

PRELIMINARY VERSION

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Legislative Summary

BILL C-11: AN ACT TO AMEND THE BROADCASTING ACT AND TO MAKE RELATED AND CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

44-1-C11-E

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Legislative Summary of Bill C-11
(Preliminary version)

44-1-C11-E

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LEGISLATIVE SUMMARY OF BILL C-11: AN ACT TO AMEND THE BROADCASTING ACT AND TO MAKE RELATED AND CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

On 2 February 2022, the Honourable Pablo Rodriguez, Minister of Canadian Heritage, introduced Bill C-11, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, in the House of Commons.¹ The short title of the bill is the Online Streaming Act.

Bill C-11 includes some of the amendments proposed during the 2nd Session of the 43rd Parliament in Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts.² On 16 February 2021, after second reading, this bill was referred to the House of Commons Standing Committee on Canadian Heritage for consideration. On 11 June 2021, this committee proposed over 30 amendments to the bill.³ Bill C-10 died on the *Order Paper* when Parliament was dissolved in August 2021.

Bill C-11 modernizes the *Broadcasting Act* (the Act) to bring online undertakings within its scope. It amends broadcasting and regulatory policies in order to provide accessible programming and ensure that the entire Canadian population is represented, including Canadians from racialized communities or of diverse ethnocultural backgrounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages.

In addition, the bill modifies the mandate and powers of the Canadian Radio-television and Telecommunications Commission (CRTC). It gives the CRTC the power to impose administrative monetary penalties when certain violations are committed, aligning with its existing powers to regulate telecommunications and spam.

1.1 THE *BROADCASTING ACT*

The *Act* was established in 1991. It sets out the principles and objectives of the broadcasting policy for Canada and provides the legislative means to achieve them.⁴

This policy stipulates that the Canadian broadcasting system must:

- be owned and controlled by Canadians;
- through its programming, provide a public service essential to maintaining and enhancing national identity and cultural sovereignty;
- serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- encourage the development of Canadian expression;
- serve the needs and interests of Canadians, and reflect their circumstances and aspirations, which include equal rights, linguistic duality, the multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples within that society;
- be readily adaptable to scientific and technological change; and
- maximize the use, and in all cases, make at least predominant use of Canadian creative and other resources in creating and presenting programming.

The Act also sets out the mission and powers of the CRTC. The organization has a mandate to regulate and supervise all aspects of the Canadian broadcasting system so it can implement the broadcasting policy for Canada. As an independent public body, it can issue broadcasting licences and establish the requirements licensees must satisfy. The Act also sets out the powers of the Governor in Council with regard to the CRTC.

Lastly, the Act lays out the governance structure of the Canadian Broadcasting Corporation/Radio-Canada (CBC/Radio-Canada), its powers and its duties as the national public broadcaster.

2 DESCRIPTION AND ANALYSIS

Bill C-11 has 54 clauses. The following description and analysis focus on the key aspects of the bill rather than examine each provision. Moreover, the amendments that update and modernize the terminology used in the Act are not considered in detail in this Legislative Summary.

2.1 DEFINITIONS AND INTERPRETATION (CLAUSE 2)

Clause 2 amends the interpretation provisions of the Act. Section 2(1) of the Act is amended to include the definition of “online undertaking.” Under this new definition, these undertakings transmit or retransmit programs over the Internet for reception by the public. The definition of “broadcasting undertaking” is also amended to encompass

online undertakings, and the definition of “broadcasting” is amended to specify that the transmission of programs for reception by the public includes scheduled or on-demand transmission.

Clause 2(3) replaces section 2(3) of the Act with new sections 2(2.1), 2(2.2) and 2(2.3) and an amended version of section 2(3). These new provisions specify who does not carry on a broadcasting undertaking.

New section 2(2.1) stipulates that a social media user uploading and receiving programs through this service does not carry on a broadcasting undertaking for the purposes of the Act.

