



Independent Broadcast Group/  
Le Groupe de diffuseurs indépendants

**Submission to House of Commons  
Standing Committee on Canadian Heritage**

**Bill C-10 – An Act to amend the *Broadcasting Act***

**The Issue:** Bill C-10 is intended to update the *Broadcasting Act* to recognize that “online services” are a part of the broadcasting system and to give the CRTC the authority it needs to meet key policy objectives.

But Bill C-10 actually removes the CRTC’s authority to supervise a critical element of online activity – the oversight of the distribution, discoverability and fair treatment of Canadian apps and services in an online environment.

It also removes the concept of Canadian ownership.

**Significance:** The combined effect of these changes to the *Broadcasting Act* is the removal of an expectation that there will be Canadian services in the Canadian broadcasting system in the online world, and that these services will be made available to Canadians.

Our broadcasting system could cease to include meaningful participation by a full range of Canadian services, reflecting all of Canada’s diverse interests and voices.

The Act does not give the CRTC the tools it needs to ensure a diversity of voices and of choice in the broadcasting system – including in an online environment.

The Canadian broadcasting system is characterized by high levels of concentration of ownership and of cross-ownership of programming services and distribution platforms (whether established, like cable and satellite, or newer platforms such as IPTV and Internet-delivered services or mobile services).

The recent announced merger of Shaw and Rogers, the two largest established cable operators, points to yet more consolidation of power in a fewer hands. Nor is the presence of Internet web-giants like Google and Facebook cause for celebration. They represent their own form of media concentration and dominance.

It is essential that the CRTC have the tools it needs to ensure a continued diversity of ownership, of voices and of choices for Canadians in the broadcasting sector.

**Explanation** Bill C-10 recognizes the CRTC's authority to require online services to exhibit and fund Canadian programs – this is “programming service” regulation. Netflix, for example, may be required to fund and provide shelf space for individual Canadian programs.

But, because of the new definitions used in Bill C-10, the CRTC's authority over distribution is gutted. Distribution, in this sense, means aggregating and providing access to a number of different services and apps – and not just to individual programs.

Bill C-10 would remove the CRTC's ability to regulate distribution activities in an online environment.

This is an enormous gap in the Bill. Online distribution activities are rapidly gaining traction in Canada and around the world. Global online distribution platforms that offer aggregated linear and on demand channels, like Amazon's Prime Video, Disney's Hulu and Google TV are quickly acquiring market share. Canada's dominant cable and satellite providers are themselves already exploiting online distribution and are moving rapidly to supplement and even replace their closed systems with Internet-based distribution.

Bill C-10, as it stands, will not permit any regulatory oversight of these activities – even when those activities involve Canada's own, dominant vertically integrated distributors, operating solely in Canada, and with very high levels of ownership of Canadian media services.

This is a step backwards, not forwards. It is taking away from the CRTC powers that it already has to ensure the presence of Canadian voices and services – and their fair treatment – in an online world.

For example, the CRTC's existing *Digital Media Exemption Order* now requires that online platforms not give “undue preference” to their own apps and services. One illustration of such a preference could be where a major online platform gives access only to its own sports app and not to competing apps without justification. As it stands now, the CRTC could intervene in this situation to ensure the fair treatment of competing services.

The current Act also permits the CRTC to require distributors to make certain services available on a mandatory basis, and to set the terms of carriage. This power is the basis for the launch and operation of services such as APTN and TV5/UNIS – which are fundamental to the diversity of voices in the Canadian system.

It must be emphasized, the Commission needs the authority both to require carriage, and to set the terms of carriage. It would be inadequate to rely on market forces and negotiations alone to support the distribution of key services. Market forces and negotiations will not ensure an adequate presence of Indigenous voices in the system, nor will they address other historic inequities.

