Coalition
for the Diversity of
Cultural Expressions

Bill C-11, the *Online Streaming Act*, after the Senate review: CDCE's analysis

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The *Online Streaming Act* must ensure the diversity of cultural expression in the broadcasting ecosystem by guaranteeing a place of choice for the creation, production and broadcasting of national content, including original French-language content, Canadian Aboriginal content and content from official language minority communities. It is an obligation of Canadian Broadcasting Policy to respect and maintain Canada's commitments under the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and to preserve the cultural sovereignty of the State.

Since the initial publication of the bill, the CDCE has been conducting an ongoing analysis and reflection with its members and several experts in order to formulate proposals to ensure that Bill C-11 best serves Canadian cultural sovereignty. At each stage of the bill's development, the CDCE has offered a consensus from the cultural community and focused its efforts on a minimum number of amendments. All of these changes are crucial if the bill, which has been anticipated for more than two decades, is to fulfill its promise to protect and promote the true diversity of Canadian cultural expressions ensuring that it will continue to flourish in the digital environment.

While work on the bill has been underway for over two years, it will soon be adopted. At this point, the cultural sector notes two major disappointments with respect to its initial demands.

While this bill aims to restore fairness to our ecosystem, at the heart of the Canadian Broadcasting Policy is a disturbing double standard in favour of foreign online companies. We refer to sections 3(1)(f) and 3(1)(f.1). This double standard could lead to a two-tiered regulatory system and therefore to a levelling down of the requirements that the CRTC will have to establish. In practical terms, this pillar of the Act could even be interpreted as authorizing the web giants to contribute to and promote creations and productions that make marginal use of Canadian talent.

However, protecting and promoting the diversity of Canadian cultural expression means ensuring that our entire creative and production chain is made up of Canadians. This is a key objective that is found in various forms in the bill, but which is contradicted by the double standard set out in section 3 (1)(f). The CDCE will seek to ensure that this important loophole is closed as much as possible by all existing complementary tools, in particular the Policy Direction to the CRTC.

The second major disappointment concerns the disappearance of the mechanism for appealing to the Governor in Council against CRTC decisions that may be considered contrary to the objectives of the Act. For the CDCE, this mechanism provided an adequate counterbalance to the Commission's powers. It was a democratic and accessible tool, that did not give undue power to the government, which could not dictate its decisions to the CRTC, but simply asked it to reconsider them. This disappearance is all the more surprising given that, only recently, under the current regulations, the Governor in Council agreed to a request from the cultural community. Indeed, several groups, associations and unions were contesting a decision regarding the CBC, because it constituted a disturbing shift towards deregulation of the system.

These two disappointments can hardly be corrected at this stage of the legislative process. However, there are other areas of significant concern to the Coalition's members that can still be improved. Indeed, one last crucial step remains to be taken: the House of Commons' consideration of the bill as amended by the Senate, which, exceptionally, adopted 26 amendments. Of these, according to the CDCE, three must be rejected and four must be retained.

The CDCE's requests to members of the House of Commons

Reject
- the amendment to section 4.2
- the amendment to section 9.1(1)(d)
- the amendment to section 10(1)(1.1.1)

Support
- the amendment to section 18(2)
- the amendment to section 3(1)i(v)
- the amendment to section 31.1
- the amendment to section 7 (1)

1. Three amendments to be rejected

1.1 Section 4.2: an unnecessary change that makes a very damaging technical error

Section 4.2 was substantially modified by the Senate Committee on Transport and Communications.
It should be recalled that in C-11, the original section read as follows

> Matters
> (2) In making regulations under subsection (1), the Commission shall consider the following matters:
>
> (a) the extent to which a program, uploaded to an online undertaking that provides a social media service, directly or indirectly generates revenues;
>
> (b) the fact that such a program has been broadcast, in whole or in part, by a broadcasting undertaking that
>
> (i) is required to be carried on under a license, or
> (ii) is required to be registered with the Commission but does not provide a social media service; and
>
> (c) the fact that such a program has been assigned a unique identifier under an international standards system.