New section 2(2.2) specifies that an online undertaking that provides a social media service does not exercise programming control over programs uploaded by a user of its services who is not the provider of the service, the provider’s affiliate or the agent or mandatary of either of them.

New section 2(2.3) specifies that a person who transmits programs over the Internet as part of the operations of an educational institution, a museum or a venue for the presentation of live performing arts does not carry on an online undertaking.

New section 2(3) states that the Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic independence enjoyed by broadcasting undertakings. The Act shall also be construed and applied in a manner that is consistent with the Government of Canada’s commitment to enhancing the vitality and supporting the development of Canada’s English and French minority communities (new section 2(3)(b)).

2.2 BROADCASTING POLICY FOR CANADA (CLAUSE 3)

The broadcasting policy for Canada sets out objectives that the CRTC must implement. Bill C-11 amends multiple aspects of this policy.

In the current version of the Act, section 3(1)(a) states that the Canadian broadcasting system shall be owned and controlled by Canadians. Clause 3(1) amends this provision to specify that this principle does not apply to foreign broadcasting undertakings that provide programming to Canadians.

New section 3(1)(a.1) requires all participants in the Canadian broadcasting system to contribute to the implementation of the objectives of the broadcasting policy in a manner that is appropriate given the nature of their services.

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In its current form, the Act states that the Canadian broadcasting system, through its programming and the employment opportunities it provides, must serve the needs and interests of Canadians. Clause 3(3) amends section 3(1)(d)(iii) of the Act and specifies that, through its programming and employment opportunities, the Canadian broadcasting system must serve the needs and interests of all Canadians, including

Canadians from racialized communities and Canadians of diverse ethnocultural backgrounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages.

Furthermore, clause 3(3) adds section 3(1)(d)(iii.1) to the Act to stipulate that the Canadian broadcasting system must provide opportunities to Indigenous persons to produce programming in Indigenous languages, English or French, or in any combination of these languages, and to carry on broadcasting undertakings.

The Act is also amended to ensure that the broadcasting policy for Canada enhances the vitality of official language minority communities, including by supporting production and broadcasting by those communities (section 3(1)(d)(iii.3)).

The bill also strengthens the role the community element plays in the Canadian broadcasting system. Section 3(1)(d)(iii.4) is added to state that the broadcasting policy for Canada supports community broadcasting and reflects the diversity of the communities being served.

Clause 3(4) amends the wording of section 3(1)(f) of the Act regarding the use of Canadian creative resources by broadcasting undertakings to create and present their programming. Section 3(1)(f.1) is added to compel foreign online undertakings to make “the greatest practicable” use of these human resources while taking into account Canada’s linguistic duality.

Bill C-11 clarifies two further objectives of the broadcasting policy for Canada. Currently, sections 3(1)(g) and 3(1)(h) of the Act state that broadcasting undertakings should provide programming of high standard and that broadcasting undertakings have a responsibility for the programs they broadcast. The bill’s new interpretation provisions add the term “programming control” to distinguish situations where a broadcasting undertaking has control over the selection of programs for transmission from those where it does not.

In its current form, section 3(1)(i) of the Act outlines a set of objectives that the programming provided by the Canadian broadcasting system should achieve. Clause 3(5) adds section 3(1)(i)(i.1) to specify that this programming should reflect and support Canada’s linguistic duality, including programming from French linguistic minority communities.

The current Act stipulates in section 3(1)(i)(ii) that the programming provided by the Canadian broadcasting system should be drawn from local, regional, national and international sources. This provision is amended to state that these sources should include local community broadcasters. Moreover, this programming must reflect the viewpoints of Indigenous persons and Canadians from diverse ethnocultural backgrounds (new section 3(1)(i)(ii.1)).

With regard to linguistic duality, clause 3(6) deletes the phrase “as resources become available” from current section 3(1)(k) of the Act; the concept provides for the desired increase in access to programming in both official languages but appears outdated given the potential of online undertakings. The bill also deletes the same wording from sections 3(1)(o) and 3(1)(p) of the Act on programming for Indigenous persons and persons with disabilities, respectively.

