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CANADA'S ONLINE STREAMING ACT (BILL C-11)

Trade Implications for Foreign Online Content Suppliers

EXECUTIVE SUMMARY

In June 2022, Canada's House of Commons passed Bill C-11 (commonly known as the Online Streaming Act), a proposal to amend the Broadcasting Act. The Senate Transport and Communications Committee completed its review of the bill on December 14, 2022, offering several minor changes and teeing it up for possible Senate passage as a consolidated bill in early 2023. If passed, the new law will have an adverse economic impact on U.S. cross-border suppliers of online content by subjecting them to prescriptive obligations to produce and promote Canadian content, currently imposed only on licensed Canadian broadcasters.

While many of the specific measures will require subsequent rulemakings by the Canadian Radio-television and Telecommunications Commission (CRTC), the new grant of authority, in both mandate and directive, is explicitly discriminatory, designed to require foreign (mainly U.S.) suppliers to fund or otherwise promote Canadian audiovisual production. Although the U.S.-Mexico-Canada Agreement (USMCA) recognizes Canada's interest in promoting Canadian content through an exception for "cultural industries," this exception includes guardrails to ensure that its exercise will not adversely affect U.S. trade interests. Given the near-certainty of such an effect, C-11 would, accordingly, be actionable under Canada's trade obligations in the U.S.-Mexico-Canada Agreement (USMCA).

If Canada proceeds with C-11 as currently drafted, it will be incumbent on the United States to assess the scope of likely violations of USMCA rules, the degree to which its trade interests are harmed, and consider what steps are appropriate in response. If the Canadian government declines to withdraw this legislation extending onerous broadcast-based obligations to the online realm, or exclude U.S. suppliers from its application, it must recognize the significant differences between traditional domestic broadcasters and global streaming services, setting requirements accordingly in the least trade-restrictive manner.

Background

C-11 is a significant amendment to Canada's Broadcasting Act. Its key change is the creation of a legislatively-defined category of "online [broadcasting] undertakings", which the CRTC is directed to regulate so as to ensure that such undertakings, "contribute in an appropriate manner to the creation and presentation of Canadian programming" and "clearly promote and

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recommend Canadian programming." While not prescriptive as to how the CRTC should achieve these goals, C-11 empowers the CRTC to take a range of actions to require currently unlicensed foreign suppliers to create preferences for Canadian content, including but not limited to funding obligations, presentational preferences, and even quotas, akin to obligations that currently apply to licensed Canadian broadcasters.

History of Broadcasters' Obligations in Canada—and Online Content's Exemption

Obligations on licensed broadcasters to institute preferences for Canadian content ("CanCon") are highly complex and have evolved over time, starting from a rigid definition of what content qualifies as Canadian, and implemented through a combination of quotas,[1] expenditure requirements,[2] and obligations on suppliers to highlight and exhibit Canadian content.

Within its existing authority under the Broadcasting Act, the CRTC has to date chosen not to impose such obligations on online services (including foreign services), offering online service a broad degree of flexibility by exempting them from the prescriptive burdens imposed on licensed broadcasters (free-to-air, cable and satellite services and associated programming services).

The original vehicle exempting online services from content regulation was the CRTC's 1999 Exemption Order for new Media Undertakings,[3] which C-11 will effectively overturn. Given Canada's expansive definition of broadcasting[4] and the highly prescriptive regulation licensed broadcasters endure, it is unlikely that the internet would ever have taken root in Canada the way it did and delivered the vast benefits it has brought to Canadian consumers and businesses without this exemption for "new media".[5] The impact of this exemption (and negative impact of its removal) is evident when comparing the deregulated treatment online services have enjoyed to date with that of the tightly-regulated licensed broadcasting undertakings (distribution and programming).

