Bill C-11-3 and issues concerning its drafting

Research note by the Forum for Research and Policy in Communications (FRPC)

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Introduction

On 21 June 2022 the House of Commons passed Bill C-11-3, the *Online Streaming Act*, to amend Canada's 1991 *Broadcasting Act*, and sent the bill to the Senate for its study and debate. The Senate's Transport and Communications Committee (TRCM) began its pre-study of C-11 on 8 June 2022 and by the end of this week will have heard from some 135 separate witnesses.

It is unclear precisely when TRCM will submit its report and recommendations about Bill C-11 to the Senate, but the latter is expected to sit from now until December 22, 2022, and to resume sitting in early 2023, perhaps as early as January 30.

Some parties have been urging the Senate (and through the Senate, TRCM) to pass Bill C-11 as quickly as possible, perhaps hoping that this will rapidly ramp up spending on Canadian program production by foreign streaming companies. They argue that the bill and its issues have been studied for years, whether through public consultations that began in September 2016 and received 'input' from some 30,000 people, the panel appointed by the government in June 2018 to consider a Broadcasting and Telecommunications Legislative Review (BTLR) or through the witnesses heard at the House of Commons Standing Committee on Canadian Heritage regarding both Bill C-10 (C-11's predecessor) and Bill C-11. One problem with this argument is that the current legislative practice of leaving it to individuals to create a consolidated version of existing statutes and proposals for their amendments means that very few people have had the chance to assess the impact of either bill on the *Broadcasting Act*. A second problem with this argument is that it ignores the fact that, at least in the case of Bill C-11, many clauses were added to the bill by the Heritage Committee during its last three meetings about Bill C-11 on 14 June 2022: witnesses who had previously given evidence would therefore have been unable to address any concerns raised by those amendments.

Others have acknowledged that C-11-3 will need at least a few 'key' amendments,[1] though it is not yet clear which amendments would be key.

The question for TRCM (and ultimately the entire Senate) is whether just a few well-considered amendments will suffice. Apart from the major public-policy issues raised by Bill C-11, including the regulation of user-uploaded programs, the granting to Cabinet of more powers of direction over the CRTC and the degree to which the CRTC ought to be able to intervene in disputes between all broadcasting undertakings (rather than just licensed distribution and programming services), the bill ought to also meet basic standards for writing laws set out over the last century by the Uniform Law

[1] Coalition for the Diversity of Cultural Expressions (CDCE*), Release: The future of Canadian culture in the hands of Senators*, (8 November 2022): "The Coalition for the Diversity of Cultural Expressions therefore calls on Senators to immediately adopt the few key amendments needed to restore fairness to our system and allow the Bill to move to the next step in the process."

Conference of Canada (ULCC). The basic premise of these standards is that statutes be logically organized and "written simply, clearly and concisely."[2]

Unfortunately, while it is often said that the Devil is in the details, most of such details remain intact in Bill C-11. This is perhaps due to the fact that, as mentioned above, neither Parliament nor the government has provided a public, consolidated version of Bill C-11 and the 1991 *Broadcasting Act*, making it difficult to determine just what is being proposed. It is also due to the fact that limits on the time available to Committees to meet necessarily limits the time available to witnesses to set out their concerns. Rational witnesses will use the limited time they have to address major problems, rather than each concern they may have with Bill C-11.

The problem, though, is that small details may have huge consequences down the road. Unclear or missing language in Bill C-11 may well wind up in Canada's courts, delaying a smooth and rapid infusion of money and other resources into Canada's broadcasting system. Whatever else it decides to say about major public-policy issues, therefore, TRCM represents a last chance to ensure that Bill C-11 is clear and coherent – and currently, the bill may require many more than a few key amendments.

Right now there are dozens and dozens of problems, both small and large, as FRPC discovered when it studied the *Broadcasting Act* proposed by C-11, word by word, checking for wording that may complicate its interpretation, and gaps in the bill with respect to issues such as due process. We estimate that the bill has just over 200 issues that range from vague or ambiguous wording, imprecise translations and conflicts between sections, as well as serious gaps in due process. This note offers examples of some of these problems.

1. Bill C-11-3 uses unclear wording

Laws must be written clearly so that those subject to the laws are able to understand and comply with them, and so that those who must implement the laws understand what they must do. Terms that are either new or are being used in a novel way should be defined. Bill C-11 uses and does not define words like "disinformation" (3(1)(s)(v)), "discoverability" (3(1)(q)(i)) and "feedback" (5.2(2)(g)).