2.3 APPLICATION (CLAUSE 4)

Clause 4 adds new sections 4.1 and 4.2 to the Act. New section 4.1(1) specifies that the Act does not apply to users who generate and receive programs through an online undertaking that provides a social media service. Note that the bill does not define the term “social media service.”

However, new section 4.1(2) specifies that the Act applies if a program is uploaded by a social media service provider, its affiliate or the agent or mandatary of either of them.

New section 4.2(1) grants the CRTC the authority to make regulations determining which programs uploaded by a social media service are subject to the Act. Under new section 4.2(2), the CRTC must consider the following:

- whether the program uploaded to a social media service directly or indirectly generates revenues;
- whether the program was broadcast by a licensed broadcasting undertaking or an undertaking registered with the CRTC; and
- whether the program has been assigned a unique identifier under an international standards system.

2.4 OBJECTS
(CLAUSE 5)

Currently, section 5(2)(a) of the Act states that the Canadian broadcasting system should be regulated and supervised in a manner that takes into account the characteristics of English- and French-language broadcasting. Clause 5(1) adds Indigenous languages to the criteria that the CRTC must consider, as well as the minority context of French in North America and the specific needs and interests of English and French linguistic minority communities in Canada.

Clause 5(2) amends the Act to state that the CRTC must facilitate the provision to Canadians of programs that are created and produced by the above-mentioned groups (new section 5(2)(e)) and the production of programs accessible to persons with disabilities (new section 5(2)(e.1)).

Clause 5(3) adds section 5(2)(h) to the Act. Under this new provision, the CRTC must avoid imposing obligations on a broadcasting undertaking if they do not contribute in a material way to implementing the broadcasting policy for Canada.

2.5 ENGLISH AND FRENCH LINGUISTIC MINORITY COMMUNITIES
(CLAUSE 6)

Clause 6 adds to the Act sections 5.1 and 5.2, which state that the CRTC must enhance the vitality of the official language minority communities and consult with them when making decisions that may adversely affect them. One purpose of these consultations is to enable the CRTC to gather information on its policies, decisions and initiatives. The CRTC is required to openly and meaningfully consider the communities' opinions and provide them with feedback.

2.6 DIRECTIONS OF THE GOVERNOR IN COUNCIL
(CLAUSES 7 AND 8)

Under section 7 of the current Act, the Governor in Council may, by order, issue directions of general application to the CRTC relating to the objectives of the broadcasting policy for Canada and relating to the regulation and supervision of the Canadian broadcasting system.

Section 8 of the Act concerns the procedure to follow when the Governor in Council makes an order under section 7. Clause 8(1) amends sections 8(2) and 8(3) of the Act as regards the publication requirements for proposed orders of the minister responsible and their referral to parliamentary committees. The bill ends the automatic referral of proposed orders to a Senate or House of Commons committee when they are tabled before each house of Parliament. It also requires the minister responsible to specify

in the notice of the proposed order the period during which interested parties may make representations (at least 30 days) and obliges the minister to publish a report summarizing the representations received.

2.7 GENERAL POWERS
(CLAUSES 9 AND 10)

Section 9 of the Act currently grants the CRTC the power to establish classes of licences. Clause 9(1) amends section 9(1)(a) to explicitly state that this power does not extend to online undertakings.

In addition, the CRTC's current power to issue and renew the operating licences of broadcasting undertakings for up to seven years is eliminated. The CRTC may now issue and renew licences for a fixed or indefinite term (new sections 9(1)(b) and 9(1)(e)).