The revised section reads as follows:

> Matters
> (2) In making regulations under subsection (1), the Commission shall consider the following matters:
>
> (a) the extent to which a program contains a sound recording that has been assigned a unique identifier under an international standards system;
>
> (b) the fact that the program has been uploaded to an online undertaking that provides a social media service by the owner or the exclusive licensee of the copyright in the sound recording, or an agent of the owner; and
>
> (c) the fact that the program or a significant part of it has been broadcast by a broadcasting undertaking that
>
> (i) is required to be carried on under a license, or
> (ii) is required to be registered with the Commission but does not provide a social media service.”.

It is important to reiterate the Coalition's position from the outset of the discussions: section 4.2 as drafted in C-11 does not need to be changed.

Unfortunately, while the amendment currently in the Bill was proposed with the stated intention of allaying fears and satisfying specific interests - namely those of the Canadian professional music industry - it has several negative consequences:

- it induces a technical error that excludes music videos, the core of music consumption on social media
- it excludes a majority of professional audiovisual content
- it satisfies the interests of foreign companies that seek to be excluded, as much as possible, from the scope of the law.

The public debates surrounding Bill C-11 have largely focused on section 4.2. However, most of the arguments heard were not based on facts, but rather on fears that do not stand up to a careful reading of the bill as a whole.

Bill C-11 seeks to ensure Canadian cultural sovereignty by ensuring that any broadcasting undertaking with significant operations in Canada that have an impact on our ecosystem takes into account the market in which it operates and its specificities. This includes, for example, linguistic duality.

In order to determine which companies have a significant impact on our ecosystem and to put in place rules specific to each of them, it is essential that the CRTC have the means and the power to collect and process data from all the services concerned. It is therefore necessary that the CRTC be able to collect data on social media. Any undue restriction of the CRTC's scope reduces its ability and commitment to preserve Canadian cultural sovereignty.

Witnesses and interveners in the public record have expressed concern that content which has no impact on our ecosystem could fall under the CRTC's jurisdiction. Please note that there are two articles, namely sections 5(2)(a.1) and (h which prevent any form of regulation on services that do not have a significant impact on Canadian broadcasting policy.

> (a.1) takes into account the nature and diversity of the services provided by broadcasting undertakings, as well as their size, their impact on the Canadian creation and production industry, particularly with respect to employment in Canada and Canadian programming, their contribution to the implementation of the Canadian Broadcasting Policy objectives and any other characteristic that may be relevant in the circumstances;
>
> (h) takes into account the variety of broadcasting undertakings to which this Act applies and avoids imposing obligations on any class of broadcasting undertakings

if that imposition will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

In the same vein, we have heard concerns that individuals posting videos on social media with no commercial or professional intent could be penalized by the law. Section 2.1 explicitly states that users are not covered by the Act.

(2.1) A person who uses a social media service to upload programs for transmission over the Internet and reception by other users of the service — and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them — does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act.

Finally, it has been suggested that the bill threatens the freedom of expression of Canadians. This is simply not true. First, freedom of expression is protected by the Canadian Charter of Rights and Freedoms. That, in itself, should be enough to allay the fears we have heard. Moreover, the bill contains an explicit reference to this issue, which has been improved by the work of the Senators:

(3) This Act shall be construed and applied in a manner that is consistent with
(a) the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings and creators[1]; and

Fears that the CRTC would interfere with the freedom of expression of individuals, act as a censor of content or impose rules that would harm Canadian creators are unfounded. Any proposed amendment to further restrict it is therefore unnecessary.

However, the proposal made by the Senate is not only useless: it is also very harmful, both for the music and the audiovisual sectors.

Indeed, the reference to the notion of sound recording has the effect of reducing the professional audiovisual contents under the scope of the Law. But more than that, this reference is problematic because, in the Copyright Act, sound recording excludes music videos. This fundamental element that the Senate has indicated it wants to protect is therefore outside the scope of the Act.

Therefore, it is imperative that this amendment be rejected.

