The Centre for Civic Engagement

Why Bill C-11's Misdiagnosed Canada's Broadcasting Woes

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This study was commissioned by the Centre for Civic Engagement. The CCE is a non-partisan Canadian charity dedicated to conducting original research on public policy issues related to Canadian prosperity, productivity, and national flourishing. The CCE's research informs an active program of policy seminars, events, conferences, and lectures all aimed at providing the policy making community with actionable insights that encourage informed decision making on issues that matter to Canadians.

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Introduction

Nearly one year ago, I made my way from my home in Ottawa across the river to the Gatineau hearing room used by the Canadian Radio-television and Telecommunications Commission (CRTC) to participate in its inaugural proceeding on implementing the Online Streaming Act,[1] better known as Bill C-11. I had regularly appeared as a witness at House of Commons and Senate committees, but this was my first time participating in a hearing before Canada's broadcasting regulator. I came with a simple message: while the roster of witnesses was filled with cultural lobby groups and broadcasters asking for their share of the bill's anticipated pot of gold, the perspective of consumers and the public interest needed to be heard.

My opening statement[2] emphasized prioritizing public over private interests, which, I argued, meant putting Canadians at the centre of their communications system, as one CRTC chair once characterized it. I did not anticipate receiving a warm reception, but I was still taken aback by the frostiness toward the notion that consumers and the public interest were important considerations. Instead, commissioners pointed to the need to step in where broadcasters or content creators were struggling to succeed in the market.

In fact, later that same day, an internet streaming executive was baffled when a commissioner characterized[3] the CRTC's mandate as one "to make sure that the ultimate beneficiaries of the broadcasting activities in the country are the artists and the creators that produce the content" without any reference to the perspective of the viewing public.

At the time, I chalked up the response to a tunnel-visioned regulator who saw the role of broadcast regulation primarily through the prism of Robinhood-style cross-industry subsidies. To the CRTC, the arrival of Bill C-11 wasn't a new paradigm. It was simply more of the same extended to the internet. Yet with the benefit of hindsight, it has become clear that the CRTC perspective wasn't the outlier. It was actually a reflection of the entire system: the government, culture lobby groups, broadcasters, and the regulator committed to a decades-old regulatory edifice premised on a Canadian culture model that can only succeed through legislated support mandating cross-industry subsidies and content promotion with little interest in metrics such as commercial success.

That may not sound to many like today's world of record-breaking spending on film and television production in Canada, a dizzying array of streaming choices, and global success stories for digital creators, but it is the starting point for understanding the Online Streaming Act.

1 "Online Streaming Act," Government of Canada, November 27, 2023, https://www.canada.ca/en/canadian-heritage/services/modernization-broadcasting-act.html.

2 Michael Geist, "The Unrecognizable Bill C-11: The Online Streaming Act Comes to the Heritage Committee," *michaelgeist.ca*., May 25, 2022, https://www.michaelgeist.ca/2022/05/the-unrecognizable-bill-c-11-the-online-streaming-act-comes-to-the-heritage-committee/.

3 "Transcript, Hearing," *Canadian Radio-television and Telecommunications Commission*, December 5, 2023, https://crtc.gc.ca/eng/transcripts/2023/tb1205.htm.

When the bill was first introduced in November 2020 by then-Canadian Heritage Minister Steven Guilbeault, it came with a warning that "the support system for Canadian content was at risk." The risk that the government was citing—echoing the views of the industry—was that longstanding subsidies from broadcasters and broadcast distributors to support the creation of Canadian content were slowly shrinking as viewing habits and revenues moved online. The resulting bill was therefore designed with a specific "problem" in mind, namely capture some of the online revenues to make up for the emerging shortfall and require those online services to promote Canadian content without regard for subscriber interest.

The problem was that this represented a fundamental misdiagnosis of the issue. If parts of the Canadian cultural sector were under pressure, it was not because of fewer dollars transferred through regulation but rather due to increased competition, consumer choice, and a new landscape of creator opportunities. But instead of modernizing the law to reflect the current reality, the government chose to retain an outdated model and penalize Canadian digital success stories in the process.

