

***International conference on legislative reforms around the world to protect and promote the diversity of cultural expressions online*** (27 January 2022)

Remarks for a roundtable by Monica Auer, Executive Director, Forum for Research and Policy in Communications (FRPC)

## **I. Introduction**

I'd like to begin by thanking the Coalition for inviting me to be part of this round table.

As a lawyer practising in the area of Canadian broadcasting and telecommunications my remarks will focus briefly on some of the changes being proposed for Canada's 30-year-old broadcasting legislation, about which Pierre [Trudel] has already made some comments. I will also comment on three aspects of these changes which raise questions.

## **II. 1991 *Broadcasting Act* and Bill C-10**

Canada is a Federal state whose national laws are set by Parliament. It enacted Canada's current *Broadcasting Act* in 1991, and delegated responsibility to implement it to the Canadian Radio-television and Telecommunications Commission or CRTC. The CRTC regulates and supervises Canadian radio and television programming services as well as cable and satellite distribution services.

The '91 Act has three main Parts. Part 1 sets out Parliament's broadcasting policy for Canada, Part II empowers the CRTC to license and regulate broadcasters and Part III continues the Canadian Broadcasting Corporation, or CBC.

In November 2020 the Minister of Canadian Heritage proposed major changes to Parts I and II of the *Broadcasting Act*, in Bill C-10. The Bill made no major changes to Part III or the CBC.

The House of Commons passed Bill C-10 in June 2021. As Eugenie mentioned, c-10's passage through the Senate – required to become law – was interrupted last summer by a Federal election.

It's widely expected that the new Minister of Canadian Heritage, the Honourable Pablo Rodriguez, will be reintroducing new broadcasting legislation next week when the House begins its new session, or soon afterwards.

### **A. Part I - Content**

Parliament's requirements for broadcast programming are set out in section 3 of the '91 Act. While it acknowledges Canada's linguistic duality (s.3(1)(d)(iii)), Bill C-10 goes further, highlighting "the minority context of French in North America" (Bill C-10, s. 3(1)(c)). It says the broadcasting system should "support the production and broadcasting of original programs in French" and "enhance the vitality of official language minority communities" (Bill C-10, s. 3(3)(iii.3)).

The '91 Act says the broadcasting system should reflect the multicultural and multiracial nature of Canadian society (s. 3(1)(d)(iii)). Bill C-10 says that the broadcasting system should serve Canadians' needs and interests including Canadians "from racialized communities and Canadians of diverse ethnocultural backgrounds ...." (Bill C-10, s. 3(1)(d)(iii)). C10 adds that news programs produced by

Canadians should include “the viewpoints of ... Canadians from racialized communities and diverse ethnocultural backgrounds” (Bill C-10, s. 3(1)(i)(ii.1).

## ***B. Parts I and II: Discoverability***

“Discoverability” was not a broadcasting concept when the current *Act* was passed in 1991. Instead, the current *Act* (s. 3(1)(t)(i)) and Bill C-10 both say that cable and satellite distributors “should” give priority to the carriage of Canadian programming services.

Bill C-10 adds that online undertakings that transmit or retransmit other broadcasters’ programming services “should” ensure that these services are discoverable (Bill C-10, s. 3(1)(q)(i)). It emphasizes that “online undertakings must clearly promote and recommend Canadian programming” in English, French and Indigenous languages and must “ensure that any means of control of the programming generates results allowing” the discovery of Canadian programming (Bill C-10, s. 3(1)(r)). The Bill does not define discoverability, so the CRTC may have to decide its meaning.

## ***C. Part II: Regulation***

It has been said that Bill C-10 will enable the CRTC to regulate online streaming – but the CRTC asserted its jurisdiction over online broadcasting more than twenty years ago, in 1999. At that time the Internet was very young: Netflix, for instance, had only just launched its online service.

The ‘91 *Act* requires the CRTC to exempt broadcasters from regulation when they cannot help to implement Parliament’s broadcasting policy, however, and the CRTC therefore exempted all online broadcasters from regulation.

In 2017, however, Netflix agreed to spend \$500 million over five years on original productions in Canada. It is clear that this online broadcaster and others can now contribute materially to Canada’s broadcasting policy.

Yet the CRTC still exempts online services from regulation. This is for a very practical reason: if it began to license online broadcasters it could only license Canadian broadcasters. This may seem strange, because the ‘91 *Act* explicitly gives the CRTC jurisdiction over broadcasters operating in whole OR in part in Canada: but Cabinet has used its power under the ‘91 *Act* to order the CRTC not to license, and therefore not to regulate, any foreign broadcasters.

Bill C-10 hints at a new regulatory framework for online broadcasters, but very briefly. C-10 keeps the ‘91 *Act*’s licensing powers, but would allow the CRTC to make regulations about “the registration of broadcasting undertakings” (s. 9(1)(i)). The CRTC may register online broadcasters instead of licensing them. Bill C-10 does not otherwise explain how registration will work.

Bill C-10 retains the CRTC’s current powers over broadcasters’ expenditures and scheduling, and empowers it to issue orders about the “showcasing and discoverability of Canadian programs” (new s. 9.1(1)(b)).

Finally, Bill C-10 gives the CRTC the power to levy fines for broadcasting infractions (Bill C-10, new Part II.2).

To conclude, Bill C-10 has positive features. Its emphasis on Indigenous broadcasting, the reflection of Canada's racialized communities and the availability of broadcast services and programming for official-language minority communities is long overdue.

Yet Bill C-10 has more than a few problems. Here are three.

The first involves accountability. The CRTC collects data about what broadcasters actually broadcast – but does not publish any results. How, then, can Parliament and Canadians know if Canada's broadcasting policy is being met? The CRTC's procedures also lack transparency: it does not publish all applications it receives or all decisions it makes, its decisions are not signed and it has circumvented the public hearings mandated by the current *Act* by holding hearings to which the public is not invited. The '91 *Act* has not ensured the CRTC's accountability and transparency, and neither does Bill C-10.

A second problem involves the CRTC's independence. The CRTC was the first Canadian broadcast regulator to issue its own decisions; before then the government issued broadcasting licences from 1918 to 1967. The '91 *Act* permits Cabinet to issue orders to the CRTC on broad policy matters – but C-10 also lets each government's Cabinet issue orders to the CRTC about the conditions it imposes on broadcasters, about their spending and about the CRTC's regulations including those for registration (Bill C-10, s. 7.1). In spring 2021 a draft policy direction that Cabinet proposed to issue after Bill C-10 becomes law includes 14 separate directions. Bill C-10 re-introduces political influence in Canadian broadcast decision-making.

Finally, Bill C-10 maintains the CRTC's excessive discretion. Fifty-one of the 59 objectives in the current *Act* are discretionary; 60 of Bill C-10's 74 objectives for Canada's broadcasting policy are discretionary. Canadians may think that Canada's broadcasting legislation requires broadcasters to reflect the multicultural nature of Canadian society, for example – but it does not, as the language used is permission ("should"). Granting the CRTC excessive discretion on the one hand and effective freedom from meaningful oversight on the other is a legislative recipe for ensuring that Canada's broadcasting policy is not met.