Coalition
for the Diversity of
Cultural Expressions

Brief presented to the Standing Committee on Canadian Heritage

In the context of the study of Bill C-11, *Online Streaming Act*

June 3, 2022

The *Online Streaming Act* must ensure the diversity of cultural expressions in the broadcasting ecosystem by guarantying a place of choice for the creation, production and broadcasting of national content, including original French-language content, Indigenous content in Canada and content from official language minority communities. The Canadian Broadcasting Policy is essential to fulfill Canada's commitments under the *UNESCO Convention on the protection and promotion of the Diversity of Cultural Expressions* and to preserve the State's cultural sovereignty.

The CDCE has conducted a reflection with its members and several experts in order to formulate requests for amendment to Bill C-11 and has limited its demands to what it considered essential in order to encourage a rapid adoption of the Bill, while making modifications that it deems necessary to meet the minimum requirements of the cultural sector.

1. The use of Canadian talent

The CDCE ask for a modification to section 3 (1) f) in Bill C-11 which wording is as follows:

> (f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French or English, renders that use impracticable, in which case the undertaking shall make the greatest practical use of those resources;
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> (f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources and shall contribute strongly in an equitable manner to the creation, production and presentation of Canadian programming in accordance with the objectives of the broadcasting policy set out in this subsection and taking into account the linguistic duality of the market they serve;

The differential treatment for foreign and Canadian online and traditional undertakings could result in reduced requirements for foreign online undertakings with respect to spending on Canadian programming, lower contributions to funds to support content development, reduced efforts to showcase Canadian programming, as well as a reduced role of Canadian creative and other resources in the creation, production, and presentation of programming.

According to Canadian Heritage[1], the revised *Broadcasting Act* would inject an additional $70 million per month into the music and audiovisual sectors. But this is largely based on an estimate of Canadian program

[1] Canadian Heritage, Fact sheet – Estimated Impact of Bill C-10 and $830 Million Projection

expenditures and contribution comparable to the current obligations of Canadian broadcasting undertakings. To ensure this level of contribution, and to support the vital role of Canadian creative and other resources in Canadian programming creation, production, and presentation, it would be preferable not to set a lower expectation for foreign online undertaking's contribution in the Act.

It would therefore be preferable to opt for language that does not distinguish between foreign and Canadian undertakings, but rather requires each broadcasting undertaking to contribute to Canadian programming and to make maximum-but-not-less-than-predominant use of Canadian creative and other resources when doing so. Thus, the objective of section 3(1)(f), which is to support Canadian programming, would apply across the Canadian broadcasting system:

> (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation, production and presentation of Canadian programming, and shall contribute significantly to the creation, production and presentation of Canadian programming to the greatest extent possible that is appropriate for the nature of the undertaking;

2. Appeal to the Governor in Council

Several stakeholders expressed concerns with the increased latitude given to the CRTC to determine the precise obligations to which broadcasting undertakings will be subject. The fears are varied, from the lack of expertise in the CRTC to oversee a greater number of undertakings in a complex and changing environment, to what seems to be a bias towards certain players in the sector.

The CDCE shares some of these concerns and considers that civil society representatives should keep tools to make their voices heard on the important decisions that the CRTC must make. The call to the Governor in Council is one of the tools available to civil society.

Applications to the Governor in Council are rarely successful, but when they are, they can make a difference by allowing civil society to make legitimate arguments that had not been accepted by the Commission. One example is the appeal by organizations following a 2017 CRTC decision in the context of the renewal of the television licences of large French-language private ownership groups. The CRTC had not included requirements for the creation and presentation of programs in original French-language and music programs. The Governor in Council asked the CRTC to review its decisions[2], resulting in a new CRTC decision[3].

Bill C-11 maintain this remedy that can be used in connection with licenses, but as the conditions of service of broadcasting undertakings will now be determined by orders, this remedy will now become useless.

The CDCE asks that CRTC orders be subject to an appeal to the Governor in Council to have them set aside or referred back to the Commission for reconsideration and rehearing. This is simply a matter of adapting the existing provision in the *Broadcasting Act* to the new regulatory context. The amendments recommended by the CDCE read as follows:

> **28 (1)** If the Commission makes a decision ~~under section 9 to issue, amend or renew a licence~~, the Governor in Council may, within 180 days after the date of the decision, on petition in writing of any person received within 45 days after that date or on the Governor in Council's own motion, by order, set aside the decision or refer the decision back to the Commission for reconsideration and hearing of the matter by the Commission, if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1).

[2] See the Order Referring Back to the CRTC Decisions CRTC 2017-143 to 2017-151 to Renew the Broadcasting Licences, SI/2017-42, Vol. 151, no 18, September 6, 2017.
[3] See the Broadcasting Decision CRTC 2018-334, August 30, 2018.