Terms that appear clear but whose meaning has changed due to practice may also need definitions. For example, Bill C-11 adds more than a dozen requirements for 'public hearings' to the *Broadcasting Act*'s existing requirements. Although the 1991 *Act* mandates a "public hearing" before issuing mandatory orders or new licences, the CRTC has for years been holding 'non-appearing public hearings' – brief meetings of CRTC Commissioners and staff from which the public is excluded. This device may enable the Commission to manage its own scarce resources – time and money – effectively. For example, the 1991 *Broadcasting Act* requires the CRTC to hold a public hearing when it issues a new licence – but does not distinguish between contentious and non-contentious matters: such as when a party applies for a new licence in a remote area without current service, and no other party applies for the same licence. It is obviously inefficient to schedule a public hearing, book and pay for a space to hold a hearing for just the applicant and the CRTC: non-appearing hearings solve that problem. That said, the CRTC also uses non-appearing hearings when it comes to matters such as serial non-compliance, when it proposes to issue mandatory orders. In 2018, for example, the CRTC issued 4 mandatory orders involving regulatory non-compliance: should the CRTC not at least have a record of the broadcasters'

[2] *Drafting Conventions*, i.2 (General – style).

answers to questions about that non-compliance? In such cases artifices like non-appearing public hearings arguably bring the administration of justice into disrepute: if Parliament wants the CRTC to hold meaningful rather than fake public hearings it should define this term or grant the CRTC more discretion to not hold public hearings.

2. Bill C-11-3 uses wording that is ambiguous or vague

Where clear wording would offer certainty, Bill C-11 is often ambiguous. For example, the exemption power on 9(4) says that the CRTC "shall, by order, on the terms and conditions that it considers appropriate, **exempt persons who carry on broadcasting undertakings** of any class specified in the order from any or all of the requirements of this Part, of an order made under section 9.1 or of a regulation made under this Part…." Some have suggested that the CRTC could rely on this section to exempt social-media users from regulation. Yet Bill C-11 says that persons (human or corporate, under the *Interpretation Act*) who use social-media services to upload programs for transmission online and reception by other social-media service users do not "by the fact of that use, carry on a broadcasting undertaking …." (2(2.1)). If users who upload 'programs' are not carrying on broadcasting undertakings, will the CRTC be able to exempt them under 9(4)? Moreover, even if such users were broadcasters, the exemption applies to requirements of Part II of the *Act* – as the 4.1 and 4.2 sections fall under Part I of the Act: do the CRTC's exemption powers apply to regulations it makes through 4.2(1) in Part I? Perhaps the answer to these questions is quite different: perhaps 9(4) could be read as granting the CRTC an overall power of exemption, except that the Commission must under certain circumstances exempt broadcasters from regulation. Parliament should clarify not just which parties may be exempted from regulation, but also whether the CRTC actually has discretion to exempt in as-yet unforeseen circumstances.

C-11 also empowers the CRTC to make orders that impose conditions on broadcasting undertakings about "continued ownership and control by Canadians of Canadian broadcasting undertakings" (9.1(1)(p)). Does the word, "continued", mean that all broadcasting undertakings that are now owned and controlled by Canadians must remain that way? Or does it mean that at least one broadcasting undertaking must remain owned and controlled by Canadians? C-11 also empowers the CRTC to make orders and regulations "in a manner that is consistent with the freedom of expression enjoyed by users of social media services that are provided by online undertakings (10.1): if users of online undertakings' social-media services 'enjoy' relatively little freedom of expression due to the social-media services' practices, would the CRTC have to defer to that limitation?

C-11 also effectively removes social-media services of online undertakings from the scope of the *Broadcasting Act* when they transmit programs over the Internet that are "ancillary to a business not primarily engaged in the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business" (2(2.3(a)). Words like "ancillary", "primarily", "intended" and "directly" lack clarity, and wind up giving the CRTC more discretion than it already has: it will have to interpret this section to decide which social-media services of which online undertakings it covers.

We found some

3. Bill C-11-3's English-language and French-language versions sometimes differ

Canadian law is not just bijural (civil law in Quebec, and common law in the rest of Canada), but bilingual: laws are drafted in both French and in English and are equally 'authentic'. Equal authenticity means that neither version is 'more' correct than the other; when differences between the wording of a statutory section are found, a common meaning must be ascertained.