The well-chronicled parliamentary battle over Bill C-11 largely pushed many of these issues to the side, replaced by debate over the government's disastrous decision to extend the law beyond the large streaming services—often referred to as "web giants"—to include user content within its ambit. That policy change—Guilbeault's initial bill included exemptions for user content—was driven largely by the desire to expand the pool of streaming services caught by the law.

Music lobby groups, particularly those based in Quebec, were anxious to scope YouTube into the law and concerned that the user content exemption might exclude them from potential mandated contributions. The government complied with demands to limit the user content exception, a decision that sparked widespread opposition to the bill amid cries of censorship and harm to Canadian digital creators. Efforts at the Senate to strike a compromise sent an amended bill back to the House of Commons for further consideration, but the government doubled down and promised to address the issue through a policy direction to the CRTC, rather than within the legislation itself.

Years after Guilbeault first tabled Bill C-10 in 2020, the follow-on Bill C-11 received royal assent in April 2023. If the members of the Canadian creator community that had lobbied for the bill expected an immediate influx of new money, they have been left sorely disappointed. More than 18 months later, implementation of the bill has been a regulatory mess, marked by multiple court challenges[4] and the prospect of trade battles that have been exacerbated by the imminent return of President Donald Trump to the White House.

[4] Marie Woolf, "Streaming giants launch multiple legal challenges to Bill C-11 payments in Canada." *The Globe and Mail,* July 4, 2024, https://www.theglobeandmail.com/politics/article-streaming-platforms-launch-multiple-legal-challenges-to-bill-c-11/

Bill C-11's Faulty Foundations: Who's In and Who's Out

While an updated Broadcasting Act was always going to face its fair share of challenges, much of the blame lies at the faulty foundation on which the bill was based. There are many modest amendments included in the first major effort in three decades to update Canada's broadcast rules, but the core involved three issues: (i) the inclusion of internet streaming services as "undertakings" regulated in a similar manner to broadcasters and broadcast distributors such as cable and satellite companies; (ii) the creation of contribution requirements for these internet undertakings; and the (iii) the imposition of discoverability requirements designed to raise the profile or prominence of certain content.

Implementation of each of these issues has proven challenging. The inclusion of internet streaming services within the law may sound straightforward, but there are thousands of services worldwide. Would all services be subject to Canadian broadcasting law? If there are thresholds, how to determine who is and who is out?

The CRTC set out to establish these standards as its first order of business by determining which services would be caught by a mandated registration system, a requirement that was later linked to broadcasting regulatory fees. In a September 2023 ruling,[5] the CRTC stated that registrations would give it "de minimis information about online undertakings and their activities in Canada, which would give the Commission an initial understanding of the Canadian online broadcasting landscape and would allow it to communicate with online undertakings." There were many requests for exemptions, but the CRTC ultimately decided that there was just one exemption standard that mattered, ruling that only those services with $10 million or more in Canadian revenues would be subject to the registration requirement.

Since the law applied to any streaming service, this included far more than just giants such as Netflix and Spotify. Indeed, government officials had internally acknowledged that the broadly drafted Bill C-11 applied Canadian broadcast law to everyone: any audio or video service anywhere in the world, including news sites, podcasts, audiobooks, and adult sites. Few paid attention to the broad scope since those supporting the law were quietly delighted at the large universe of potential sources of new money and critics were primarily concerned by the freedom of expression risks posed by regulating user content.

The registration decision left some characterizing it as a podcast registry or part of one of the world's most repressive online censorship schemes. That clearly overstated the matter, but the concerns were not assuaged by the CRTC's own analysis, which seemed to point to the decision as the thin edge of the wedge with the registration requirement being the first step toward a far broader regulatory framework. In fact, the rationale for the CRTC to include many of the services was that without such information it would not be well positioned to regulate the streaming services. This created an obvious contradiction: the commission claimed that the registration requirement required disclosure of only limited information but then also argued that such information was essential to future decision-making on compliance with the Broadcasting Act objectives.

