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BILL C-11, THE *ONLINE STREAMING ACT*, GIVES FREE REIN TO THE CRTC

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On November 22, 2021, the federal government introduced Bill C-11, the *Online Streaming Act*, in the House of Commons.¹ The purpose of this Bill is to amend the *Broadcasting Act*² in order to give the Canadian Radio-television and Telecommunications Commission (CRTC) the authority to regulate online streaming services through orders.³

Not only is the government targeting companies like Netflix and Disney, but it also has platforms such as Spotify and YouTube in its sights, and thus, indirectly, almost all audio and audiovisual content accessible online in Canada.

THE CRTC'S GROWING INFLUENCE

The *Broadcasting Act* was designed as part of an interventionist economic and nationalist political strategy,⁴ at a time when radio spectrum, the only resource that allowed for transmissions, was scarce.⁵

In this context, the *Broadcasting Act* historically entrusted the CRTC to oversee the control and regulation of broadcasting activity.⁶ For example, the CRTC grants broadcasting licences⁷ that incorporate, through applicable regulatory requirements, certain express conditions, including Canadian broadcasting content quotas and mandatory broadcaster contributions, used to subsidize the creation of this content.⁸

In exercising its functions, the CRTC must implement Canada's broadcasting policy,⁹ the stated objective having not historically been to control all content, but rather to ensure that Canadians



have, among other things, "access to compelling creative content from diverse sources and on a variety of platforms."¹⁰

But information technology has come a long way since then: fibre optics and the internet have allowed telecommunications service providers to circumvent the problem of the scarcity of the transmission medium. Thanks to the sector's innovations, Canadians now have access not only to the content offered by traditional broadcasters—the Act's and the CRTC's purported *raison d'être*—but also to a whole new world of additional independent, creative, diverse content.

In 2012, in its *Reference re Broadcasting Act*¹¹ decision, the Supreme Court of Canada rejected the opinion that the CRTC had general jurisdiction over online content.

The goal of Bill C-11 is thus to correct the current legislation's blind spots and expand the CRTC's empire. If adopted in its current form, Canadians could see a massive bureaucratization of today's most dynamic spaces for creativity and expression.

CONTROLLING STREAMING INDIRECTLY

Bill C-11 obviously targets content streaming platforms like Netflix and Disney.¹² These "online undertakings" ("undertakings for the transmission or retransmission of programs over the Internet for reception by the public")¹³ would fall under the CRTC's authority. Certain interest groups, like ADISQ, consider this a government attempt to collect taxes from these companies.¹⁴ Others worry, not without reason, about the potentially harmful economic, cultural, and legal consequences¹⁵ of imposing a burdensome government mechanism in an area where freedom and the almost total lack of regulation have worked wonders so far.

It is not unreasonable to think that the golden age of online series and documentaries would likely never have emerged if the internet had been regulated by a panel of bureaucrats enforcing government policies.

It is worth noting, however, that government spokespersons have barely mentioned another regulatory aspect that is even more concerning: In contradiction with the Supreme Court's 2012 decision, Bill C-11 would allow the CRTC to gain jurisdiction over any "program," namely any unique audio or audiovisual content that is either:

- i) monetizable (directly or indirectly generates revenues);
- ii) broadcast by a company holding a licence; or
- iii) tagged with a unique identifier under an international standards system (for example, musical content with copyright protection).¹⁶

Pablo Rodriguez, Minister of Canadian Heritage and sponsor of Bill C-11, has said on several occasions that the bill was not aimed at users or

creators who publish their own content.¹⁷ It is true that content that does not generate revenue directly or indirectly for the person who uploads it (or who owns the rights to the content) cannot be regulated as such. However, the CRTC's Chair noted that it would be possible to regulate home videos, contrary to what Minister Rodriguez had stated.¹⁸

Section 4 of Bill C-11 would give the CRTC the discretionary power to regulate streaming platforms, such as YouTube and TikTok, which host this kind of content.

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For example, the CRTC could issue orders to a certain kind of platform to regulate the dissemination of content considered potentially misleading, deceptive, or hateful, as it already does for TV content under the *Television Broadcasting Regulations, 1987*.¹⁹ These platforms would likely adopt a general and uniform policy to comply with the orders, despite the exemptions enjoyed by certain content—notably political videos and podcasts—under Bill C-11. The end result would thus be the same, through the intermediary of these platforms which could therefore be constrained to manage, in the manner wished by the CRTC, independent content that would otherwise be exempted.

THREATS TO FREEDOM OF EXPRESSION

In short, Bill C-11's flaws would give the CRTC a great deal of latitude to indirectly control content generated by individual users. It has the potential to push streaming platforms and social media toward a highly regulated environment.²⁰

A wealth of expressive content (podcasts, video clips, etc.) protected by freedom of expression would fall under the CRTC's authority or, at the very least, could suffer the consequences of CRTC orders targeting the platforms that host

them. This follows logically from the ubiquity of tools to monetize multimedia content on social media, where much intellectual, social, and political debate takes place these days.

If the government really has no intention to regulate the independent content that Canadian citizens share online, it should close this regulatory loophole.

It is difficult to predict exactly how the CRTC would use these new powers, or even whether it would use them at all. If the government really has no intention to regulate the independent content that Canadian citizens share online, it should amend the law and close this regulatory loophole before it is adopted.

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