In connection with the power to issue licences, clause 10 adds new section 9.1(1) to the Act, which enables the CRTC to make orders imposing conditions for carrying on broadcasting undertakings to implement the broadcasting policy for Canada. These orders may then impose requirements regarding the following:

- the proportion of programs to be broadcast that must be Canadian programs (section 9.1(1)(a));
- the proportion of programs that must be devoted to specific genres to ensure diversity of programming (section 9.1(1)(d));
- the showcasing and discoverability of Canadian programs (section 9.1(1)(e));⁵
- the programming services carried by distribution undertakings and the terms and conditions of service in contracts with their subscribers (sections 9.1(1)(h) and 9.1(1)(j));
- access to programming by persons with disabilities (section 9.1(1)(k));
- any changes in ownership or control of a broadcasting undertaking (section 9.1(1)(m)); and
- obligations for persons carrying on broadcasting undertakings to provide certain information to the CRTC on matters such as governance, programming and finances (sections 9.1(1)(n) and 9.1(1)(o)).

2.8 REGULATIONS
(CLAUSES 11 AND 12)

The Act currently provides for a broadcasting regulatory framework in general terms and leaves the regulatory details to the CRTC. The CRTC, therefore, can independently interpret the Act, and it is not required to submit every regulatory change to Parliament.

Clause 11(2) repeals section 10(1)(a) of the Act, which currently gives the CRTC the power to make regulations on the proportion of airtime that must be devoted to broadcasting Canadian programs. To achieve this objective, the CRTC will now make orders to impose conditions respecting the proportion of programs and the proportion of airtime to be devoted to Canadian programs (new section 9.1(1)(a)).

In addition, clause 11(4) amends section 10(1)(c) of the Act to specify that the CRTC may make regulations respecting television standards over which a person carrying on a broadcasting undertaking has programming control.

Clause 11(6) amends section 10(1)(e) of the Act to stipulate that online undertakings are not subject to regulations governing the proportion of time to be assigned to political parties and candidates.

Of further note, clause 11(8) amends section 10(1)(i) so that the CRTC may make regulations respecting the registration of broadcasting undertakings with it, including online undertakings.

Clause 11(10) replaces sections 10(2) and 10(3) of the Act. The CRTC must now consider a set of criteria in making regulations respecting Canadian programs. Notably, it must consider whether online undertakings collaborate with independent Canadian producers in making these regulations (new section 10(1.1)(d)).

Clause 12 adds section 10.1 to the Act in order to clarify that the CRTC's order- and regulation-making powers must be exercised in a manner consistent with the freedom of expression enjoyed by social media users.

2.9 REGULATIONS: FEES
(CLAUSE 14)

Clause 14 creates new section 11.1, which gives the CRTC the ability to make orders or regulations to require persons carrying on broadcasting undertakings to make expenditures to develop and support Canadian content.

New section 11.1(1)(a) specifies that these mandatory expenditures may serve to support the development, financing, production or promotion of Canadian audio or audiovisual programs. These expenditures may also directly support the creators

of Canadian programs, including their training (new section 11.1(1)(b)), or the participation of organizations representing the public interest in proceedings before the CRTC (new section 11.1(1)(c)).

New section 11.1(4) of the Act provides that a CRTC regulation made under the new powers provided in new section 11.1(1) applies to all persons carrying on broadcasting undertakings, including online undertakings.

New section 11.1(6) of the Act stipulates that orders and regulations made under new section 11.1 may provide for expenditures to be calculated based on criteria such as the revenues of the persons carrying on broadcasting undertakings, their performance in relation to objectives set by the CRTC and the market they serve.

2.10 PUBLIC HEARINGS (CLAUSE 16)

Section 18 of the Act currently requires the CRTC to hold public hearings in certain circumstances, such as when issuing, suspending or revoking a licence. Clause 16 amends section 18(1) of the Act and requires the CRTC to hold such hearings when establishing classes of broadcasting undertakings (new section 11(2)(b)) or objectives for the broadcasting of Canadian programs (new section 11.1(6)(b)).

2.11 CONSULTATIONS BETWEEN THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION AND CBC/RADIO-CANADA (CLAUSE 19)

Under the current Act, CBC/Radio-Canada must fulfill its legislative mandate and satisfy the licence conditions and other regulatory requirements set by the CRTC. The strengthening of the CRTC's order-making and regulatory powers under new sections 9.1(1) and 11.1 of the Act affects the relationship between CBC/Radio-Canada and the CRTC. Clause 19 amends sections 23(1) to 23(3) of the Act to reflect the CRTC's new order-making and regulatory powers.