[5] "Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330," *Canadian Radio-television and Telecommunications Commission*, September 29, 2023, https://crtc.gc.ca/eng/archive/2023/2023-329.htm.

The registration requirements[6] are now more than a year old with 54 entities included in the registration database.[7] Those entities were later scoped into a decision on broadcast regulatory fees used to support the CRTC. The commission ruled in March 2024 that it would use the registration decision as the standard, requiring those with more than CAD $10 million in Canadian revenues to contribute to the costs of the regulatory system. Google challenged that decision[8] at the Federal Court of Appeal on the grounds that the CRTC included advertising revenues generated from user content in its calculations, despite the government's direction that user content fell outside the scope of regulation.

The court has yet to rule on the legal challenge, but the case highlights one of the flaws of the government's decision to include user content within the law since its impact extends beyond simply regulating the content itself. In fact, the CRTC-approved thresholds for inclusion in registration and regulatory payments were similarly a function of a poorly constructed bill. Opposition parties had presented multiple amendments to establish regulatory thresholds within the law itself, insisting it would foster greater market certainty. The government rejected each one, leaving the issue to the CRTC and in the process creating doubt about its scope and ultimately delaying the implementation of the bill.

6 "Registration for online streaming services," *Canadian Radio-television and Telecommunications Commission*, August 1, 2024, https://crtc.gc.ca/eng/industr/modern/registr.htm.

7 "List of registered online streaming services," *Canadian Radio-television and Telecommunications Commission*, January 1, 2024, https://applications.crtc.gc.ca/portail-portal/eng/listes-lists/Digital-Media/12?_ga=2.74996433.299088392.1731259230-1687810677.1731259230.

8 Michael Geist, "Government Court Filing on Bill C-11: "The Act Does Allow For the Regulation of User-Uploaded Programs on Social Media Services"," *michaelgeist.ca.*, June 13, 2024, https://www.michaelgeist.ca/2024/06/government-court-filing-on-bill-c-11-the-act-does-allow-for-the-regulation-of-user-uploaded-programs-on-social-media-services/.

Bill C-11's Faulty Foundations: Mandated Contributions

The registration and regulatory payments decisions served as a prelude to the more consequential Bill C-11 decision, namely mandated contributions, a regulatory euphemism for payments. The CRTC was faced with numerous policy questions that were left unanswered in the legislation, including definitions of Canadian content, discoverability requirements, and the regulatory treatment of existing cultural contributions. Yet given the law's core objectives—generating new money from internet streamers for Canadian content production—the commission chose to leave the myriad of policy issues for later and focus first on an initial "base contribution."

It ruled[9] that internet streaming services generating at least $25 million in revenue in Canada would be required to contribute 5 percent of those revenues to support various Canadian funding programs that support film and TV production, news, and music. The CRTC's key objective appears to have been to ensure that the competing groups hoping for some of the streamer dollars all got something: 2 percent went to the Canada Media Fund (CMF), 1.5 percent for news, 0.5 percent for the Indigenous Screen Office, 0.5 percent for Diversity and Inclusion Funds, and another 0.5 percent for independent productions. There was a similar breakdown for audio streamers. Notably, these requirements were significantly above the typical international standard which is closer to the 2 percent total range.

The decision was unsurprisingly welcomed by potential recipients (though some grumbled that the CMF support was lower than expected) but sparked anger among many streaming services. The CRTC ignored the existing contributions from streaming services, many of whom have spent hundreds of millions in the Canadian market. Moreover, it maintained an approach whereby the streaming services were required to pay into the system but are unable to access the funds even as they invest in production in Canada.

