforms.

The government says it will use the power to make sure Canadian content shows up more prominently, but that raises so many more questions.

Is the government competent to decide what Canadians consider Canadian? What if a Canadian producer makes a documentary about an American president? What about a Canadian with a podcast about cricket matches in Pakistan? What about a YouTube channel operated by Quebec or Western separatists? What happens if the government's starts to view content that's inconvenient for the government as unCanadian?

The government says none of this will be a problem. The legislation will give the CRTC the power to regulate the internet and the agency will figure out how to do it. That's asking for a lot of trust from Canadians.

There's a true oddity at the heart of this issue: money. The government says it's doing this to make internet giants pay for Canadian content. But money is already pouring in for Canadian content makers. And if this is about the money, why is the government entangling it with fundamental freedoms that give Canadians the right to consume and communicate whatever they want online?

There's another oddity: the rush. The government tried to rush Bill C-10 (Bill C-11's predecessor) because it clearly knew a snap election was coming, but the initiative for that initial bill was ultimately ground to a halt with controversy. Now, with no hint of an election looming, the government is again limiting debate and using every procedural tactic to push through Bill C-11. Why the rush? Why not take the time to hear from both advocates and critics? The government's process with this bill is almost as concerning as its content.

Lastly, whenever the government does anything there needs to be a discussion about making sure it doesn't go too far. The government says it wants to regulate the internet to make sure Canadian content gets viewership and revenues, but a regulatory machine built to promote Canadian content, and thereby demote other content, can be repurposed. It opens the temptation for the government to quiet critics. Perhaps the current government could resist that temptation, but will all future government be that virtuous? The government dismisses any concern about government overreach, but it isn't implementing any protections to prevent erosions of fundamental rights of expression.

Ultimately, C-11 will have an impact on the way all Canadians express themselves and consume content online. They deserve the fullest possible explanation about those impacts and the associated risks. This report provides that explanation.

Introduction

Bill C-11 would hand the Canadian Radio-television and Telecommunications Commission (CRTC) the power to regulate all audio-visual content online to determine whether the content is Canadian and how easily consumers should be able to access that content based on that standard.

Ultimately, Bill C-11 is about government power: through this legislation, the government wants bureaucrats to have the power to decide what is Canadian content online and what is not, even though the government has not presented a roadmap of exactly how the CRTC would make such a determination. The government wants Parliament to hand the CRTC new powers and is hiding the scope and guidelines it will give the CRTC until after the legislation is passed into law.

Audio-visual content generally falls into two categories: commercial and non-commercial. Bill C-11 would empower the CRTC to regulate commercial content, but there is serious concern that the legislation's definition of commercial content is overly broad and could capture some user generated content, which is traditionally seen as non-commercial. Regulation in this case would mean allowing the CRTC to decide whether the online content in question should be considered Canadian content or not, which would then lead to the promotion of certain online content (and, inherently, the demotion of other content) that consumers see based on that standard.

While the government says it will regulate commercial content, but allow some user-generated content to be made exempt, its guidelines for the CRTC are incredibly vague, potentially allowing bureaucrats to shift standards in deciding exactly which pieces of user-generated content should be regulated. This means that online posts made by average everyday users on platforms like TikTok or YouTube could easily become regulated and fall within the CRTC's purview. The CRTC would then determine, based on its own standards, whether that content should be pushed on Canadian consumers. Inherently, this means other content will become less discoverable, even on social media platforms.

While Bill C-11 may be handing the CRTC the power to promote certain content on the basis of whether it is Canadian in character, the toolset given to the CRTC to do so could set a dangerous precedent in the future. If government bureaucrats have the power to reorder what we see online on the basis of one set of criteria, a future government could easily expand the categories of content it wants the CRTC to reorder. Other bills, such as the government's online harms bill, could serve as the basis for that expansion in the future. Thus, Bill C-11 is just the starting point for online content regulation and must be viewed in concert with other government initiatives to limit free speech.

Finally, after examining the rationale given by the government for the creation of Bill C-11, it is clear that the legislation is not only dangerous, but also unnecessary. The government's stated goal is to promote the creation of Canadian content in the online streaming world. However, Canadian content is thriving more than ever before, with record foreign and domestic investment in recent years. If the sole objective of Bill C-11 is for Canadian content to survive and succeed, the legislation is simply not needed.