For example, under the current wording of section 23(1) of the Act, the CRTC must consult CBC/Radio-Canada, at the latter's request, regarding any conditions attached to any licence issued to it. The bill extends this duty to circumstances where the CRTC proposes to impose new regulatory requirements on CBC/Radio-Canada through an order or regulation made under new sections 9.1(1) and 11.1 of the Act.

2.12 CONDITIONS GOVERNING SUSPENSION AND REVOCATION
(CLAUSE 20)

Section 24 of the Act sets out the conditions under which the CRTC may suspend or revoke a licence. For example, a licence may be suspended or revoked if a licensee contravenes or fails to comply with the conditions attached to the licence, a regulation made under Part II of the Act or a compliance order made by the CRTC pursuant to section 12(2) of the Act.

Clause 20 amends section 24(1)(a) of the Act and adds that a licence may be suspended or revoked if the licensee contravenes any order made by the CRTC under new sections 9.1(1) and 11.1(2) of the Act.

2.13 REPORT OF CONTRAVENTION BY CBC/RADIO-CANADA
(CLAUSE 21)

Section 25(1) of the Act enables the CRTC to report to the minister responsible any circumstances in which CBC/Radio-Canada has allegedly contravened or failed to comply with any condition, order or regulation to which it is subject, as well as the CRTC's observations or recommendations on the matter. Clause 21 updates section 25(1) of the Act to specify that the CRTC's authority in this regard extends to orders made under new sections 9.1(1) and 11.1(2).

2.14 PROVISION OF INFORMATION BY THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION
(CLAUSE 22)

Clause 22 adds new sections 25.1 to 25.3 to the Act, authorizing the CRTC to provide the minister responsible or the Chief Statistician of Canada with any information submitted to it regarding a broadcasting undertaking. These sections also authorize the CRTC to make available for public inspection any information submitted to it during proceedings before it, unless this information is designated as confidential by the person who submits it to the CRTC.

For example, new section 25.3(4) authorizes the CRTC to disclose or require the disclosure of confidential information in the course of proceedings before it, if it determines that the disclosure is in the public interest. Furthermore, the CRTC may disclose or require the disclosure of this information to the Commissioner of Competition at the latter's request.

Similar provisions appear in sections 37 to 39 of the *Telecommunications Act*.

2.15 SETTING ASIDE OR REFERRING DECISIONS BACK TO THE
CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION,
AND FILING OF PETITIONS
(CLAUSES 23 AND 24)

Clause 23(1) amends section 28(1) of the Act and grants the Governor in Council more time to set aside CRTC decisions to issue, amend or renew a licence, or to refer these decisions back to the CRTC for reconsideration. The current time limit of 90 days is raised to 180 days.

2.16 PROHIBITION AND BROADCASTING CONTRARY TO
THE *BROADCASTING ACT* AND DEFENCE
(CLAUSES 25 AND 26)

Clause 25 adds new section 31.1 to the Act; it prohibits a person from carrying on a broadcasting undertaking, except for an online undertaking, unless they have a licence to do so or they are exempt from this licence requirement pursuant to an order made under section 9(4) of the Act.

Clause 26 amends sections 32 to 34 of the Act to specify that contravening the prohibition set out in new section 31.1 is an offence punishable on summary conviction. It also specifies that the maximum fine for this offence is \$25,000 for an individual and \$250,000 for a corporation. The Act currently provides that the maximum fine for carrying on a broadcasting undertaking without a licence is \$20,000 for an individual and \$200,000 for a corporation.

Clause 26 also adds new section 33.1 to the Act to specify that a person cannot be found guilty of the offence above or of the offence of contravening any regulation or order made by the CRTC, if they establish that they exercised due diligence to prevent the commission of an offence.