The mandated payments also sparked fears that it would render some services uneconomic in Canada. For example, audio streaming services such as Spotify operate on thin margins with the majority of revenues allocated toward licensing. Increasing costs by 5 percent would force the service to either exit the market or pass along the costs to consumers. These were not idle threats as there have been cases of market exits elsewhere in light of regulatory costs. These include the experience in Denmark, where mandated payments far in excess of most European countries led to a significant reduction[10] in domestic film and television production, and in Uruguay, where higher copyright fees briefly led to a market exit for Spotify.[11]

[9] "Broadcasting Regulatory Policy CRTC 2024-121-1 and Broadcasting Order CRTC 2024-194," *Canadian Radio-television and Telecommunications Commission*, August 29, 2024, https://crtc.gc.ca/eng/archive/2024/2024-121-1.htm.

[10] Jakob Isak Nielsen, "Small European Film Markets: Portraits and Comparisons," *crescine.eu.*, https://www.crescine.eu/small-film-industries/denmark#:~:text=Feature%20fiction%20output%20peaked%20around,established%20Film%20Agreement%202024%2D27

[11] "Spotify Is Being Pushed Out of Uruguay," *Spotify.com.*, December 1, 2023, https://newsroom.spotify.com/2023-12-01/spotify-is-being-pushed-out-of-uruguay/#:~:text=Unfortunately%2C%20Spotify%20will%20begin%20to,(the%20Rendici%C3%B3n%20de%20Cuentas).

Alternatively, those that remained in the market were likely to pass along the additional costs to consumers with individual Canadians bearing the brunt of the government policy and the resulting CRTC decision. In fact, months later the services remain in the market, but increased consumer pricing in response to Bill C-11 has become commonplace. For example, Spotify recently announced price increases,[12] citing the regulatory costs from the bill as one of the reasons why.

The CRTC ruling also sparked multiple legal challenges in the Canadian courts. The Motion Picture Association-Canada, which represents Netflix as well as Hollywood studios such as Paramount, Universal, and Warner Bros. Discovery, challenged[13] the decision in Federal Court on the grounds that it could compel the disclosure of sensitive confidential information to competitors. Music streaming services, including Spotify, Apple, and Amazon, launched[14] a separate legal challenge focused on the requirements to fund news as part of the CRTC decision.

Opposition to the decision has played out in other venues as well. Nineteen members of the U.S. Congress insisted[15] the law discriminates against U.S. companies and asked trade officials to intervene. The companies, led by the Digital Media Association, also launched a "Scrap the Streaming Tax" public relations campaign designed to heighten opposition to the decision.

Ironically, this opposition comes at a time when Canada has experienced unprecedented investment in film and television production. While the bill started with the warning that "the support system for Canadian content was at risk," there has never been more spending on film and television production in Canada—including on Canadian content—than right now. According to the Profile 2023 report[16] produced by the Canadian Media Producers Association, last year there was record production, record Cancon production, and record French-language production. Over the past decade, as streaming services have grown in popularity, Canadian film and television production has more than doubled. Simply put, the data tells us that there is no Canadian content emergency and no risk to the viability of film and TV production in Canada.

[12] Sean Previl, "Spotify Premium's price in Canada is about to go up. Here's how much," *Global News*, October 9, 2024, https://globalnews.ca/news/10802859/spotify-premium-price-increase-canada/.

[13] "Motion Picture Association – Canada Files for Review of CRTC Decision to Force Global Entertainment Streaming Services to Pay for Local News," *Motion Picture Association*, July 4, 2024, https://www.mpa-canada.org/press/motion-picture-association-canada-files-for-review-of-crtc-decision-to-force-global-entertainment-streaming-services-to-pay-for-local-news/.

[14] "Amazon, Apple, Spotify file legal challenge against Canada's music streaming tax," *musicbusinessworld.com*., July 8, 2024, https://www.musicbusinessworldwide.com/amazon-apple-spotify-file-legal-challenge-against-canadas-music-streaming-tax/.

[15] Steven Chase, "Members of Congress say Canada's online streaming act discriminates against Americans," *The Globe and Mail*, May 16, 2024, https://www.theglobeandmail.com/politics/article-members-of-congress-say-canadas-online-streaming-act-discriminates/.