The CRTC's initial conclusions when it exempted "new media" online content from its broadcasting rules were prescient, and are still applicable. In 1999, the CRTC concluded:

[1] https://crtc.gc.ca/eng/cancon/r_cdn.htm.
[2] e.g., TV stations must devote 55% of prime-time programming, and spend 30 percent of their programming budget overall on Canadian content; cable systems' Canada content expenditure requirement is 5 percent. See https://crtc.gc.ca/eng/archive/2017/2017-148.htm.
[3] https://crtc.gc.ca/eng/archive/1999/PB99-197.htm.
[4] "Broadcasting" is defined as "any transmission of programs," and a "program" is defined as "sounds or visual images…intended to inform, enlighten or entertain." In short, most Internet-delivered content fits within this definition.
[5] Defined as "broadcasting services delivered and accessed over the Internet".

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> In the Commission's view, there is no apparent shortage of Canadian content on the internet today. Rather, market forces are providing a Canadian Internet presence that is also supported by a strong demand for Canadian products.
>
> The Commission notes that a number of initiatives and funds have been developed in both the public and private sectors to help finance and support Canadian new media products.
>
> For these reasons, the Commission concurs with the majority of participants that there is no reason for it to impose regulatory measures to stimulate the production and development of Canadian new media content.[6]

The CRTC further argued that the internet gave "rise to new avenues and forms of expression and communication for Canadians, amongst themselves and others in both French and English," provided "valuable sources of information and other services to many Canadians that are otherwise unavailable" and that the "demand for Canadian information and other services has led to the development of search engines and aggregation sites that facilitate access to Canadian services."[7] All of these facts—which led the CRTC to declare that imposing licensing requirements on online providers under the Broadcasting Act would *not* help Canada's content industry—remain true today.

Impact of Intervention on Content Curation in Canada

Since TV, radio, and Broadcast Distribution Undertakings (BDUs)[8] are licensed services subject to Canadian ownership and control requirements, the impact of content regulation has generally been indirect in impact (*i.e.,* the market for U.S. audiovisual content controlled by such entities has been limited by them by regulation[9]), with potential distributors themselves (*e.g.,* U.S. cable and satellite services) simply excluded from the market.

The impact on programming undertakings (the creators and developers of content), however, which is also subject to ownership and control requirements, has been more direct: for HBO or Comedy Central to access a Canadian BDU as an established offering with its own channel, such companies have had to cede majority control of a Canadian-established entity (often the

[6] https://crtc.gc.ca/eng/archive/1999/PB99-84.htm
[7] https://crtc.gc.ca/eng/archive/1999/PB99-84.htm
[8] i.e., companies that own transmission infrastructure in Canada
[9] Over-the-air radio and TV are subject to Canadian content quotas of 40 and 55 percent, respectively; cable and satellite TV are required to contribute a minimum of 5 percent of their revenue to "the creation and presentation of Canadian content". See, for example https://crtc.gc.ca/eng/archive/1997/pb97-150.htm

BDU itself).[10] The policy rationale for such a restriction was the theory that Canadian control of the programming entity itself would somehow promote Canadian cultural interests, but the result appears little more than extractive and redistributive rent-seeking for the benefit of Canadian corporations (typically the BDUs themselves). It is not obvious how such ownership requirements could be imposed on internet-delivered "channels" (e.g., a channel on YouTube) but the risk of similarly extractive policies cannot be discounted.

While not addressed in the legislative changes envisaged in C-11, the rigid requirements for qualifying as Canadian content[11] (and thus benefiting from quotas, contributions, and prominence) are long overdue for fundamental reform, as they are likely to be hindering foreign suppliers' willingness to expand production in Canada.

Relationship With Canada's International Trade Obligations with the United States

Because such restrictions and preferences are explicitly discriminatory, they conflict with several provisions negotiated both under the North American Free Trade Agreement (NAFTA) and its successor, the U.S. Mexico Canada Agreement (USMCA), as discussed in detail below. While Canada secured latitude to deviate from rules designed to prevent such discrimination against U.S. suppliers in both agreements, under a broad-reaching "cultural industries" exception,[12] the United States ensured that this exception would not be invoked indiscriminately by securing a negotiated right to retaliate in a commensurate manner if such preferences adversely affect U.S. trade interests. It is very likely that implementation of the proposed amendments would affect U.S. trade interests and thus justify U.S. retaliation.