2.17 ADMINISTRATIVE MONETARY PENALTIES
(CLAUSE 28)

Under current sections 32 and 33 of the Act, a person who carries on a broadcasting undertaking without a licence, who contravenes or fails to comply with a regulation made under the Act, or who contravenes or fails to comply with a condition of their licence is guilty of an offence punishable on summary conviction. Clause 28 establishes a regime of administrative monetary penalties by adding to the Act new Part II.2, which contains new sections 34.4 to 34.995. This regime significantly strengthens the CRTC's powers.

Clause 28 imposes monetary penalties on any person who contravenes a regulation or order made by the CRTC (new section 34.4(1)). It provides for a maximum penalty of \$25,000 for a first violation by an individual and \$10 million for a first violation in any other case (new section 34.5(1)). It also sets out a list of criteria the CRTC must take into account when determining the amount of the penalty, including the nature and scope of the violation, the history of compliance of the person who committed the violation and the person's ability to pay (new section 34.5(2)). In most cases, pursuant to new section 34.94(1) of the Act, a person cannot be held liable for a violation if they establish that they exercised due diligence to prevent its commission.

2.17.1 Designation of Persons to Issue Notices

Clause 28 sets out the proceedings for violations pursuant to new section 34.4(1) of the Act. The CRTC may therefore designate persons to issue notices of violation (new section 34.7). These designated persons are authorized to cause the notices to be served on the persons believed to have committed a violation, if there are reasonable grounds to believe that the violation was committed (new section 34.8(1)).

Clause 28 also adds to the Act new parts II.3 and II.4 respecting the submission of information and material misrepresentation of fact, which contain new sections 34.996 to 34.998. New Part II.3 authorizes designated persons to require a person to submit to them information relevant for the purpose of verifying whether a violation was committed (new section 34.996). New Part II.4 adds an explicit prohibition on knowingly making a material misrepresentation of fact to designated persons (new section 34.997). Any person who makes a material misrepresentation is guilty of an offence and is liable to a maximum fine of \$10,000 for a first offence by an individual and \$100,000 for a first offence in any other case (new section 34.998(1)).

2.17.2 Proceeding in Respect of Violation and Prescription

During violation proceedings, the CRTC has all the powers of a superior court of record (new section 34.91).

Violation proceedings have a prescription period of three years after the day on which the subject matter of the proceedings became known to the CRTC (new section 34.97(1)).

The CRTC's decisions in violation proceedings can be appealed to the Federal Court of Appeal under section 31 of the Act (new section 34.92(4)).

2.17.3 Undertaking and Requirements

A violation can also be resolved through an undertaking by the person believed to have committed it (new section 34.9(1)). The undertaking sets out the acts or omissions that it covers and any requirement for the person in question to pay a specified amount (new section 34.9(2)). The undertaking ends the violation proceeding for any act or omission referred to in the undertaking (new section 34.9(4)), and the CRTC may make public the name of the person who entered into it (new section 34.98(a)).

2.17.4 Commission of a Violation by a Corporation
or by CBC/Radio-Canada

When a corporation is believed to have committed a violation, its officers, directors, agents or mandataries may be held liable for the violation, whether or not the corporation is proceeded against (new section 34.95).

As for CBC/Radio-Canada, the CRTC cannot impose a penalty on it without holding a public hearing on the matter (new section 34.99(1)). After holding this hearing, if the CRTC is satisfied that CBC/Radio-Canada has committed a violation, it submits a report to the minister responsible setting out the circumstances of the violation, its findings, the amount of any penalty imposed and any observations or recommendations relating to the violation (new section 34.991(1)). This report must be tabled before each house of Parliament (new section 34.991(2)).