The remainder of the report will proceed as follows. First, the report will examine exactly what Bill C-11 is, including its content, context and what the government says it wants to achieve through the legislation. Second, the report will outline why the government's rationale for the legislation, supporting domestic Canadian content, doesn't hold water and it will show that Canadian content has been thriving in recent years. Third, the report will outline the core concerning provisions of Bill C-11, most notably the regulation of user generated content and the burgeoning new powers to be given to the CRTC.

SECTION I:

What is Bill C-11?

Overview

Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*,[1] was tabled by Canadian Heritage Minister Pablo Rodriguez on Feb. 3, 2022. The bill, known as the *Online Streaming Act*, is the government's follow-up to Bill C-10, which was introduced in the previous Parliament.

The original Bill C-10 made it through three readings in the House of Commons and two readings in the Senate. Despite desperate attempts to pass the bill, Bill C-10 finally stalled at committee consideration shortly before the Senate's summer break, followed by the federal election in fall 2021. From the start, Bill C-10 was controversial, and its failure was a relief to many.

During the election campaign, the government committed to re-introducing the legislation within the first 100 days of a new Parliament. The new bill contains some modest changes to the prior bill, but many of the sources of concern that sparked widespread discussion regarding government or CRTC regulation of user generated content on the internet remain.

What does Bill C-11 do?

Bill C-11 would establish a new class of regulated broadcaster called the "online undertaking." Online undertakings would include any services that transmit programs over the internet in Canada. These new online undertakings would not be licensed per se, but they would face regulation from the CRTC including:

- mandated registration,
- the possibility of mandated payments to support Canadian content production,
- discoverability requirements that would require online services promote Canadian content,
- mandatory disclosure of detailed confidential information, including algorithmic data, and
- the prospect of multi-million-dollar penalties for failure to comply that could be applied to any online undertaking, whether an internet giant or a smaller, niche podcasting or gaming service

Much like Bill C-10, the bill leaves many of the specifics to the regulator, subject to a prospective policy direction in which the government would direct the commission to prioritize issues such as support for diversity and inclusion as well as revisiting what is considered Canadian content. The government admits that the definition of Canadian content is outdated and requires updating, but has provided little guidance on what it has in mind.

In fact, the government has indicated that it will only publicly release the policy direction after Bill C-11 receives royal assent, meaning that these specifics will remain hidden for the foreseeable future. The government wants Parliament to empower the CRTC now and figure out guidelines later. This approach is both backwards and lacks transparency.

1. Bill C-11, *An Act to amend the Broadcasting Act and to make consequential amendments to other Acts*, 1st sess, 44th Parliament, 2021, online: *Parliament of Canada* https://www.parl.ca/legisinfo/en/bill/44-1/c-11 [Bill C-11].

SECTION II:

Why Bill C-11 Isn't Needed

What is the political context for this legislation?

Bill C-11 and its predecessor Bill C-10 did not come about by accident. Rather, the bills are better understood as part of a broader effort to regulate the online environment.

In recent years, the government has emphasized internet regulation with obvious implications for freedom of expression. Laws, including hate speech, defamation, and child pornography, have always applied to online content and efforts to ensure their effectiveness in the online environment may be needed. However, the government's regulatory shift envisions applying additional laws that invoke broadcasting-style rules or envision the establishment of new regulators with mandates that could include takedown requirements or website blocking.

What are the government's stated goals?

Former Heritage Minister Steven Guilbeault made it clear from early on that his top legislative priority was to get money from web giants[2] and his first legislative step would be to use Bill C-10 to target internet streaming services such as Netflix, Amazon, and Disney, with new requirements to fund Canadian content and to increase its discoverability by making it more prominent for subscribers.

While the government's desire to regulate the internet was clear well before Bill C-10 was tabled and under multiple ministers, it was under Guilbeault that the efforts accelerated. By 2020, Guilbeault actively began to seek new discoverability requirements, mandated payments, and myriad other conditions for streaming services. He argued that support for the film and television sector was declining due to the emergence of internet streaming services, which had resulted in decreased revenues for the conventional broadcast sector and therefore lower contributions to Canadian content creation. In fact, Guilbeault told *Le Devoir*, without acting there would be a billion-dollar deficit in support in the next three years[3] — a claim that was dubious at best.[4]

Guilbeault's objective was to generate a few hundred million dollars more per year in local production by the internet streamers. In other words, he was expecting roughly $2 billion in new investment over three years in Canadian content from U.S. entities due to his planned regulations (moving from a billion-dollar deficit to a billion dollars in extra spending). In addition, the government stated that a key objective was "fair and equitable treatment as between online and traditional broadcasters" and that the current system "perpetuates a regulatory imbalance which puts Canadian broadcasters at a competitive disadvantage."[5] Bill C-10, the government claimed, would level the playing field.[6] Much the same arguments animate Bill C-11.