In the House of Commons and Senate committee debates, it was suggested that global streaming services should be subject to the same production requirements as Canadian broadcasters. Doing so would represent a significant challenge. This has been rightfully recognized by Heritage Canada. As Thomas Owen Ripley, Associate Assistant Deputy Minister, Canadian Heritage, has stated "these broadcasting services have global business models whereby they are making productions for global audiences and not exclusively for the Canadian audience"[13]. The current flexibility included in the bill, which specifies that global online undertakings should make "the greatest practicable use of Canadian creative and other human resources" and clarifies that they should "contribute in an equitable manner", i.e., in a

[10] *e.g.,* HBO Canada is majority-owned by Bell Canada, one of the three dominant Canadian media conglomerates.
[11] e.g., a complex "points" system, and mandatory Canadian control of the intellectual property of the content.
[12] In the Trans-Pacific Partnership negotiations (TPP), Canada agreed to remove this exception in exchange for a more narrowly-crafted sectoral "non-conforming measure", providing guardrails around its application, but the re-negotiated CP-TPP reverted to the broader exception.
[13] See https://www.ourcommons.ca/DocumentViewer/en/44-1/CHPC/meeting-36/evidence.

fair manner, must remain. To avoid trade challenges, the CRTC should be directed to prioritize flexibility when developing its regulatory framework for these services.

Notwithstanding the discriminatory nature of Canada's long-standing broadcasting regime, and occasional calls for enforcement against such measures (*e.g.,* the Country Music Television dispute[14] that flared under NAFTA in 1994), a *modus vivendi* was eventually established, whereby the United States accepted restrictions on licensed broadcasting undertakings in exchange for the freedom granted to internet-delivered content. As a result, Canadian consumers have been able to enjoy, with few restrictions, popular services such as Netflix, Apple TV, Prime Video, YouTube, BBC, and Spotify, as well as the plethora of specialized services such as OutTV, BritBox, Acorn, and smaller minority-focused services such as Chinese and Indian TV offerings.[15] Similarly, novel services such as TikTok, which also fits neatly in Canada's definition of broadcasting, are readily available, rapidly growing and exempt from interventionist policies dictating what content must be shown, funded, or recommended, based on rigid nationality requirements. All of these services (and, indirectly, the associated service that make them possible—motion picture and TV production and post-production services) are now threatened with highly burdensome requirements that, for the United States, could significantly upset the balance of concessions reflected in USMCA.

Benefits Generated by Foreign Online Audiovisual Services Suppliers to Canada's Content Industry

The rationale for a new approach--an ostensible need to extend to the internet regulation rooted in traditional media in order to boost local production of audiovisual content—is an approach unsupported by evidence, lending support to the view that C-11 is more about transferring revenues to favored Canadian businesses[16] than it is responding to any popular dissatisfaction about the availability of local content. It is widely stated that Canadian programming is currently underfunded, but these statements are rooted in a rigid formula for Canadian content (CanCon) developed in the 1970s.

Indeed, the contrary argument is the more persuasive: online distribution platforms, mainly from the United States, have contributed to a significant degree in the expansion of Canadian audiovisual production, both through direct investment in such production and through the

[14] See https://core.ac.uk/download/pdf/217210414.pdf.
[15] See https://www.yupptv.com/canada.html and https://www.eastwardmedia.com/2021/07/02/the-hottest-video-streaming-platforms-for-chinese-audience-in-north-america/.
[16] It is noteworthy that that the small number of Canadian entities certified by the CTRC as eligible to receive mandated contributions from broadcasters includes affiliates of the three dominant suppliers, Bell, Rogers and Shaw. These entities are required to make contributions--but can contribute to their own affiliates, a legal form of self-dealing denied foreign suppliers. See: https://crtc.gc.ca/eng/general/cipfund.htm.