1.2 Section 9(1) (1) (d): certain types of programs are essential to ensure diverse programming

[1] Addition of the Transport and Communications Senate Committee

Bill C-11 contained the following section prior to the Senate proceedings:

> 9.1 (1) The Commission may, in furtherance of its objects, make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1), including conditions respecting
>
> **(d) the proportion of programs to be broadcast that shall be devoted to specific genres, in order to ensure the diversity of programming;**

This section aims to maintain a certain level of regulatory protection for content considered important to Canadian cultural sovereignty, but often difficult to monetize. This refers, for example, to local news, but also to content recognized as "programs of national interest" by the CRTC. The latter includes drama, documentaries, youth programming and, in the French-language market, music programs.

The Senate chose to remove part (d) of this section. This undermines the regulatory protection afforded to content that is most in need and truly contributes to a diversity of cultural expression. We ask elected officials to reject the Senate amendment in order to keep this provision of the Act intact.

1.3 Section 10(1) (1.1) (1.11): Truly Canadian Programming

The definition of Canadian content was the subject of much discussion during the work on the bill. It should be remembered that it is up to the CRTC to define what constitutes Canadian programming. Nevertheless, the legislation sets out criteria that the CRTC must take into account.

In Bill C-11, these criteria are as follows:

> 10 (1) (1.1) In making regulations under paragraph (1)(b), the Commission shall consider the following matters:
>
> (a) whether Canadians, including independent producers, have a right or interest in relation to a program, including copyright, that allows them to control and benefit in a fair and equitable manner from the exploitation of the program whether Canadians own copyright in relation to a program, control the exploitation of a program and retain a material and equitable portion of its value;
>
> (b) whether key creative positions in the production of a program are primarily held by Canadians;
>
> (c) whether a program furthers Canadian artistic and cultural expression;

(d) the extent to which persons carrying on online undertakings whether persons carrying on online undertakings or programming undertakings collaborate with independent Canadian producers, with persons carrying on Canadian broadcasting undertakings producing their own programs, with producers associated with Canadian broadcasting undertakings or with any other person involved in the Canadian program production industry, including Canadian owners of copyright in musical works or in sound recordings; and

(e) any other matter that may be prescribed by regulation.

Coalition members representing producers, performers, writers, composers and directors are affected to varying degrees by one or more of these criteria. Collectively, these criteria are all essential to protecting the diversity of our cultural expressions and ensuring that the entire creative and production chain is made up of Canadians. In this way, a variety of Canadian voices, perspectives and talent can be supported by regulation, both in terms of funding and promotion.

The Senate added a line to this section that reads : « (1.11) Aucun des critères énoncés aux alinéas (1.1)a) à e) n'est déterminant au regard du contenu de tout règlement pris en vertu de l'alinéa (1)b). »

This addition is of great concern. Making these core criteria optional, or not being able to prioritize some of them depending on the circumstances, could have the effect of excluding core elements that should be considered in defining Canadian content for regulatory purposes.

The CDCE therefore requests that this amendment be rejected.

2. Amendments to be retained

2.1 Public hearings when it matters: retaining amendment 18(1)(2)

The Coalition's fourth request is to secure the retention of an amendment it proposed and which was retained by the Senate, albeit in slightly different wording, to maintain public hearings when the public interest requires them. The Coalition's goal was to ensure that Canadians would be able to participate fully in the CRTC's deliberations as it begins to regulate new online players.

In the original bill, section 18(1) (2) read as follows:

18 (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

(a) the issue of a licence, other than a licence to carry on a temporary network operation;

(b) the suspension or revocation of a license;

(c) the establishing of any performance objectives for the purposes of paragraphs 11(2)(b) and 11.1(6)(b); and

(d) the making of an order under subsection 12(2).

Marginal note: Idem

(2) The Commission shall hold a public hearing in connection with the amendment or renewal of a license unless it is satisfied that such a hearing is not required in the public interest.