2. "Town hall with / Assemblee virtuelle avec Steven Guilbeault" (16 September 2020) at 00h:47m:58s, online (video): *Vimeo* <player.vimeo.com/video/458756268>.
3. Guillaume Bourgault-Côté, "Les géants du Web coûtent cher au milieu culturel canadien" (18 September 2020), online: *Le Devoir* <www.ledevoir.com/culture/586138/culture-un-milliard-en-moins-a-cause-des-geants-du-web>.
4. See e.g. "The Broadcasting Act Blunder, Day 16: Mandated Payments and a Reality Check on Guilbeault's Billion Dollar Claim" (11 December 2020), online (blog): *Michael Geist* <www.michaelgeist.ca/2020/12/broadcastingactblunderbillion/>.
5. Canadian Heritage, "Summary: Amendments to the Broadcasting Act," PowerPoint, at 12, 9, online: *Broadcasting Accessibility Fund* <www.baf-far.ca/sites/default/files/BOD/Summary%20-%20Canadian%20Heritage%20-%20Bill%20C-10%20-%20Amendments%20to%20the%20Broadcasting%20Act.pdf>.
6. "Bill C-10, an Act to modernize the Broadcasting Act" (last modified 31 August 2021), online: *Government of Canada* <www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/standing-committee/dm-transition-material-2021/bill-c10-modernize-broadcasting-act.html>.

What does the data about film and television production actually tell us?

The data simply does not support the government's claims regarding the state of the industry. The regulated sector enjoys many benefits not available to internet streaming services, and pre-COVID, the industry had enjoyed record production numbers with foreign streaming services being major contributors.

The years leading up to the introduction of Bill C-10 and C-11 were indicative of a booming film and television production industry in Canada. The total value of the Canadian film and television sector exceeded $8.3 billion in 2017 (more than a billion more than had been recorded over the previous decade), increased to over $8.8 billion in 2018, and $9.4 billion in 2019, before falling slightly to $9.3 billion in 2020.[7]

Similarly, Canadian content production hit an all-time high in 2018-19 at $3.3 billion.[8] Money was pouring into the sector, with distributors and foreign financing leading the way. Foreign investment in Canadian content production doubled from $421 million in 2010-11 to $864 million in 2018-19.[9] While that number dropped by $104 million in 2019-20, "foreign investment still accounted for 26 per cent of the total financing for Canadian content production."[10] By 2020, foreign financing was still the largest source of financing for English-language television production.[11]

Despite the absence of regulatory requirements, Netflix had emerged as one of the leading backers of Canadian content, reporting that it commissioned hundreds of millions of dollars in original programming in Canada in 2016, a number which has continued to grow.

Furthermore, research has shown that Canada ranked first among peer countries with respect to expenditures on television production per capita, expenditures on domestic television production (i.e. Canadian content or equivalent domestic production) per capita, hours of television production per capita, and employment in film and television production per capita.[12] Comparison data on expenditures on television production per capita is particularly striking since it shows Canada far ahead of peer countries such as the U.K., France, and Australia. Further, the data shows that Canadian content fared very well, with more money spent per capita on Canadian content than the equivalent per capita spending on domestic content in other peer countries. The government's claim that new regulatory powers are needed to preserve Canadian content runs counter to the facts.

7. Canadian Media Producers Association, *Profile 2020: Economic Report on the Screen-based Media Production Industry in Canada* (Ottawa: Canadian Media Producers Association, 2021) at 9, online (pdf): CMPA <cmpa.ca/wp-content/uploads/2021/05/PROFILE-2020_EN.pdf> [Profile 2020].
8. Profile 2020 at 21.
9. Profile 2020 at 21.
10. Profile 2020 at 21.
11. Profile 2020 at 43.
12. Nordicity, *International Benchmarking Study of The Canadian Television Production Sector* (Ottawa: Nordicity, 2019), online: Scribd <www.scribd.com/document/446985914/Nordicity-International-Benchmarking-Study-of-the-Canadian-Television-Production-Sector>.

What does the data about "discoverability" actually tell us?

The government has also cited the need to improve the "discoverability" of Canadian content as a critical reason to support Bill C-10 and now Bill C-11. While few would oppose ensuring that Canadian content is easy to find and well marketed, there seemed to be little to support claims that regulatory intervention for streaming services is needed.