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export, over their platforms, to a growing international audience that Canadian broadcasters could not themselves ever expect to fully reach. For example, reports indicate that that 90 percent of all growth in movies, television, and streaming production in Canada can be attributed to global production and investment. The demand for content globally—made possible in large part by the proliferation of streaming services—has generated an annual $6 billion in foreign investment in the Canadian industry.[17] In fact, fifty-eight percent of the $9 billion invested in film and television production in Canada between April 2020 and 2021 came from abroad—an amount which remained relatively level to the prior year, increasing slightly, while investment from Canadian producers and broadcasters declined by 12 percent and 8 percent, respectively.[18]

Further, foreign markets have long represented a key market for Canadian productions, the revenue from which often equal or top those earned domestically from Canadian film and television content.[19] Online streaming services, particularly those from the United States and other foreign markets, play an essential role in the delivery of Canadian programming abroad, and thus sustaining domestic production and availability. Consider the "game changing" nature of Netflix's acquisition of Canada's Schitt's Creek,[20] which skyrocketed the program's popularity in the United States from featuring on a small cable channel to at one point adorning the top of Nielsen's most-streamed show list and breaking records for its Emmy Award wins.[21] Similar examples of the importance of streaming services to the proliferation of Canadian content include the success of Canada's Letterkenny on Hulu (after previously appearing on YouTube and smaller cable networks) and the Canadian Broadcasting Corporation's Kim's Convenience on Netflix in the United States.[22]

Success of these programs around the world can in turn encourage investment in Canadian productions. The investment of foreign suppliers into the Canadian programming industry—even when sales are subsequently made abroad—have strong positive externalities for the

[17] https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/2022-10-04_TRCM_Brief_MPA_e.pdf at 2 and https://cmpa.ca/wp-content/uploads/2022/04/Profile-2021-EN.pdf at 4.
[18] https://cmpa.ca/wp-content/uploads/2022/04/Profile-2021-EN.pdf at 4.
[19] https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2110007401 and https://cmpa.ca/wp-content/uploads/2022/04/Profile-2021-EN.pdf at 77.
[20] See https://www.vulture.com/2020/04/schitts-creek-netflix-pop-success-story.html ("And then, in January 2017, came a development Dan Levy calls "game changing": Schitt's Creek debuted on Netflix, starting with the first two seasons (and followed by season three in December). The impact on linear ratings was immediate: Season three's Pop audience surged 28 percent (to 423,000 viewers), while season four's audience jumped another 11 percent to a best-yet 470,000 weekly viewers.").
[21] https://variety.com/2020/tv/news/schitts-creek-season-6-netflix-nielsen-weekly-streaming-rankings-1234818927/; https://www.nytimes.com/2020/09/20/arts/television/emmys-schitts-creek.html
[22] https://nypost.com/2020/01/20/how-the-weirdos-of-letterkenny-became-hulus-sleeper-hit/; https://www.nytimes.com/2021/06/01/dining/kims-convenience.html; https://www.theglobeandmail.com/arts/television/article-how-the-success-of-cbcs-kims-convenience-pushed-its-stars-and-asian/

domestic production industry and Canada's economy overall.[23] Between April 2020 and 2021, foreign producers supported 60% of the film and television jobs in Canada, representing 129,180 employees.[24] The support from global production companies for the Canadian content production industry provides a catalyst for domestic content to flourish not only presently but in the future as individuals and communities supported through these partnerships develop in Canada.

Similarly, evidence for the contribution foreign suppliers have made to the Canadian music industry is well documented[25] with reports citing earnings of Canadian rightsholders from streaming services of $500 million in 2019 alone, and service revenue showing strong growth (18% in 2021).