2.18 AMENDMENTS TO THE OBJECTS AND POWERS
OF CBC/RADIO-CANADA
(CLAUSES 29 TO 31)

Section 38(1) of the Act concerns the attributes needed to be appointed as director of CBC/Radio-Canada. The provision currently states that a person cannot be appointed as director if they are directly or indirectly engaged in the operation of a broadcasting undertaking. Clause 29(2) adds new section 38(3), which specifies that the undertakings in question are those that must be carried on under a broadcasting licence, that are carried on by a person who is exempt from the requirement to hold a licence under a CRTC order or that must be registered with the CRTC, including online undertakings.

Clause 30(1) amends section 46 of the Act to account for the CRTC's new order-making powers.

2.19 RELATED AMENDMENTS
(CLAUSES 32 TO 35)

2.19.1 Canada's Anti-Spam Legislation

Commonly referred to as Canada's anti-spam legislation (CASL), *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* prohibits sending a commercial electronic message (CEM) without the recipient's consent.

CASL sets out the circumstances in which a person is considered to have given their express or tacit consent to receive a CEM and imposes requirements on the form and contents of CEMs. A business that contravenes CASL requirements incurs administrative monetary penalties.

Section 5 of CASL provides that the legislation does not apply in respect of broadcasting by a broadcasting undertaking as defined in the Act. Clause 32 amends section 5 of CASL to ensure it applies to online undertakings, even in their capacity as broadcasting undertakings. CASL, therefore, prohibits online undertakings for the transmission of programs from sending CEMs without the recipient's consent.⁶

However, clause 33 adds new section 6(7.1) to CASL to allow an online undertaking to send a CEM under two conditions. First, the recipient must have expressly or implicitly consented to the transmission of a program from that online undertaking to an electronic address. Second, the message must be the program itself, form a part of it or be sent in the course of transmitting it to that electronic address.

The limited circumstances in which a person is deemed to have given implicit consent to receive CEMs are set out in section 10(9) of CASL. However, clause 34 amends this provision to specify that the circumstances described there do not apply to online undertakings.

2.19.2 *Cannabis Act*

The *Cannabis Act* governs the sale of cannabis in Canada. It prohibits certain ways of promoting cannabis, cannabis accessories and cannabis-related services.⁷ While section 23(1) of this legislation prohibits broadcasting such illicit promotions on behalf of another person, section 23(2) provides for some exceptions to this prohibition. For instance, an exception is made for undertakings that merely distribute a broadcaster's signal (section 23(2)(b) of the *Cannabis Act*). Clause 35 amends

section 23(2)(b) of the *Cannabis Act* to add an exception for online undertakings that broadcast an illicit promotion, provided that they did not insert the promotion themselves and that the broadcast is otherwise compliant with the Act.

2.20 CONSEQUENTIAL AMENDMENTS
(CLAUSES 36 TO 47)

2.20.1 *Access to Information Act*

Clause 36 amends the *Access to Information Act* to ensure that confidential information provided to the CRTC under new section 25.3 of the *Broadcasting Act* cannot be subject to an access-to-information request.

2.20.2 *Canadian Radio-television
and Telecommunications Commission Act*

Under section 13 of the *Canadian Radio-television and Telecommunications Commission Act* (CRTCA), the CRTC must submit to the minister an annual report on its activities. Section 13(2) of the CRTCA requires the report to include information about the CRTC's activities pertaining to the enforcement of specific provisions of the Act. Clause 37 adds two sections to section 13(2) of the CRTCA; they require this report to include information about the notices of violation the CRTC issues concerning contraventions of an order or regulation made under the Act for the identification and removal of barriers and the prevention of new barriers, and about the notices of violation issued concerning the contravention of certain provisions of the *Accessible Canada Act*.

2.20.3 *Copyright Act*

2.20.3.1 Ephemeral Recordings

Section 30.8 of the *Copyright Act* provides an exception for ephemeral recordings that allows programming undertakings to fix or reproduce some works,⁸ performances and sound recordings without these fixations or reproductions constituting copyright infringement. This exception allows programming undertakings to avoid paying royalties for acts that are entirely the result of the technical processes used to make authorized broadcasts of protected content.