In concluding that the CRTC must be able to impose discoverability measures because Canadians have difficulty finding Canadian content, a government panel that issued a discoverability policy recommendation cited two reports.[13] Yet neither make the case for the need for new regulations. One of the reports had nothing to do with Canada and said absolutely nothing about the ability to find or recognize Canadian content. The other was focused on Canada but did not find that Canadians have trouble finding Canadian content – rather, it found a range of experiences and emphasized that "word-of-mouth is Canadians' main discoverability method."[14]

In reality, it is (and was then) not hard to discover Canadian content on Netflix and other streaming platforms, with a simple search for "Canada" and streaming hours of Canadian shows prompting algorithms to promote Canadian content. This, coupled with the recent success of Canadian-based content, should, based on the government's own stated objectives, render Bill C-11 unnecessary.

13. Mark McCaffrey, Paige Hayes & Jason Wagner, *Can you find that show I didn't know I wanted to watch?: How tech will transform content discovery* (London: Price Waterhouse Coopers, 2017), online: <gsma.force.com/mwcoem/servlet/servlet.FileDownload?file=00P1r00001kQ5Theas>; Telefilm Canada, Discoverability: Toward a Common Frame of Reference: Part 2: The Audience Journey (Montreal: Telefilm Canada, 2016), online: <telefilm.ca/en/studies/discoverability-toward-common-frame-reference-part-2-audience-journey> [Telefilm] (incorrectly cited as a 2018 report but actually dates to 2016).

14. Telefilm at 14.

SECTION III:

Core Provisions and Key Concerns

Overview: what is the government's new regulatory approach?

While there are many elements in Bill C-11, this review focuses on the internet regulation issues, with particular focus on the implications for user generated content and internet streaming services. Section 1(1) of Bill C-11 seeks to bring internet services into the scope of the *Broadcasting Act* by incorporating "online undertaking" into the definition of broadcasting undertaking, which is currently focused on conventional broadcasters such as CTV as well as broadcast distributors, such as cable and satellite companies. Online undertaking, in turn, is defined as "an undertaking for the transmission or retransmission of programs over the internet for reception by the public by means of broadcasting receiving apparatus."[15]

The extensive regulation envisioned by Bill C-11 is established through amendments to sections 9, 10, and 11 of the *Broadcasting Act*. These new powers would allow the CRTC to:

- require registration of any broadcasting undertaking (s. 10(1)(i)),
- impose, by order, conditions virtually indistinguishable from licensing requirements (s. 9.1(1)),
- implement a wide range of additional regulations (s. 10 and 11).

Among the potential regulations under Section 10 are mandated payments for the purposes of: funding Canadian content, supporting Canadian creators, and supporting individuals or groups "representing the public interest in proceedings before the Commission under [the] Act."[16]

The list of conditions under Section 9.1(1) include the mandated disclosure of financial and audience information, a requirement to carry emergency broadcasts, and discoverability requirements that would allow the CRTC to mandate that platforms prioritize some users' content over others.

However, the term "discoverability" is not defined. It therefore falls to the CRTC to decide what it meant and what conditions would be imposed on internet services as a result. This means the CRTC will have the power to make some content more "discoverable" over other content but without any guidance thus far established. Guidance is very much needed, as present rules governing discoverability are extraordinarily outdated and ineffective.

15. Bill C-11, s 1(2).
16. Bill C-11, s 10.

Case Study One

Robin and John Jones are sitting down for a relaxing Sunday evening. They get to the couch and start haggling over what to watch. Robin is a huge fan of renowned Canadian author Margaret Atwood. She's read all of Atwood's books and has heard great reviews of the Handmaid's Tale TV series. While John isn't a huge Margaret Atwood fan, he agrees to watch the show with his wife.

The Jones's have all of the major streaming services, but as they scroll through the recommendations, the Handmaid's Tale doesn't show up.

Because of the CRTC's outdated Canadian content rules, the Handmaid's Tale isn't actually considered to be Canadian by government bureaucrats. With the hypothetical passage of Bill C-11, the CRTC can use "discoverability regulations" to mandate prioritizing what it views as Canadian content, leaving what the CRTC considers to be non-Canadian content buried in streaming feeds.

Unable to find the Handmaid's Tale, Robin agrees to watch a Toronto Maples Leafs documentary with John. Again, the Jones's start looking for the show, but it doesn't show up in their streaming feeds. Like the Handmaid's Tale, the CRTC does not considered this Maple Leafs documentary to be Canadian content due to outdated methods of determining Canadian content.