Canadian parliamentarians have acknowledged the importance of this foreign investment into Canadian content creation:

> "Over the past decade the contributions made by global producers account for 90 percent of the growth of film, television and streaming production in Canada."[26]
>
> "..some Senators are concerned that too little attention has been paid by a majority of Senators to the significant benefits that international investment has for Canada."[27]
>
> "..the Bill also inadequately recognizes that major contributions that online platforms make to Canadian broadcasting and to promoting Canadian creators."[28]

Given the significant contributions foreign online services already make to the Canadian audiovisual sector, penalizing them with additional burdens could adversely affect the very artists and creators C-11 purports to help. If foreign suppliers have to make payments into funds with little accountability and oversight and promote content or meet quotas for content that consumers are not interested in, then foreign online suppliers may avoid or pull back from Canadian market—to the clear detriment of Canadian creators. Even for those service suppliers who choose to remain, mandatory funding to a certified production entity, or expenditures to meet an arbitrary quota may mean less funding and market development for quality creation

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23 https://kstatic.googleusercontent.com/files/fe33a9d774dbc0645559dd247dd3049218ac5a2a2d9c124f2ed3319191675d579590fe79f159f8c7ad1b4b074d0b8502499b793521bcbaa0ccdeafd8ceccc7d

24 https://cmpa.ca/wp-content/uploads/2022/04/Profile-2021-EN.pdf at 4; https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/2022-10-04_TRCM_Brief_MPA_e.pdf at 3

25 https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/TRCM_Brief_DigitalMediaAssociation_e.pdf

26 https://sencanada.ca/content/sen/committee/441/TRCM/Reports/C11Observations_EN_FINAL_e.pdf

27 https://sencanada.ca/content/sen/committee/441/TRCM/Reports/C11Observations_EN_FINAL_e.pdf

28 https://sencanada.ca/content/sen/committee/441/TRCM/Reports/C11Observations_EN_FINAL_e.pdf

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service suppliers have every incentive to produce and to market globally. Finally, if other markets were to replicate the discriminatory measures C-11 envisages, or insist on reciprocal treatment, Canadian content would be a prime target for a beggar-thy-neighbor form of cultural protectionism.

Trade Implications of C-11

While the text of C-11 is subject to change and many of the more prescriptive requirements that C-11 envisages must be implemented through future CRTC rulemaking, the outlines of the proposed regime are clear, and its inconsistency with core trade obligations is beyond dispute. The discriminatory preferences that Bill C-11 will require are articulated in the following provisions:[29]

Section 3 (1) f (i)

> each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;

Section 3 (1) q

> online undertakings that provide the programming services of other broadcasting
> undertakings should
>> (i) ensure the discoverability of Canadian programming services and original Canadian programs, including original French language programs, in an equitable proportion;

Section 3 (1) r

> online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages, and

[29] Available at: https://www.parl.ca/DocumentViewer/en/44-1/bill/C-11/third-reading

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ensure that any means of control of the programming generates results allowing its discovery;

The impracticality of extending such obligations to *all* content available on the internet in Canada that falls within Canada's definition of broadcasting is obvious, and one of the motivating factors that lead to the original 1999 Exemption Order. Indeed, the very open nature of the internet, which empowers individuals to consume a wide array of audiovisual content from around the globe, represents the polar opposite of a closed system such as that of broadcasting, whereby an undertaking controls transmission directly to the consumer (and thus is in a position to institute discriminatory preferences).

Because of the vast and open nature of the internet, the CRTC will have to define a manageable subset of internet-delivered content that it will regulate to avoid the scenario of a "reverse takeover of the Internet."[30] Bill C-11 takes an initial step in excluding several subsets by providing guidance – but not a firm legal requirement – for the CRTC to focus its application of these rules on commercial music content, rather than most user-generated content or content ancillary to other services (e.g. promotional video on a product of service).