Unfortunately, the English-language and French-language versions of Bill C-11 are occasionally different. Online undertakings that provide other broadcasters' programming services should, in the English-language version of the draft, provide "*reasonable* terms" for the services' carriage, packaging and retailing. In the French-language version, they should provide "des conditions *acceptables*" (3(1)(q)(ii)). The programming of the community element should "*be available* throughout Canada so that all Canadians can engage in dialogue on matters of public *concern*" in the English-language version, but "*être offerte* dans tout le Canada afin que tous les Canadiens puissent établir un dialogue sur des *questions d'intérêt public*" [be *offered* throughout Canada so that all Canadians can engage in dialogue on matters of public *interest*] (3(1)(s)(vi)). Later, when issuing orders to the CRTC, the Minister "shall … publish the representations that are *made* during that period", and "publie les observations qu'il a *reçues* durant cette période" (8(2)(b)): should not both versions refer to the same submissions? Altogether we found 26 examples where the English-language and French-language versions of Bill C-11 appear to differ.

4. Bill C-11-3 has gaps

Last, but by no means least, Bill C-11 is filled with gaps. This is most obvious when it comes to registration, the 21st century replacement for licensing. Bill C-11 empowers the CRTC to make regulations "respecting the registration of broadcasting undertakings with the Commission" (10(1)(i)) and mentions that the CRTC may require some broadcasting undertakings to be registered (4.2(2)(b)(ii)). As C-11 is otherwise entirely silent about "registration", it is left to the CRTC – or Cabinet (7(7)) – to decide who or what must register, whether they must apply to register, whether such applications or registrations will be published, whether public comment on such registrations – and any conditions that apply to the registrants – will be invited, whether registrations last for specified terms or in perpetuity, whether registrations can be suspended, revoked or rescinded, and whether or when the CRTC will both make and publish its decisions about registrations.

While petitions about licensing matters may be submitted to Cabinet (as with Cabinet's recent decision to return the CRTC's decision renewing CBC's licences to the CRTC for rehearing and reconsideration), there is no such provision for decisions (if any) about registrations. Presumably decisions and orders about registrations could only be challenged before the Federal Court of Appeal?

Gaps in due process are especially significant in the entirety of 5.1 and 5.2, granting major procedural rights to official language minority communities (OLMCs) which are apparently entirely unavailable to all other communities, up to and including a novel and uncertain type of 'review-and-vary' power to "alter" its initiatives, policies and decisions involving OLMCs.

Somewhat less obvious are the gaps in the 1991 *Broadcasting Act* that Bill C-11 ignores. For example, C-11 leaves intact the impression that the CRTC will consider "any complaint or representation" about broadcasting (18(3)) even though the CRTC delegated effective responsibility over complaints about broadcasting years ago to various non-CRTC bodies such as the Canadian Broadcast Standards Council and the Commissioner of Complaints for Telecommunications and Television Services. The CRTC's 2020

Communications Monitoring Report does not even mention the numbers of complaints received by the CRTC (or the CBSC and CCTS). If Parliament wants the CRTC to consider or report on Canadians' complaints about the broadcasting system, it should clarify this gap.

It would also be helpful it Parliament would clarify which orders require public hearings. As currently written section 18 sets out four times when the Commission must hold a public hearing (however it defines 'public hearing'): when it issues, suspend or revokes a licence, when it sets performance objectives under 11(2)(b) and 11.1(6)(b), and when it makes an order under 12(2). Are the orders under 12(2) the same as the orders that the CRTC may issue under 9.1? If yes – a public hearing is required. If no – would such hearings be left to the CRTC's discretion?

Conclusion: the Senate and the House should fix Bill C-11's problems before enacting it

FRPC supports the passage of Bill C-11 to clarify the role and responsibilities of online broadcasters in Canada. The risk for Parliament and the cultural sector is that if the dozens of drafting issues now in C-11 are not addressed by TRCM and the Senate (in the near future) and/or the House of Commons after C-11 returns to the other place, the first decisions made by the CRTC under a new *Broadcasting Act* may well be hauled before Canada's federal courts. This will delay the new law's implementation for months, if not years – and, from the perspective of non-Canadian online streaming platforms (whose managers bear a duty to the platforms' owners, not to the public interest in broadcasting in Canada), may be the best case scenario.

Even worse, since the courts' true role is to interpret, not to make, laws, gaps in the new *Broadcasting Act* may wind up back in Parliament's lap, starting with the House of Commons and again proceeding to the Senate.

The Senate can and should help the House to pass a well-written bill that will bring Canada's broadcasting regulation into the 21st century. To do that, it must not just tackle a few major policy issues – it must also take the Devil out of C-11's many details.