While the Jones's feeds don't show content about Canadian icons such as Atwood and the Leafs, the Jones's keep seeing a recommendation entitled Gotta Love Trump. Thanks to the same outdated rules, a show about a controversial American president is actually considered Canadian content because it ticked the right Canadian content certification boxes.

While the CRTC would be tasked with establishing the specifics, the Bill C-11 is also notable in that it grants the commission the power to target individual services or companies with unique or individualized requirements. The source of this targeted approach is Section 9.1(2), which provides:

> *(2) An order made under this section may be made applicable to all persons carrying on broadcasting undertakings, to all persons carrying on broadcasting undertakings of any class established by the Commission in the order or to a particular person carrying on a broadcasting undertaking.*

Rather than establishing a level playing field, this opens the door to multiple fields with individual companies potentially each facing their own specific requirements and conditions to operate in Canada. These could include individualized data requests or other compliance measures. Such powers are both sweeping and undemocratic, particularly given that the CRTC will have the power to treat some companies differently than others.

While there are scores of issues related to the government's regulatory efforts, there are two overarching concerns with Bill C-11 that will be addressed below. The first involves the regulation of user generated content, while the second involves massive new powers that would be handed over to the CRTC.

Key Concern #1: User Generated Content

How is the government trying to regulate user generated content?

One type of service that was initially exempted from the new regulation under Bill C-10 was user-generated content services. User generated content refers to the wide range of original content created by millions of Canadians. These may be videos featuring their thoughts on political developments on Instagram, short videos of their children accompanied by a favourite song on TikTok, instructional videos on YouTube, or podcasts on Apple Podcasts.

Originally, the bill proposed to add the following after Section 4 of the *Broadcasting Act*:

> 4.1 (1) This Act does not apply in respect of
>
> (a) programs that are uploaded to an online undertaking that provides a social media service by a user of the service – who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them – for transmission over the internet and reception by other users of the service; and
>
> (b) online undertakings whose broadcasting consists only of such programs.
>
> (2) For greater certainty, subsection (1) does not exclude the application of this Act in respect of a program that is the same as one referred to in paragraph (1)(a) but that is not uploaded as described in that paragraph.

The Act would also state, at Section 1(2.1):

> A person who uses a social media service to upload programs for transmission over the internet and reception by other users of the service – and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them – does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act.

The two provisions worked together to exclude both users as akin to broadcasters (Section 2.1 exception) and their content (Section 4.1). Without these provisions – and Section 4.1 in particular – anything uploaded by users would be treated by Canadian law as a "program" and subjected to CRTC regulation. Since the bill covers all audio-visual content, this meant that videos posted to TikTok, or YouTube would be treated as a program subject to potential regulation much like a program airing on a conventional broadcaster. Government officials confirmed this at a hearing on April 23, 2021, with Owen Ripley, Canadian Heritage's Director General of Broadcasting, Copyright and Creative Marketplace, stating:

> But if the exclusion is removed – if 4.1 is struck down – the programming we upload to YouTube, that programming that we place on that service would be subject to regulation moving forward but would be the responsibility of YouTube or whatever the sharing service is. The programming that is uploaded could be subject to discoverability requirements or certain obligations like that.
>
> If the way forward is to maintain the exclusion for individual users but to strike down the exclusion for social media companies, that means that all the programming that is on those services would be subject to the Act regardless of whether it was put there by an affiliate or a mandatary of the company.[17]

17. "Meeting No 26 CHPC – Standing Committee on Canadian Heritage (23 April 2021), online (video): *ParlVU* <parlvu.parl.gc.ca/Harmony/en/PowerBrowser/PowerBrowserV2/20210423/-1/35243>.

Despite the warning, in late April 2021, the Parliamentary Secretary to the Minister of Canadian Heritage, Julie Dabrusin, put forward a motion to remove the exclusion, which gained the support of the committee. The removal sparked widespread concern about the implications of regulating user generated content. While the individuals would not be treated as broadcasters subject to regulation, their content could face CRTC rules such as discoverability requirements as a "program" subject to regulation.

How has user generated content regulation evolved from Bill C-10 to Bill C-11?