As well as the addition of a definition to Article 2 (1):

> *decision* includes a determination made by the Commission in any form; (*décision*)[4]

It seems important to us that the government should not deprive itself of the power to intervene if it feels that the CRTC is deviating from the direction it considers appropriate for the implementation of Canadian policy.

3. Public hearings for orders

Bill C-11 do not provide for a public hearing process for the issuance of orders setting out conditions of service, as is the case for licences. Instead, section 9.1 (4) provide that proposed orders be made available on the CRTC's website and that interested persons be given the opportunity to make representations.

Unlike hearings, such a process does not ensure that the various views are considered in a review. In addition, the CRTC would not be able to ask stakeholders as easily for clarification to allow it to get a better sense of the positions of all stakeholders in an issue. Stakeholders will also not be able to take advantage of the hearings to intervene on elements raised by other parties, which could hinder the understanding of the issues. We are also concerned about the uneven levels of experience and resources available to the various potential stakeholders.

For example, will a community group that makes its first submission to the CRTC, have the necessary support to develop a convincing argument to make its case in the face of divergent positions that could be filed by experienced lawyers on behalf of large broadcasting undertakings?

We therefore propose that the next bill provides for a public hearing process and we repeat our previous recommendation:

> **18 (1)** Except where otherwise provided, the Commission shall hold a public hearing in connection with
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> **(a)** the issue of a licence, other than a licence to carry on a temporary network operation;
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> **(b)** the suspension or revocation of a licence;
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> **(c)** the establishing of any performance objectives for the purposes of paragraphs 11(2)(b) and 11.1(5)(b); and
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> **(d)** the making of an order under subsections 9.1 (1) and 12(2).

4. Increase transparency related to the adoption of a policy direction provided for in Article 8 of the Act

The new section 8 (2) of the Bill could considerably limit the understanding, for all stakeholders, of the changes made to a policy direction or the issues raised.

Section 8(2) provides important clarification but insufficient because it allows the minister to cut back the comments received or to present only a summary of them. This is why we suggest that it be amended to make sure that full comments are available, not just a summary of them.

We propose the following change:

> **(2)** The Minister shall

[4] Note 1 refers to the definition contained in the *Telecommunications Act*.

a) specify in the notice the period — of at least 30 days from the day on which the notice was published under paragraph (1)(a) — during which interested persons may make representations; and
b) publish~~, in any manner that the Minister considers appropriate, a report summarizing~~ the representations that are made during that period.

5. Restore terminology that was present in C-10

We have identified changes in terminology between the version of Bill C-10 that passed third reading last year and Bill C-11. In this section we will explain the reasons why we propose to reintroduce text that was initially adopted.

5.1. Original French language programs

During the review of Bill C-10, several amendments were made to ensure that the place of content created and produced in French would be considered more carefully by the CRTC. Several organizations, including the CDCE, asked that the expression "original French language programs" (*émissions de langue originale française*) was used in these amendments, which was indeed reflected in the French version of C-10.

Unfortunately, Bill C-11 uses " *émissions originales de langue française* " in all clauses, while in English, "French language original programs" is used in some places[5] and "original French language programs" in others[6].

The difference is important. All original programs that are subsequently translated, dubbed or otherwise offered in French can be considered original programs in French-language. This is a departure from the stated objective of ensuring that original content is created and produced in French.

The CDCE demands that the term "original French language programs" (*émissions de langue originale française*) be used throughout the Bill to avoid any ambiguity.

5.2. Official language minority communities

A number of clauses were added to Bill C-10 regarding official language minority communities (OLMCs). However, the nomenclature that appeared in Bill C-10 ("official language minority communities" and "*communautés de langue officielle en situation minoritaire*" in French) has been replaced in Bill C-11 by the expression "English and French linguistic minority communities" and "*minorités francophones et anglophones du Canada*" in French. Thus, the French version of the new wording proposed by Bill C-11 removes the concept of "community", an important concept for organizations working for these communities and which distinguishes them from the majority.

Generally speaking, "official language minority communities" (or OLMCs) are defined as English-speaking communities in Quebec and French-speaking communities outside Quebec. This is the term they have long preferred (rather than Anglophone and Francophone minorities) and it is how federal institutions refer to them.

While we agree that Bill C-11 recognizes the minority context of French in North America with respect to the conditions of operation of broadcasting undertakings, the introduction of this recognition could lead to an interpretation that the term "French-speaking minorities" includes Francophones in Quebec, who are in the majority in that province. Such a result would be unacceptable and would constitute a detrimental setback for the protection of OLMC rights. To avoid this problem, Bill C-11 should:

[5] 3(1) (i.1) and 9.1(1)e)
[6] 3(1) q) (i), 9.1(1)b) et c), 9.1(7), 11.1 (1.1) and (3)

1) return to the term originally used in Bill C-10, i.e. "official language minority communities" and "*communautés de langue officielle en situation minoritaire*" in French; and

2) expressly define in the legislation that this expression refers to English-speaking communities in Quebec and French-speaking communities outside Quebec.