Thus, the public hearing requirements were maintained in relation to licenses only, while a system based on orders will be phased in. The Senate made changes and the section now reads as follows:

18 (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

(a) the issue of a license, other than a license to carry on a temporary network operation;

(b) the suspension or revocation of a license;

(c) the establishing of any performance objectives for the purposes of paragraphs 11(2)(b) and 11.1(6)(b); and

(d) the making of an order under subsection 12(2).

Marginal note: Idem

(2) The Commission shall also hold a public hearing in connection with the following matters unless it is satisfied that such a hearing is not required in the public interest:

(a) the amendment or renewal of a license;

(b) the making of an order under subsection 9.1(1) or 11.1(2); and

(c) the making of any regulation under this Act.

(2.1) A hearing in connection with a matter referred to in paragraph (2)(b) or (c) shall be held after the proposed order or regulation in question is published.”.

Public hearings are a democratic mechanism that allows all parties to contribute to the regulator's considerations. We applaud the work of the Senate on this issue and the fact that a firm majority of Senators on the TRCM Committee voted in favor of it, and we stress the importance of its continuation.

2.1 Article 3(1)i(v): Recognizing the crucial role played by independent producers

Members of the Coalition were asking for a correction to section 3(1)i(v) so that it would restore the leading role of independent producers in the ecosystem.

Indeed, in the current Broadcasting Act, section 3(1)(i)(v) reads as follows:

> (i) the programming provided by the Canadian broadcasting system should
>
> (v) include a significant contribution from the Canadian independent production sector;

However, Bill C-11 made a significant change to this key section

> (i) the programming provided by the Canadian broadcasting system should
>
> (v) include the greatest possible contribution from the Canadian production sector, whether it is independent or affiliated with or owned by a broadcasting undertaking;

By specifying "whether independent, affiliated or owned by a broadcasting undertaking", this wording dilutes the importance of the use of independent producers, which is a central issue in ~~the~~ Canadian Broadcasting Policy.

The Senate amendment, which removes the clarification added in C-11 and comes back to the original article, corrects this error by reverting to the current wording and satisfies the Coalition's members who requested a change. The Coalition supports the amendment adopted by the Senate.

2.2 Article 31.1: a *Status of the Artist Act* respected by all companies active in the ecosystem

Members of the Coalition were asking for a correction to section 31.1 to ensure that foreign online businesses are not subject to different requirements than those imposed on Canadian businesses with respect to the Status of the Artist Act.

Thus, in C-11, it stated:

> 31.1 Section 6 of the Status of the Artist Act is amended by adding the following after subsection (2):
>
> (3) This Part does not apply in respect of an online undertaking, as defined in subsection 2(1) of the Broadcasting Act.

The Senate replaced this entire section with the following:

> (2) This Part applies:
>
> (ii) broadcasting undertakings, regulated under the Broadcasting Act, that are federal works, undertakings or businesses, as defined in section 2 of the Canada Labour Code, or that are corporations established to perform any function or duty on behalf of the Government of Canada;".

The new wording satisfies the Coalition members who were asking for a change, and the CDCE supports the amendment that was adopted by the Senate.

2.3 Section 7 (1): an amendment that protects the independence of the CRTC

In the current Act, section 7(1) reads as follows

> 7 (1) Subject to subsection (2) and section 8, the Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to
> (a) any of the objectives of the broadcasting policy set out in subsection 3(1); or
> (b) any of the objectives of the regulatory policy set out in subsection 5(2).

In C-11, the following was added after this paragraph:

> 7.1 For greater certainty, an order may be made under subsection (1) with respect to orders made under subsection 9.1(1) or 11.1(2) or regulations made under subsection 10(1) or 11.1(1).

While the Coalition did not ask for this addition to be removed, we note that some of our members had asked for it out of concern that the CRTC would be given too much power. This amendment adopted by the Senate satisfies the Coalition members who requested it and the Coalition supports it.

2.4 Amendments to support equity-seeking groups: CDCE applauds the work of the Senate

Finally, while the Coalition has not spoken out on issues of equity and inclusion, we would like to acknowledge the work of the Senate on this issue and support the amendments that have been introduced