**The problems with Canada’s broadcasting policy**

The controversy that began in September 2020 with Bill C-10*, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, is continuing with Bill C-11*, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, whose short title is the *Online Streaming Act.*

Nearly all the attention concerning these two bills has reflected fears that, if enacted, the government’s new broadcasting legislation would enable the CRTC to regulate broadcast content posted online by individual ‘users’ of online services. These fears are well-founded, and flow from the statute as currently written. Under C-11,

1. Broadcasting is defined as the transmission of programs (s. 2, “broadcasting”)
2. A program consists of sounds and/or images intended to inform, enlighten or entertain (s. 2, “program”), and users may upload programs to ‘online social media undertakings’ (not defined by Bill C-11)
3. The *Broadcasting Act* does not apply to programs uploaded to online social media undertakings by users (s.4.1(1)) – except when the CRTC enacts regulations to do so (s. 4.1(2)(b)).

One problem, then, is the express ‘exception to the exception’ that would permit the CRTC to regulate social media users’ programs. Why does it exist?

According to the government, Canadians should simply ‘trust the CRTC’. Even if a non-sequitur were an explanation – and it is not, telling Canadians to trust the CRTC does not actually explain why Canadians should trust the Commission. For context, this is an agency that

* Does not report on its implementation of Canada’s broadcasting policy
* Issues decisions and other determinations without identifying which CRTC Commissioners made them
* Ignored the 1991 *Broadcasting Act*’s requirement to report on CBC’s 2013 breach of its network licence
* Evades the public hearings mandated by the *Broadcasting Act* by holding ‘public hearings’ closed to all but CRTC Commissioners and staff
* Has ignored its own *Rules of Procedure* by failing to publish all applications it receives
* Has delegated away its responsibility to address the public’s complaints about broadcasting – without express legal authority to do so, and that
* Has for years met with those the CRTC regulates behind closed doors to discuss unknown issues and unknown evidence, all the while assuring Canadians that it serves the public interest.

‘Trust us’ might have worked in the CRTC’s first year of operation: the CRTC’s track record 54 years on just isn’t good enough.

But there are other problems with Bill C-11. For one thing, it gives near-complete control over the CRTC to the federal Cabinet while leaving current problems related to transparency and accountability untouched. For another, its ‘broadcasting policy for Canada’ is virtually meaningless – being left almost entirely to the CRTC’s discretion.

The broadcasting policy set out in Bill C-11’s section 3(1) is summarized below.

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| **Order** | **Subsection** | **Level** | **Nature** | **Topic** |
| 1 | a | System and undertakings | **Shall, conditional** | Ownership and control ***except for foreign services*** |
| 2 | a.1 | Undertaking & broadcasting policy | **Shall, conditional** | Contribution to implementation ***as appropriate*** |
| 3 | b | System and undertakings | Declaration | Essential public service |
| 4 | c | English- and French-language broadcasting | Declaration | Different conditions by language |
| 5 | d(i) | System's purpose | Should | Safeguard and strengthen Canada's economic, social, political and cultural fabric |
| 6 | d(ii) | System's purpose | Should | Range of Canadian programming  |
| 7 | **d(iii)** | System's purpose | Should | Programming and employment opportunities serve Canadians' needs |
| 8 | **d(iii.1)** | System's purpose | Should | Indigenous programming opportunities |
| 9 | d(iii.2) | System's purpose | Should | Original French-language production |
| 10 | d(iii.4) | System's purpose | Should | Community broadcasting  |
| 11 | d(iii.5) | System's purpose | Should | Independent broadcasting undertakings |
| 12 | d(iv) | System's purpose | Should | Ready adaptation to science/technology |
| 13 | e | Element | **Shall, conditional** | ***Appropriate*** contribution to Canadian program creation & presentation |
| 14 | f | Undertaking & Canadian resources | **Shall, conditional** | Predominant use of Canadian and other human resources ***except for service nature*** |
| 15 | f.1 | Foreign online undertaking & Canadian resources | **Shall, conditional** | Greatest ***"practicable use"*** of Canadian creative and other human resources |
| 16 | g | Undertaking & high-standard programming | Should | High standard |
| 17 | h | Broadcasters' responsibility for programs they control | Declaration | Responsibility for programming  |
| 18 | i(i) | System's programming | Should | Varied and comprehensive programming  |
| 19 | i(i.1) | System's programming | Should | Creation, production and broadcasting of French-language original programs |
| 20 | i(ii) | System's programming | Should | Program sources & unique position of community broadcasters |
| 21 | i(ii.1) | System's programming | Should | Canadian productions of news and current events |
| 22 | i(iii) | System's programming | Should | Educational and community programs |
| 23 | i(iv) | System's programming | Should | Expression of differing views on matters of public concern |
| 24 | i(v) | System's programming | Should | Significant contribution from Canadian independent producers |
| 25 | j | Educational programming  | Declaration | Educational programming is integral part of system |
| 26 | k | Broadcasting services | **Shall** | **Extension of English- and French-language services to all Canadians**  |
| 27 | l | National public broadcaster's broadcasting services | Should | Programming that informs, enlightens and entertains |
| 28 | m(i) | National public broadcaster's programming | Should | Predominantly and distinctively Canadian  |
| 29 | m(ii) | National public broadcaster's programming | Should | Reflect regions |
| 30 | m(iii) | National public broadcaster's programming | Should | Flow and exchange of expression |
| 31 | m(iv) | National public broadcaster's programming | Should | In English and in French |
| 32 | m(v) | National public broadcaster's programming | Should | Equivalent quality of English- and French-language programming  |
| 33 | m(vi) | National public broadcaster's programming | Should | Shared national consciousness and identity |
| 34 | m(vii) | National public broadcaster's programming | Should | Availability as resources become available |
| 35 | m(viii) | National public broadcaster's programming | Should | Reflect Canadian multicultural and multiracial character |
| 36 | n | National and other broadcasters  | **Shall** | **Conflicts between public and private broadcasters**  |
| 37 | o | Indigenous programming | should | In community and other elements of system |
| 38 | p | System | Should | Accessible programming |
| 39 | q(i) | Online undertakings | should | Ensure discoverability of Canadian programming  |
| 40 | q(ii) | Online undertakings | Should | Provide reasonable terms of carriage, packaging and retailing |
| 41 | r | Online undertakings | **Shall** | **Promote and recommend Canadian programming**  |
|  | s | [dropped] |  |  |
| 42 | t(i) | Distribution undertakings | Should | Give priority to Canadian programming services |
| 43 | t(ii) | Distribution undertakings | Should | Affordable rates and efficient delivery |
| 44 | t(iii) | Distribution undertakings | Should | Provide reasonable terms if broadcasters supply services under contract |
| 45 | t(iv) | Distribution undertakings | Should | Originate programming to achieve s 3 objectives and provide access to underserved communities |
|  |  |  |  |  |
|  |  |  |  |  |
| Should: | 33 |  |
| Shall [absolute] | 3 |  |
| Shall, conditional | 5 |  |
| Shall, absolute and conditional | 8 |  |
| Declaration | 4 |  |
| Total:  | 45 |  |