For the vast amount of content that remains squarely in the ambit of C-11 (subscription video, music, and news, and user-generated content that the CRTC deems within scope), however, the CRTC will presumably have to set thresholds using factors such as revenue or subscribership to institute an administrable regime; and it will likely continue to use exclusion orders to exempt the rest. Within the boundaries of what will be included, however, one can expect major U.S. online music, video, and owner-monetized user-generated content to be subject to CRTC regulation.

There are two key trade rules in USMCA that regulations would almost certainly breach: investment performance requirements (Article 14.10.1 (b))[31] and the provision ensuring non-discriminatory treatment of digital products, Article 19.4[32]

With respect to investment (and all major U.S content companies have some level of investment in Canada, even if not licensed as broadcasters), C-11's Article 3.1 f (i) requirement

[30] See Comments of the Internet Society before the Senate Transport and Communications Committee regarding Bill C-11: https://sencanada.ca/Content/Sen/Committee/441/TRCM/briefs/2022-09-14_TRCM_Brief_ISCC_e.pdf at 3-4 ("C-11 seeks to reverse the effects of this technological and business revolution. By declaring virtually all audio- and audio-visual content on the Internet to be broadcasting, the closed system of few voices — which is the basic idea of broadcasting – can be made perpetual… It is a kind of reverse takeover of the Internet. The Canadian broadcasting system – tiny in the scheme of things – can take on the world of the Internet by the mere trick of redefining "broadcasting".").
[31] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf
[32] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf

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to "make the greatest practical use of Canadian creative and other human resources" is an explicit local content requirement USMCA's investment rules proscribe, as is clear from the text of the provision (emphasis added):

> No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:
>
> (a) to export a given level or percentage of goods or services; [or]
>
> **(b) to achieve a given level or percentage of domestic content**
>
> [...]

Even if rules instituted pursuant to C-11 did not result in direct quotas (a tool ill-suited to interactive online environment), a mandate for a supplier to spend a percentage of revenue on Canadian content or contribute to a promotional fund would have a similarly restrictive impact, as it does currently as applied to BDUs—ensuring that a minimum amount of Canadian content is developed (even if not transmitted).

The digital products rule of USMCA is more straightforward in its application, obligating Canada to ensure that it does not discriminate (*i.e.,* accord less favorable treatment) to "digital products[33] on the basis of, *inter alia*, place of production or nationality of authorship, the very factors Canada uses to define content that is Canadian. The rule reads:

> No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.

All three provisions cited above—3 (1) f (1), 3 (1) (q), and 3 (1) (r)—cited above are clearly and specifically designed to provide more favorable treatment to content deemed Canadian and are thus inconsistent with this rule.

[33] Defined to include both music and video.

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To the extent that the CRTC exempts categories of suppliers from any resultant obligations (*e.g.,* based on revenue or subscribership, so as to make the regime administrable), Canada would be in jeopardy of also breaching the national treatment and MFN obligations of the Cross-border Services and Investment chapters: the exempt Canadian and foreign online suppliers would be accorded more favorable treatment than that of the regulated foreign suppliers, putting those regulated suppliers at a competitive disadvantage.

As noted above, if challenged, Canada can be expected to invoke its cultural industries exception (Article 32.6)[34] as a basis for justifying the inevitable discrimination the measure engenders. Like all exceptions, this provision is designed to provide parties (in this case, only Canada) latitude to act contrary to a specified rule to achieve a specified legitimate objective– in this case, protection and promotion of Canadian audiovisual production. Unlike typical exceptions, this is not subject to constraints against being unnecessary or arbitrary.

However, also unlike other exceptions, this exception has a unique counterbalancing coda attached to it: the affirmative right of a party aggrieved by the exercise of the exception to take commensurate action to compensate for the harm. This could include the imposition of tariffs or the denial of licenses applicable to Canadian suppliers benefitting from access to the U.S. market.

[34] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/32_Exceptions_and_General_Provisions.pdf