Canadian Heritage Minister Pablo Rodriguez has insisted that the government has addressed concerns regarding the regulation of user generated content by restoring the section 4.1 exception for treating user content as programs subject to potential regulation. When combined with the return of section 2.1 exempting users from being treated as broadcasters, the government claimed that it "listened, especially to the concerns around social media, and we've fixed it." However, it turns out that the bill is not quite as advertised. While Section 4.1 was restored, the government has added 4.1(2), which creates an exception to the exception. That exception to the exception – in effect a rule that does allow for regulation of content uploaded to a social media service – says that the Act applies to programs as prescribed by regulations that may be created by the CRTC.

The bill continues with a new Section 4.2, which gives the CRTC the instructions for creating those regulations. It says the CRTC can create regulations that treat content uploaded to social media services as programs by considering three factors:

- whether the program that is uploaded to a social media service directly or indirectly generate revenue
- if the program has been broadcast by a broadcast undertaking that is either licensed or registered with the CRTC
- if the program has been assigned a unique identifier under an international standards system[18]

The implications of this provision were recently confirmed by CRTC Chair Ian Scott, who told the Standing Committee on Canadian Heritage that *"Section 4.2 allows the CRTC to prescribe by regulation user uploaded content subject to very explicit criteria. That is also in the Act."*

While the government may have intended to limit the scope of potential regulation, these factors are all open to broad interpretation. For example, direct or indirect revenue generation can include sponsorships, ad revenues, or even commercial opportunities that arise because of their program.

Many of those programs will be posted to services such as YouTube that are captured by the second factor and involve some form of unique identifier to satisfy the third condition. In other words, far from limiting the scope of regulation, the new section swings the door wide open.

18. Bill C-11, s 4.2(2).

Case Study Two

Bob Smith is a lover of all things canoe. Bob's father took him canoeing for weeks every summer as a young kid and he's loved it ever since. Because of his love of canoeing, Smith started his own podcast and YouTube channel. Smith talks about all of the latest canoeing equipment and chronicles each canoe trip that he takes. While Bob didn't think he would be an overnight sensation, his subscriber numbers increase tenfold over the span of just two months. After starting with just a handful of followers, Bob is now drawing in crowds of hundreds from across Canada and around the world.

Johnson's Canoeing Company decided to give Bob a ring to talk about sponsoring Bob's canoeing podcast. While Johnson's is based in Louisiana and Bob is making podcasts from Thunder Bay, enough Americans are listening to Bob's show that Johnson's feels a small-time endorsement deal might help both sides. Johnson's could promote their products while Bob could use the extra money to upgrade his equipment and think about making even more frequent podcast episodes.

Under Bill C-11, if Bob accepts the sponsorship, his show, which is available on multiple platforms including YouTube, becomes subject to the CRTC's discoverability regulations. Because Bob is from Canada, the CRTC might determine that Bob's podcast does in fact qualify as Canadian content. However, the CRTC would ensure that Bob's podcast is included in feeds of Canadians who aren't really interested in canoeing, because the CRTC is focused on pushing Canadian content over all else. This could lead to declining click rates. YouTube could then interpret the lower click rates as a sign that the content is no longer popular or desirable, leading to less media feed promotion for viewers outside of Canada. In short, if Bob accepts the sponsorship, viewership outside of Canada might decline substantially.

Bob ultimately decides to turn down Johnson's sponsorship offer. Because Bill C-11 and its discoverability rules could push his content on Canadians who really aren't interested in canoeing, lowering his discoverability outside of Canada, the endorsement would ultimately lead to lower non-Canadian viewership. An opportunity to promote Canadian content abroad becomes lost as, ironically, an American sponsorship would lead to fewer views outside of Canada.

The law does not tell the CRTC how to weigh these factors. Moreover, there is a further exclusion for content in which neither the user nor the copyright owner receives revenue as well as for visual images only. The result are regulations that leave considerable room for CRTC interpretation at a time when confidence in the Commission is low given recent allegations of bias and questions about who might be appointed to lead it in the future. This empower now, regulate later approach is deeply concerning.

Key Concern #2: Dangerous New Powers Handed to the CRTC

What are the expansive powers delegated to the CRTC?

One of the most troubling aspects of Bill C-11 is the virtually limitless reach of the CRTC's jurisdictional power of audio-visual services. During the Bill C-10 debate, an internal government memo identified a wide range of

sites and services potentially covered by the legislation. Given that the approach remains unchanged in Bill C-11, the scope remains the same. The memo noted that bill could cover podcast apps such as Stitcher and Pocket Casts, audiobook services such as Audible, home workout apps, adult websites, sports streaming services such as MLB.TV and DAZN, niche video services such as Britbox, and even news sites such as the BBC and C-SPAN. While it is uncertain whether the CRTC would exempt some of these services, the broad scope of the language in the bill raises the possibility of extensive regulatory reach.