Section 3(1) has 45 sections or subsections which are either discretionary, mandatory or declaratory. While ‘declaratory’ statements clarify a statute’s interpretation, imperative terms such as ‘shall’ establish an obligation or a duty, while permissive terms such as ‘should’ permit action to be taken. In 1990, the Supreme Court of Canada held that “… the word "should" denotes simply a "desire or request" … and not a legal obligation.”[[1]](#footnote-1)

Nearly three-quarters (33 or 73%) of the 45 sections in Canada’s broadcasting policy use discretionary wording to address the programming provided by the broadcasting system in general and by the national public broadcaster (CBC) in particular, and to address how distribution undertakings such as cable and satellite companies make programming available.

Of the 8 sections that use non-discretionary or mandatory wording, five include conditions that enable the mandatory wording to be overridden. These conditions are shown in the italicized text below:

(a) the Canadian broadcasting system shall, *with the exception of foreign broadcasting undertakings providing programming to Canadians*, be effectively owned and controlled by Canadians;

(a.1) each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy set out in this subsection *in a manner that is appropriate in consideration of the nature of the services provided by the undertaking*;

(e) each element of the Canadian broadcasting system shall *contribute in an appropriate manner* to the creation and presentation of Canadian programming;

(f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, *unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable*, in which case the undertaking shall make the *greatest practicable* use of those resources;

(f.1) 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;

Altogether just three of the 45 subsections of Canada’s broadcasting policy are unconditionally required – one applying to the extension of broadcasting services to all Canadians, one applying to conflicts between the CBC and other broadcasters, and one applying to the promotion of Canadian programming by online undertakings:

(k) a range of broadcasting services in English and in French shall be extended to all Canadians;

(n) where any conflict arises between the objectives of the [Canadian Broadcasting] Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);

and

(r) online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery; ….

The concern raised by ‘trust us’ arguments in relation to Bill C-11 is that nearly all of this 2022 broadcasting policy for Canada – whether it applies to the ‘system’, the system’s ‘programming’, the CBC’s programming or distribution undertakings – is being left to the discretion of an institution that has never had to demonstrate whether it has even implemented the 1991 broadcasting policy for Canada. Rather than just placing its faith in the CRTC, Parliament should pare down the objectives for Canada’s broadcasting policy to the goals that absolutely must be met – and which are therefore mandatory.

1. *R. v. S. (S.)*, 1990 CanLII 65 (SCC), [1990] 2 SCR 254, per Dickson C.J.:

…

I agree with Robins J.A. that the use of the term "should" in s. 3(1)(d) [of the *Young Offenders Act*] does not provide evidence of a mandatory duty. While I agree that s. 3(2) dictates that a liberal interpretation be given to the legislation, in my opinion that does not require the abandonment of the principles of statutory interpretation nor does it preclude resort to the ordinary meaning of words in interpreting a statute. In the context of s. 3(1)(d), I find that the word "should" denotes simply a "desire or request" (to use Robins J.A.'s definition) and not a legal obligation. [↑](#footnote-ref-1)