5.3. Regulations - Canadian programs

Subsections (i) to (v) of section 10(1)(b) in Bill C-10 have been moved to a new section, 10(1.1), entitled "Regulations - Canadian programs" in Bill C-11.

Subsections (a) to (e) contain minor wording changes and two more significant changes that we would like to correct: the replacement of "intellectual property rights" with "copyright" and the loss of the link between subsections (a) and (d) - formerly subsections (i) and (iv).

Intellectual property rights are broader than copyright. For example, copyright does not include trademark-like elements, such as the brand of a television program.

The lack of a link between subsections (a) and (d) is probably an oversight. It is important that broadcasters and online undertakings negotiate fairly with program owners regarding the intellectual property, exploitation and value of these programs. To address this issue, and to reflect the different context of the music industry, we recommend the addition of: "with owners of musical works and sound recordings " and " in furtherance of subparagraph (a) " to subsection (d).

We therefore propose the following formulation for (a) and (d):

> (a) whether Canadians own intellectual property rights ~~copyright~~ in relation to a program, control the exploitation of a program and retain a material and equitable portion of its value;
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> (d) whether persons carrying on online undertakings or programming undertakings collaborate with independent Canadian producers, with owners of musical works and sound recordings, with persons carrying on Canadian broadcasting undertakings producing their own programs or with producers associated with Canadian broadcasting undertakings, in furtherance of subparagraph (a);

5.4. Canadian ownership and control of the system

Section 3(1)(a) has been significantly amended from the latest version of C-10. This change weakens the scope of this objective and we are concerned that it may facilitate the acquisition of Canadian undertakings by foreign companies. While the ineligibility of non-Canadians to hold a broadcasting licence would be maintained under the Direction to the CRTC (ineligibility of non-Canadians), a future government could easily overturn this requirement with a new policy direction, especially since the legislator's ambition would have been weakened in the Act. Moreover, it is not desirable that the few Canadian online undertakings be easily acquired or controlled by foreign interests.

Instead, the CRTC should be encouraged to play a role in promoting the Canadian character of the system. Without restricting foreign ownership in the digital environment, the CRTC could, for example, issue priority carriage requirements or create incentives to consolidate Canadian ownership and control of the system.

In conjunction with Friends of Broadcasting, and with the support of the Independent Broadcasters Group and Unifor, we propose the following wording:

(a) the Canadian broadcasting system~~, with the exception of foreign broadcasting undertakings providing programming to Canadians,~~ shall be effectively owned and controlled by Canadians, recognizing that the Canadian broadcasting system includes foreign broadcasting undertakings that also provide programming to Canadians;

6. Social Media Articles

It is important to give the CRTC the latitude it needs to properly target social media broadcasting activities and issue appropriate conditions of service in light of the information it obtains and the consultations it conducts. This is why we had a clear preference for the broader approach that was adopted by Parliamentarians at 3rd reading of Bill C-11.

We believe that the approach on social media should not be further restricted so as not to impede the CRTC's ability to regulate broadcasting activities on social media.

It is difficult to predict the evolution of future technologies and uses. Social media are evolving rapidly and becoming increasingly popular for the dissemination of music and audiovisual cultural content. Moreover, it would not make sense for the Act to apply differently to the same program based on a different uploading technique. This would only point to ways of circumventing the Act.

Many other sections of the Bill will also guide CRTC's decisions. Sections 2.1 and 2.2 make it clear that users who upload content are not covered by the Act. Only the company is. Therefore, changes to sections 4.1 and 4.2 would not add anything to the users. They would only reduce the requirements of social media companies by limiting, possibly eliminating, the portion of programs that could be subject to the Act.

It should be noted that section 2(3) of the *Broadcasting Act* clearly states that CRTC policies and regulations must respect the freedom of expression of broadcasting undertakings.

In section 5(2), paragraph (a.1) states that the CRTC must take into account the characteristics of the services provided by broadcasting undertakings, their impact on the Canadian creative and production industry and their contribution to broadcasting policy. Paragraph (h) states that the CRTC must avoid imposing obligations that would not result in a significant contribution to broadcasting policy.

Section 9(4) of Bill C-11 will allow the CRTC to exempt "by order, on the terms and conditions as 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 if the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy".

Finally, the Governor in Council has the ability to issue directions to the CRTC to review its decisions if it believes that the CRTC's conclusions should be reconsidered or reversed. This is a remedy that civil society can access, provided that section 28 (1) is amended as we suggest. This is an interesting safeguard for people who might fear that the CRTC is casting its net too wide.

7. Additional Issues

The CDCE has chosen to focus its attention on a few priority requests. However, we would like to point out that there are other issues that are important, and we have chosen not to propose amendments for these knowing that other organizations will address them. For instance, it agrees with the Independent Broadcasters Group's proposals regarding online distribution issues.