Also, the CRTC's ability to require distribution of services on set terms is the only practical remedy available for independent services when they have been subjected to an undue disadvantage by a dominant carrier. It doesn't help the independent service at all if carrier is found to have breached the Act, but there is no actual remedy available to fix the breach. Requiring distribution and setting the terms of distribution is a key CRTC power. It is the backstop to its dispute resolution process. (See *Broadcasting Regulatory Policy CRTC 2015-96*, paragraph 100)

At the same time, any order that the CRTC may make would, of course, need to take into account the business practices of online services. The power is a flexible one and can be adapted to different circumstances – there is no question of imposing old rules on new digital platforms.

As we look forward to the next decade, the online environment will undoubtedly come to replace closed distribution systems. Without changes to Bill C-10 the CRTC will have no ability to ensure access on these platforms to Canadian services. This includes the Canadian services that are currently the bedrock of our system:

- Canadian local television (including news content)
- Canadian news, generally
- French-language apps and services
- Indigenous-owned media and Indigenous language services
- Multicultural and third-language services
- LGBTQ2+ services
- Services offering accessible content
- Canadian music services
- Canadian children's and family services
- Services offering Canadian films
- Services offered by competing providers – including independently owned services.

In fact, since Bill C-10 would remove Canadian ownership as a policy objective, it has actually removed any express recognition of the benefit of Canadian ownership of broadcasting services, and for Canadians to have access to our own services.

This is a radical change to almost 100 years of Canada-wide, cross-party effort to ensure a meaningful Canadian presence in our own broadcasting system.

The implications of Bill C-10 is that Canadians will no longer have the ability to ensure that Canadian services are offered in an online environment and treated fairly.

**Solution** A few key changes to Bill C-10 would preserve key elements of the CRTC's jurisdiction over distribution activities in the online environment. We have outlined those specific changes in the attachment.

The proposed changes are consistent with the existing definitions and underlying intent of Bill C-10.

The proposed changes do not require any particular regulatory action in relation to distribution activities. They do not prejudge an outcome.

Rather, the proposed changes preserve the CRTC's authority in this area so that, in the future, it could act if required to ensure that the distribution of Canadian services in an online environment meets broadcasting policy objectives.

The proposed changes are also intended to recognize the international character of the broadcasting system – in which Canadians have access to many sources of content – while continuing to ensure the presence and fair treatment of Canadian services as a means to ensure full Canadian participation and a diversity of voices.

### **Proposed Amendments to Bill C-10**

**1. *Changes to proposed section 9.1 to reflect the distribution activities of online distributors:***

9.1(1)(b) the presentation of programs and programming services for selection by the public, including the discoverability of Canadian programs and programming services;

*Purpose: To enable CRTC to ensure that Canadian apps and services are discoverable on online platforms.*

9.1(1)(e) a requirement for a person carrying on a ~~distribution undertaking~~ broadcasting undertaking to carry, on the terms and conditions that the Commission considers appropriate, programming services specified by the Commission;

*Purpose: To enable the CRTC to ensure Canadian apps and services are offered on online platforms. As noted above, this provision ensures that the CRTC has the ability both to require distribution and to set terms for carriage. This power is essential both as a backstop to the CRTC's dispute resolution authority, and to ensure the presence of key services such as APTN and TV5/UNIS in the system. These services cannot, by their nature, rely on market forces or "fair negotiations" alone.*

**2. Changes to the CRTC's existing regulation-making authority to reflect online distributors:**

- 10(1)(g) respecting the carriage of any foreign or other programming services by ~~distribution undertakings~~ broadcasting undertakings;

*Purpose: To ensure the CRTC's regulation-making authority regarding the carriage of programming services could be exercised in relation to online distributors.*

- 10(1)(h) for resolving, by way of mediation or otherwise, any disputes arising between ~~programming undertakings and distribution undertakings~~ broadcasting undertakings concerning the carriage of programming services ~~originated by the programming undertaking~~;

*Purpose: To ensure that the CRTC has authority to intervene in disputes regarding the carriage of programming services in an online environment.*

**3. Changes to the broadcasting policy objectives set out in section 3(1) of the Act to better reflect the importance of Canadian services and the distribution function of online services**

- 3(1)(a) the Canadian broadcasting system should support Canadian ownership and control of broadcasting undertakings, including independent ownership, offering all manner of services and reflecting a diversity of voices ~~shall be effectively owned and controlled by Canadians~~;