The government paints Bill C-11 as about making the web giants pay their fair share, yet documents later revealed that the department recognizes a far broader regulatory reach. The bottom line is that the potential scope for regulation is virtually limitless since any audio-visual service anywhere with Canadian subscribers or users is caught by the rules. Bill C-11 does not contain specific thresholds or guidance. In other words, the entire audio-visual world is fair game, and it will be up to the CRTC to decide whether to exempt some services from regulation.

Supporters of the bill will likely argue that the CRTC will establish some thresholds where regulation would not advance policies under the Broadcasting Act. Yet even that approach assumes that the CRTC has jurisdiction over all services and that it has also the power to exempt some from regulation. That will be news to many foreign services with a modest Canadian presence or services that operate well outside the film and television streaming world. The likely result is that many services may choose to block the Canadian market entirely by refusing to accept Canadian subscribers, resulting in less consumer choice and higher costs for the services that remain in Canada and face higher compliance and regulatory costs. The blocking may be particularly acute for multicultural programming, leaving many Canadians without access to services they have come to rely upon.

Case Study Three

Jamar is a huge soccer fan. He loves to watch soccer from all over the world, including Canadian soccer. In order to feed his soccer addiction, Jamar subscribes to multiple streaming services to watch soccer from North America, South America and Europe.

Jamar's favourite streaming services could be impacted by Bill C-11. The government's legislation would force foreign streaming providers to adhere to cumbersome new registration and contribution requirements. These requirements are more intensive than practically any other key market the streaming services are trying to serve. Canadian subscribers may only make up a small percentage of these services' viewership. The streaming services may decide that the new regulations forced on the industry by the CRTC are so cumbersome that it simply isn't worth trying to maintain their presence within the Canadian market.

As a result, these streaming providers may simply block the Canadian market, meaning that anyone inside of Canada won't even have the opportunity to subscribe to these services and watch their favourite soccer teams from around the world.

How is the government through the CRTC trying to regulate expression as a "program"?

The expansive approach in Bill C-11 isn't limited to its jurisdictional reach. Not only does the law have few limits with respect to which services are regulated, it is similarly over-broad with respect to what is regulated, featuring definitions that loop all audio-visual content into the law by treating all audio-visual content as a "program" subject to potential regulation.

The Broadcasting Act defines a program as:

> *program means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text*[19]

Program is therefore broadly defined to capture any audio-visual content if it is not predominantly text. Bill C-11 then defines broadcasting as:

> *broadcasting means any transmission of programs – regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not – by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;*[20]

In other words, any transmission of programs (i.e., audio-visual content) for reception by the public is broadcasting. The definition of broadcasters (called broadcasting undertakings) has been expanded to cover internet services, which the bill describes as online undertakings:

> *online undertaking means an undertaking for the transmission or retransmission of programs over the internet for reception by the public by means of broadcasting receiving apparatus*[21]

This broad definition may include video streaming services such as YouTube or TikTok, podcast services such as Apple Podcast, and any other service offering up audio-visual content.

Why is regulating expression as a broadcasting program through the CRTC so concerning?

All of this may sound technical, but the bottom line is that the starting point for regulation in Canada is all audio-visual content is now cast as a "program" under the Act. Rather than starting from the premise that Canada only regulates narrowly defined content as broadcasting, the bill starts from the opposite direction by regulating everything and swimming backward.

As a result, the bill moves toward the prospect of granting the CRTC massive power over expression with the expectation that the Commission will establish thresholds, limits or exemptions as appropriate.

However, when it comes to freedom of expression, regulation should be the exception, not the rule. This trust but don't verify approach to the regulation of free expression is a dangerous and lacks the appropriate transparency.

19. Broadcasting Act, S.C. 1991, c.11, s.2(1).
20. Bill C-11, s 2(1).
21. Id.

Case Study Four

Jean and Marie are young university students in Quebec who are interested in the province's separatist movement. They decide to start a podcast examining the history of separatist movements in Canada. They start with separatist movements from Nova Scotia during the early days of Confederation, Louis Riel's movement in Manitoba in the 1870s and 1880s, Quebec's separatist movement from the 1970s onwards, as well as recent surges in support for greater Western Canadian autonomy. Ultimately, they begin advocating for separatist movements.