Section 30.8(11) of the *Copyright Act* sets out a definition for “programming undertaking” to apply the exception. Clause 38 amends this section to specify that the ephemeral recordings exception applies to online undertakings regarding programs that they produce themselves.

2.20.3.2 Retransmission

Section 31(2) of the *Copyright Act* provides that a retransmitter's communication of a work to the public by telecommunication is not an infringement of copyright if that communication is a simultaneous, unaltered retransmission of a local or distant signal. Currently, this exception does not apply to a retransmitter that provides broadcasting services that are distributed and accessible on the Internet (or a "new media retransmitter").

Clause 39 amends section 30.9(7) of the *Copyright Act* to update the definition of "broadcasting undertaking." This amendment serves to exclude online undertakings from the definition, as they do not hold a broadcasting licence from the CRTC.

The definition of "new media retransmitter" will be repealed when clauses 40(1) to 40(4) come into force by order of the Governor in Council. At that point, the Governor in Council can define "retransmitter" in regulations made under new section 31(3)(a) of the *Copyright Act*. The content of that definition will determine the retransmitters to which the exception applies.

2.20.4 *Referendum Act, Canada Elections Act and Accessible Canada Act*

Provisions of the *Referendum Act, Canada Elections Act (CEA)* and *Accessible Canada Act (ACA)* impose obligations on broadcasting undertakings pertaining to various activities governed by these three Acts. The wording of these provisions currently refers to the conditions imposed on licences issued under the Act. The bill makes consequential amendments to certain provisions of these three Acts to replace any references to these conditions with references to the conditions the CRTC imposes by order to implement the broadcasting policy for Canada pursuant to new section 9.1 of the Act.

More specifically, clauses 41 and 42 respectively amend sections 21(1) and 24(2) of the *Referendum Act*; clauses 43, 44 and 45 respectively amend sections 335(1), 339(3) and 345(1) of the CEA; and clauses 46 and 47 respectively amend sections 42(1)(b) and 118(3)(a) of the ACA. Despite the amendments the bill makes to the wording of these provisions, they continue to have substantially the same effect.

PRELIMINARY VERSION

UNEDITED

2.21 TRANSITIONAL PROVISIONS (CLAUSES 48 TO 52)

The purpose of the transitional provisions in clauses 48 to 52 is to maintain the stability of the broadcasting regulatory framework by ensuring that any obligations imposed under the Act before Bill C-11 receives Royal Assent remain in effect.

2.22 REVIEW (CLAUSE 53)

Clause 53 provides that, five years after Bill C-11 receives Royal Assent, a committee of the Senate, of the House of Commons or of both houses must conduct a comprehensive review of the amendments it makes to the *Broadcasting Act*. This committee must also submit a report containing any recommended changes to the appropriate house.

2.23 COMING INTO FORCE (CLAUSE 54)

By default, the vast majority of the bill's provisions come into force on the day the bill receives Royal Assent. Clause 54 provides that clauses 40(2) to 40(4) (the definition of “new media retransmitter” in the *Copyright Act*) will come into force on a day fixed by order of the Governor in Council.

NOTES

1. [Bill C-11, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, 44th Parliament, 1st Session.](#)
2. [Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, 43rd Parliament, 2nd Session, \(first reading version, 3 November 2020\).](#)
3. House of Commons, Standing Committee on Canadian Heritage, [Fifth Report](#), 11 June 2021.
4. [Broadcasting Act](#), S.C. 1991, c. 11.
5. Discoverability is the intrinsic ability of given content to stand out or to position itself so as to be easily found and discovered. See Canada Media Fund, [Discoverability: Toward a Common Frame of Reference](#), 6 May 2016.
6. [An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act](#), S.C. 2010, c. 23, s. 6(1).
7. See [Cannabis Act](#), S.C. 2018, c. 16, ss. 17–22.
8. As currently defined, a programming undertaking is an “undertaking for the transmission of programs either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of a broadcasting receiving apparatus.” See [Broadcasting Act](#), S.C. 1991, c. 11, s. 2(1).