[16] Gamiela Fereg, "CMPA's Profile 2023 summarizes economic impact of film and TV production activity in Canada," *Canadian Media Producers Association*, May 8, 2024, https://cmpa.ca/pressreleases/cmpas-profile-2023-summarizes-economic-impact-of-film-and-tv-production-activity-in-canada/.

Bill C-11's Faulty Foundations: Discoverability

As the courts consider the legal challenges to Bill C-11, the CRTC plans to press ahead with the remaining policy issues, including new discoverability requirements that have significant implications for freedom of expression and Canadian cultural policy. The discoverability provision[17] in Bill C-11 grants the CRTC the power to establish regulations on the "presentation of programs and programming services for selection by the public, including the showcasing and the discoverability of Canadian programs and programming services, such as French language original programs."

Despite little evidence of a problem finding or recognizing content from Canada on streaming services, the notion of mandating discoverability received strong support from both the industry and government. It is worth considering why discoverability emerged as such a focal point for the Canadian creative sector when much of the evidence suggests that users need to do little more than put the term Canada in a search box or rely on algorithms that will seek to provide them with Canadian content where it is of interest.

The answer lies in a bygone era. Canadian film and television production has long been a product of regulatory requirements with broadcasters required to air a certain percentage of Canadian content as a condition of licence. With a few notable exceptions, Canadian content has played second fiddle to more popular U.S. programming, which has meant that broadcasters were more likely to air the Canadian programs at less popular times. Moreover, given the reliance on simultaneous substitution policies, changes in U.S. programming times had a spillover effect on Canada, with Canadian broadcasters forced to change their schedules in response to U.S. changes. That meant that Canadian programs often lacked a consistent time in the programming schedule. This experience often left some fearing that their programs would not be found unless efforts were made to make them more discoverable.

But this description of broadcasting will be unrecognizable to many, reflecting a different time of fixed broadcast schedules that has been replaced by the on-demand digital streaming world in which streamers have no reason to hide their programming. The Canadian cultural sector has for years claimed that Canadians want access to Canadian programs. If that is true, that provides plenty of incentive for services such as Netflix to ensure that they offer Canadian programming that is easy to find since they operate on a subscription basis that allows consumers to cancel if they do not find entertainment that interests them.

Moreover, discoverability may not only be unnecessary, but it runs the risk of harming Canadian creators, resulting in lost audiences and potentially millions in lost revenues. If streamers present content due to CRTC discoverability regulations rather than organic user preferences, users are less likely to watch and recommend such programming. That could lead to the content being de-prioritized globally given the risks that algorithmic analysis may conclude that the content does not perform well when it is presented to users. In such a scenario, the regulatory effect would be to trade increased visibility in Canada for reduced exposure in the rest of the world, a deal no digital creator would take.

[17] "Broadcasting Notice of Consultation CRTC 2023-138," *Canadian Radio-television and Telecommunications Commission*, May 12, 2023, https://crtc.gc.ca/eng/archive/2023/2023-138.htm.

A Different Broadcast Regulatory Future

The Bill C-11 path based on longstanding cross-industry subsidies may have seemed inevitable to politicians and policymakers but there were other, more forward-looking options available. The government could have emphasized algorithmic transparency so that creators would have a greater understanding of how their content is being presented and assurance that they are treated fairly. Transparency could have been buttressed by rules prohibiting undue preferences designed to guard against unfair treatment on platforms. The government could have mandated increased data sharing and improved intellectual property protections. It could have supported the sector by re-working Canadian content rules to increase incentives for all producers, including streaming services, to situate even more of their film and television production in Canada. And a consumer focus could have included stronger consumer contracting protections to enhance market forces by facilitating easier consumer subscription cancellations.

In other words, there is plenty of room for a modernized broadcasting law that emphasizes the interests of consumers, competition, and a new generation of creators. Instead, Canadians were presented with Bill C-11, which was not reform so much as a false panic over the viability of the sector. Canadian culture is a remarkable success story with both cultural and economic significance. Yet by ignoring the data and using panic as the basis for legislation, the government may have created real harm with the prospect of decreased competition due to market exit, higher consumer prices, and a risky trade battle with the United States.

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