Under present Canadian content rules, this podcast could be labelled Canadian content. Should Bill C-11 be passed into law, the CRTC's Canadian content regulations may actually lead to the promotion of Jean and Marie's podcast online as Canadian content even though they want to break up Canada.

However, the story may not end here. The CRTC under Bill C-11 is being given the tools to promote certain content and deprioritizing other content in the process. As of right now, the CRTC's focus will be on promoting Canadian content. But things can change.

Bill C-11 should be seen as one component of the Trudeau government's new online regulatory agenda. Other bills, such as governing so-called online harms, are also on the government's agenda.

Public Safety Minister Marco Mendocino has argued that there is need for more content regulation for the sake of promoting "social cohesion," among others. Should that occur, the CRTC might then be given a mandate to filter out pro-separatist content like Jean and Marie's podcast on the basis of promoting social cohesion.

By allowing the CRTC to control discoverability for one reason – Canadian content – the door is left open for these tools being used for different reasons down the line.

What are the dangers of empowering the CRTC in this way?

Bill C-11 – when combined with other proposed legislation such as Bill C-18 – places the CRTC in an enormously powerful position. Despite limited expertise in the area and ongoing concerns about bias (including recent allegations that the Chair of the CRTC met privately in a bar with a senior executive of a company in the midst of regulatory hearings), it would determine how internet streaming companies must financially contribute to Canada and promote Canadian content on their services. These companies would be required to provide confidential corporate information to the CRTC and would be subject to audit. The CRTC would have new powers to levy fines in case of non-compliance.

Major new powers regarding the regulation of user generated content will also be handed over to the CRTC if the legislation remains unchanged. These important issues should be addressed in the legislative process, not after.

Where is the policy direction?

Despite more than a year of debate on Bills C-10 and C-11, numerous questions about the application of the law remain unanswered. Indeed, the government has acknowledged that many specifics will be revealed as part of a policy direction to the CRTC. This direction could include details on exclusions from the scope of regulation, revisiting the definition of Canadian programs, tax credits policies for Canadian content, intellectual property policy, French language support, regulation of online broadcasters, and support for racialized groups. These are all issues framed as further measures that may be fodder for a policy direction.

During the Bill C-10 debate, the government responded to criticism about the lack of clarity in the legislation by publishing a draft version of the planned policy direction. However, for the purposes of Bill C-11, it now says that it will not release a policy direction until the bill receives royal assent. In other words, many issues will not be the subject of debates, hearings, or publicly available text. The approach is a significant retreat from the government's commitment to transparent lawmaking, leaving all stakeholders with little visibility about the full plans for broadcast and internet regulation in Canada. The government wants Parliament to empower the CRTC with intrusive new regulatory tools and claims it will simply offer the CRTC guidance as to how to apply those new tools later. Such an approach runs roughshod over the democratic process.

Conclusion

Bill C-11 is a deeply flawed piece of legislation. In fact, the government's own rationale for pushing the legislation is unsound. Canadian content, both at home and abroad, is thriving. Billions of dollars' worth of investment in Canadian content is being made by foreign streaming services around the world. All this new regulation and government intervention is not needed and, far from helping the industry, it could do more harm than good.

In addition, no other democratic nation regulates user generated content through broadcasting rules in this manner. Canada would be unique among allies in doing so, and not in a good way. Twitter, for example, has likened[22] parts of the government's regulatory agenda with approaches taken in authoritarian nations like China and North Korea. The government's own rules could also lead to Canadian content being deprioritized or blocked abroad and even risks making mainstream content more discoverable at home at the expense of content procured by digital-first Canadian creators due to outdated discoverability rules.

Finally, even if the government truly believes new regulations are needed, its determination to give sweeping new powers to the CTRC first and figure out how the CRTC should use all these new powers down the line is deeply problematic. If the government truly believes in its initiatives, it should clearly spell out exactly how any new powers given to the CRTC would be used before giving the CRTC any new powers. Prospective regulations should come first and not be treated as an afterthought, especially when free speech and free expression are on the line. While the government may be trying to hand the CRTC powers over determining whether content should be seen as Canadian or not today, it could very well broaden bureaucrats' mandate of promoting some content over others into more controversial categories tomorrow. Once a powerful new toolset has been created, it can always be repurposed for other projects.

The bottom line is that any benefits Canadian industry might gain from this legislation is heavily outweighed by the costs, both for industry and for individual Canadians.

22. Bill Curry, "Ottawa faces blowback for plan to regulate internet," *The Globe and Mail*, April 22, 2022.