



JUNE 2022

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

By Samuel Bachand, with the collaboration of Gabriel Giguère

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.

The golden age of online series and documentaries would likely never have emerged if the internet had been regulated by a panel of bureaucrats.

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.

REFERENCES

1. House of Commons, House of Commons Debates, Vol. 151, No. 048, 1st session, 44th Parliament, March 29, 2022.
2. Government of Canada, *Broadcasting Act*, S.C. 1991, c. 11.
3. And not through licences, which is a key distinction from the system that currently governs traditional radio and TV broadcasters.
4. Government of Canada, Department of Communications, *Spectrum Policy Framework for Canada*, September 1992, p. 2.
5. *Reference re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304 (Judicial Committee of the Privy Council); see also, from the same year, the version of the *Canadian Radio Broadcasting Act* adopted by the Bennet government; Michael Dewing, *Canadian Broadcasting Policy*, No. 2011-39-F, June 23, 2014, Library of Parliament.
6. Government of Canada, *Broadcasting Act*, S.C. 1991, c. 11, ss 2, 5, 6.
7. Government of Canada, *Broadcasting Act*, S.C. 1991, c. 11, s 2.
8. Government of Canada, *Broadcasting Act*, S.C. 1991, c. 11, ss 3, 5, 9; Government of Canada, *Canadian Content Development Contributions and Eligible Initiatives*, consulted on May 20, 2022.
9. Government of Canada, *Broadcasting Act*, S.C. 1991, c. 11, s 3.
10. Government of Canada, *Our Mandate, Mission and What We Do*, consulted on May 20, 2022.
11. *Reference re Broadcasting Act*, 2012 CSC 4.
12. Marie Woolf, "Heritage minister says Netflix, Disney should contribute more to Canadian culture," CTV News, February 16, 2022.
13. Bill C-11, *Online Streaming Act*, Parliament of Canada, introduced on November 22, 2021, s 2 (1).
14. Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), *Dépôt du projet de loi C-11 sur la radiodiffusion : l'ADISQ salue le dépôt d'un projet de loi nécessaire et grandement attendu*, February 2, 2022.
15. John Carpay, "Canada is one step closer to the demise of free speech with Bill C-11," *Post Millennial*, May 21, 2022; see John Carpay, President of the Justice Centre for Constitutional Freedoms (JCCF.ca).
16. Bill C-11, *Online Streaming Act*, Parliament of Canada, introduced on November 22, 2021, s 4.
17. House of Commons, House of Commons Debates, Vol. 151, No. 032, 1st session, 44th Parliament, February 16, 2022.
18. Marie Woolf, "Le projet de loi pourrait permettre au CRTC de réglementer les vidéos maison," *La Presse*, May 20, 2022.
19. Government of Canada, *Television Broadcasting Regulations, 1987*, Last amended on September 1st, 2018, s 5 (1) b) c) d).
20. Bill C-11, *Online Streaming Act*, Parliament of Canada, introduced on November 22, 2021, s 4.2 (2)(a).



This Viewpoint was prepared by **Samuel Bachand**, a lawyer at the LIS law firm and primary external counsel for the Justice Centre for Constitutional Freedoms (JCCF.ca) in the province of Quebec, in collaboration with **Gabriel Giguère**, Public Policy Analyst at the MEI. The MEI's **Regulation Series** aims to examine the often unintended consequences for individuals and businesses of various laws and rules, in contrast with their stated goals.

The MEI is an independent public policy think tank. Through its publications, media appearances, and advisory services to policy-makers, the MEI stimulates public policy debate and reforms based on sound economics and entrepreneurship. It neither solicits nor accepts any government funding.

MEI 910 Peel Street, Suite 600, Montreal QC H3C 2H8 T 514.273.0969 iedm.org