

### **Observation from the Independent Senators Group (ISG) members on the Committee:**

The term "Canadian original French language programs" is used when the bill refers to Canadian programs originally created in French. The term is not used consistently throughout the Bill.

### **Observations from the Canadian Senators Group (CSG) members on the Committee:**

The Canadian Senators Group TRCM committee members recommend the following:

1. That any future Chairs of the Canadian Radio and Telecommunications Commission (CRTC) appear regularly before the Standing Senate Committee on Transport and Communications to report on the implementation of the new Act.
2. That the CRTC's new regulations pertaining to the Act, including updates to the Canadian content certification and points system, be reviewed and studied by this committee.
3. That the issue of algorithmic manipulation of online platforms due to the implementation of this Act be studied by this committee.
4. That a definition of 'Canadian content' and 'discoverability' in the new broadcast environment be provided and made public by the CRTC.
5. That the economic and financial conditions of Canadian content creators operating in the legacy environment be examined by the CRTC and the government.
6. That the total financial compensation of the Board of Directors, Executive and other senior staff of the CBC be included in the CRTC's annual report.

### **Observations from the members of the Conservative Party on the Committee:**

#### **Key Issues for Observations**

The Committee heard overwhelming evidence that core aspects of this Bill create considerable problems and confusion in significant areas of Canadian broadcasting. Witnesses who raised serious concerns include:

- Vanessa Brousseau, Resilient Inuk, Digital Content Creator
- Jay Goldberg, Ontario Director Canadian Taxpayers Federation
- Peter Menzies, former Vice-Chair of the CRTC
- Jennifer Valentyne, Television Host, Producer and Content Creator
- Darcy Michael, Content Creator
- Vivek Krishnamurthy, Director Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, University of Ottawa
- Dwayne Winseck, Professor, School of Journalism and Communication and the Global Media and Internet Concentration Project, Carleton University
- Patrick Aldous, Senior Vice President, Business and Legal Affairs, Nettwerk Music Group Inc.
- Fenwick McKelvey, Associate Professor, Concordia University

- Emily Laidlaw, Canadian Research Chair in Cyber Security Law and Associate Professor, University of Calgary
- Frédéric Bastien Forrest, Radio personality and content creator
- Stéphane Cardin, Director, Public Policy Netflix
- Wendy Noss, President Motion Picture Association - Canada
- Scott Benzie, Managing Director Digital First Canada
- Morghan Fortier, Co-Owner and Chief Executive Officer Skyship Entertainment
- Oorbee Roy, content creator and skateboarder
- Monica Auer, Executive Director Forum for Research and Policy in Communications
- Irene Berkowitz, Senior Policy Fellow, Audience Lab at The Creative School, Toronto Metropolitan University
- Justin Tomchuk, Independent Filmmaker
- J.J. McCullough, YouTuber and columnist
- Steve de Eyre, Director of Public Policy and Government Affairs, Canada TikTok
- Jeanette Patell, Head of Canada Government Affairs and Public Policy YouTube
- Patrick Rogers, Chief Executive Officer Music Canada
- Garrett Levin, President and Chief Executive Officer Digital Media Association
- Tim Denton, Chairperson Internet Society Canada Chapter
- Matthew Hatfield, Campaigns Director OpenMedia
- Len St-Aubin, Policy Committee Member and Former Director General, Telecommunications Policy, Industry Canada
- John Lawford, Executive Director and General Counsel, Public Interest Advocacy Centre
- Michael Geist, Canada Research Chair in Internet and E-commerce Law, Faculty of Law, University of Ottawa
- The Honourable Konrad von Finckenstein, former Chair, Canadian Radio-television and Telecommunications Commission

### **User generated content**

Many of the witnesses who appeared before our Committee argued that, contrary to the assertions of the Government, the Bill incorporates user generated content.

At least a dozen witnesses raised this matter including several former chairs and vice-chairs of the CRTC, witnesses representing major platforms and of course numerous digital creators.

