

Feb 08, 2022

Bill C-11 Proposes to Regulate Canada's Online Streaming Services

By Al Turnbull and Stephen Zolf

Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, also known as the *Online Streaming Act*, (the "Bill") was tabled for its first reading on February 2, 2022 by the Minister of Canadian Heritage.

The "re-tabled Bill" aims to "respect the work of Parliamentarians during the last Parliament" and to provide a "new approach for programs uploaded to social media services."

Under the Canadian broadcasting system, online services such as Netflix, Crave, Disney+ and their domestic and foreign competitors are described as "online undertakings." If passed, the Bill will empower the Canadian Radio-television and Telecommunications (the "CRTC") to make orders imposing conditions on "online undertakings" reflective of certain objectives, including, but not limited to: support for the creation of Canadian content; fair and equitable treatment of similarly situated broadcasting undertakings; and diversity, equity and inclusion (including with respect to Indigenous communities).

While the scope of the Bill is significant, the draft legislation stops short of providing any specific requirements or measures, leaving this task solely to the discretion of the CRTC to assess what is required of each online undertaking in a regulatory proceeding and order accordingly. The CRTC will be provided with the power to set quotas (depending on the nature of the online undertaking), determine the mandated types of content and impose specific obligations such as discoverability and programming expenditure requirements.

The government summary accompanying the Bill describes its objectives under the following **five main themes**:

(1) Inclusion of Online Broadcasting: This includes the creation of a new and distinct class of broadcast undertakings as it relates specifically to "online undertakings." This clarifies that online broadcasting is under the scope of the Act.

(2) Update Broadcasting/Regulatory Policy. This section addresses the expansion of broadcasting policy (which the CRTC must implement in its regulatory framework) to provide that the broadcasting system in Canada shall serve the needs and interests of all Canadians, including "Canadians from racialized communities and Canadians of diverse ethno-cultural backgrounds." Further, the expanded policy endorses the need to provide opportunities for Indigenous persons and programming that is accessible without barriers to persons with disabilities and that reflects Indigenous cultures and languages.

(3) Renewed Approach to Regulation. The Bill replaces the CRTC's authority to impose conditions of licence with a more flexible power, allowing the CRTC to regulate all types of broadcasting undertakings through the issuance of "orders." This will allow the CRTC to impose legally binding "conditions of service" on any broadcasting service, or more broadly on "a class of broadcasting services." Through this, the Bill enables regulation of online services while at the same time retaining the requirement that licensed broadcasting undertakings be Canadian-owned and controlled. The CRTC will also gain the express power to make regulations or orders respecting expenditures by any person carrying on an undertaking, including an online undertaking, for the purposes of: (i) developing, promoting, producing, supporting and financing Canadian Programs; (ii) supporting, promoting or training Canadian creators of programs; and (iii) supporting participation by public interest groups. The specific criteria, which the CRTC must consider in making regulations defining "Canadian content," are set out in the Bill.

(4) Modernized Oversight and Enforcement: The CRTC will have the authority to issue administrative monetary penalties for the violation of certain provisions of the Act, as well as harmonizing the punishments for offences under the Act, while maintaining that a due diligence defence will still apply to existing offences under the legislation. The CRTC can also require any broadcasting undertaking to provide any information that the CRTC considers necessary for the administration of the Act. The CRTC will also have express authority to require registration of any broadcasting undertaking and the authority to audit or examine records and books of accounts of any person carrying on a broadcasting undertaking.

(5) New Approach to Social Media: The Bill's approach to social media services focuses on fair treatment for programs consumed on different platforms, regardless of how they are transmitted. The Bill will exclude the application of the *Broadcasting Act* to programs that are uploaded by users of social media services unless such programs comprise professional/revenue-generating commercial content that is generally found on other online platforms. At the same time, the Bill makes it clear that the CRTC cannot regulate Canadians' everyday use of social media, and social media users and individual creators will continue to remain exempt from the Act.

Once the Bill receives Royal Assent, it will be followed by the issuance of a government policy direction to the CRTC guiding it in applying the new law. The CRTC will then commence a public proceeding calling for comments on the appropriate regulatory framework to implement the Bill. It is anticipated that the new framework will not be finalized before mid-2023.

The Aird & Berlis Sports, Media & Entertainment Group is ready to assist with any matter or question relating to Bill C-11. If you require assistance with the foregoing, please contact us.

Authors



Al Turnbull
Associate
T 647.426.2811
aturnbull@airdberlis.com



Stephen Zolf
Partner
T 416.865.3062
szolf@airdberlis.com

This communication offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.