*Purpose: To ensure that Canadian ownership of broadcasting undertakings is maintained as a broadcasting policy objective. Without this change, there is no provision for Canadian ownership and control of services or the need to maintain ownership diversity and a diversity of voices. The change recognizes that international online services are present in the system. Note: proposed new section 3(1)(a) in Bill C-10 would be retained and renumbered as 3(1)(a.1).*

- 3(1)(t.1) online undertakings that carry the programming services of other online undertakings

- (i) should ensure the discoverability of Canadian programming services; and
- (ii) should, where programming services are supplied to them by other online undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

*Purpose: To provide policy objectives for online services that perform a distribution function. This provision is modeled on existing section 3(1)(t) (which relates to distribution undertakings). Note: this proposal also reflects new section 5(2)(a.1) set out in Bill C-10 which establishes, as a regulatory policy, that the CRTC should regulate in a manner that is fair and equitable as between broadcasting undertakings of a similar nature and size and taking into account other relevant factors.*

### **Undue Preference and Disadvantage**

Consideration should also be given to include a provision in Bill C-10 that would support the CRTC's current rules that ensure no provider can give itself an undue preference or subject another person to an undue disadvantage.

These rules are especially important in an environment, such as Canada's, that is dominated by a few large domestic companies (Bell, Quebecor, Rogers and Shaw, in particular) – with powerful international global platforms being added to the mix.

IBG would support including a provision in Bill C-10 to guard against any undue preference or disadvantage. Such provision should:

- (1) Contain a clear prescription against an undue preference or disadvantage in relation to broadcasting undertakings of all kinds, including online distribution and including in relation to the collection and use of data;
- (2) Enable the CRTC to establish, through rules, policies and orders, standards by which it would evaluate undue preference and disadvantage; and
- (3) Ensure that in evaluating any such matters, the CRTC is guided by the broadcasting policies set out in the Act – which sets out the purpose for regulatory action in the broadcasting sector.

### **Alignment: Yale Report and International Practice**

The solutions we are recommending would fulfill clear recommendations in the Yale Report (*Canada's Communications Future: Time to Act*) to ensure the fair treatment and visibility of Canadian services in an online environment.

See, in particular, Recommendations 61 and 63.

The solution is also in keeping with the approach adopted in the European Union and in the United Kingdom.

The EU's Audiovisual Media Services Directive was amended in 2018 specifically to deal with online audio visual services. In addition to providing for a minimum content requirement for online services for European works, the directive, explicitly addresses distribution issues and enables European states to regulate prominence requirements for their own "general interest" services (i.e. in the public interest) – see Article 7a of the AVMSD.

The United Kingdom is also directly seized of this issue. In 2019, the UK's communications regulator, Ofcom, recommended changes to UK legislation to ensure that it had appropriate oversight over the online distribution of key UK services. This would include discoverability requirements for those services and, notably, a commitment by Ofcom to engage with the industry on "availability obligations" in an online environment – i.e. the requirement that certain UK services would need to be distributed online under appropriate commercial relationships.

The UK House of Commons Digital, Culture, Media and Sports Committee recently released its report urging the government to act to ensure:

- (1) the prominence of UK services on devices and services,
- (2) branding of content on streaming platforms (to properly identify the originating broadcaster),
- (3) data sharing by platforms with originating broadcasters, and
- (4) measures regarding the question of whether online platforms have undue influence over how content is offered and in respect to the terms and conditions of service.

All of these elements mirror IBG's concerns and are reflected in the amendments we propose to Bill C-10.

Canada can follow the lead that the UK and others are setting in ensuring that online services play a proper role in supporting our cultural services and industries.

See: *Review of prominence for public service broadcasting -- Recommendations to Government for a new framework to keep PSB TV prominent in an online world* (Ofcom, 2019)

*The future of public service broadcasting*, UK House of Commons Digital, Culture, Media and Sports Committee, Sixth Report of Session 2019-2021.

## **Conclusion**

We appreciate this opportunity to present our views on Bill C-10.

## **Contact Information**

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