The Committee amended the bill ostensibly to try to make the parameters of the CRTC's authority clearer. In this regard, Senator Simons argued in Committee: "This [amendment] does not eliminate all of 4.2. It scopes it so that it actually does what the government has told us it wants to do. It makes it **very clear** that social media users are not included.

However, when a follow-up amendment was proposed by Senator Manning simply to ensure the legislation corresponded with what the Minister told the Committee, namely that: "with the exception of 4.2, which catches only commercial content with the three criteria. That's it", his amendment was rejected.

As such, this clause requiring consideration of various criteria for scoping in content, remains discretionary and not determinative, thus leaving user generated content vulnerable to regulation.

Some Senators are concerned that the overwhelming number of witnesses who appeared before the Committee were ignored by the Government-appointed majority and that as a result, considerable uncertainty remains related to the application of the Bill to user generated content.

### **Threshold issue**

Some Senators are particularly concerned that all amendments to establish a reasonable threshold for the inclusion of user generated content were rejected. Numerous smaller player witnesses appeared before the Committee registering this as a serious concern. However, no amendment found support from the majority of members of the Committee.

This despite the fact that a threshold of \$150 million from paid subscriptions and embedded advertising for online undertakings was recommended by Timothy Denton, a former CRTC Commissioner and President of the Internet Society of Canada. An amendment incorporating a \$100 million threshold (recommended by former CRTC Chair Konrad von Finkenstein) was also rejected by the Committee. Then the Committee rejected even lower thresholds of \$50 million and \$25 million.

Some Senators are extremely concerned that this demonstrates a shocking disregard for the concerns expressed by those who represent smaller businesses and undertakings.

### **Discoverability and algorithm manipulation**

The Committee heard overwhelming evidence that the active discoverability provisions in Bill C-11 will result in compelling platforms to engage in algorithm manipulation. When CRTC Chair Ian Scott appeared before our Committee, he said that the CRTC wouldn't change algorithms (he noted that this is prohibited under terms of the Act) but he said that CRTC policies and objectives for the sector could effectively make the platforms change their algorithms in order to implement the objectives set by the CRTC.

At least 25 witnesses who appeared before the Committee raised this issue as a matter of serious concern. Jeanette Patell, Head of Canada Government Affairs and Public Policy at YouTube told our Committee: "Section 9.1(1)(e) explicitly gives a government regulator authority over what content is prioritized and how and where content is presented to Canadians, handing the CRTC the power to decide who wins and who loses. We believe that this would actually backfire for the very creators that it attempts to support. Building and growing an audience today is about connecting with the most fans who will love your content, whether they are in Canada or around the world. ... Overpromoting content to audiences because of where they live rather than because of what they're interested in leads to audiences tuning out, and those signals train our systems to demote that content for global users. Doing so would strike at the heart of Canadian creators' success and their bottom lines".

Matthew Hatfield, Campaigns Director, OpenMedia spoke for many witnesses when he warned: "Bill C-11 must not give the CRTC the power to manipulate the results of algorithms on platforms. We would never tolerate the government setting rules specifying which books must be placed in the front window of our bookstores or what kinds of stories must appear on the front pages of our newspapers. But that's exactly what the discoverability provision in section 9.1(1) currently does. This dictatorial approach is not needed or appropriate. Striking the discoverability language in 9.1 while keeping the language asking platforms to showcase Canadian content would be a reasonable compromise. That change could make it easy for users to explore Canadian cultural content when we want to but not have our feeds overwritten by content the government chooses for us everywhere we go".

Justin Tomchuk, an Independent Filmmaker, told our Committee on Sept 27: “If Bill C-11 disrupts the discoverability of Canadian creators globally, I can see a scenario where some companies with few physical ties will leave the country entirely so they can continue to work unimpeded by these aggressive mandates”.

Some Senators are concerned that despite this testimony from repeated witnesses, all attempts to bring clarity to this issue through reasonable amendments were rebuffed by the Government-appointed majority. Witness Scott Benzie, Managing Director, Digital First Canada, asked our Committee: “Section 9.1 needs to be clear that dynamic changes to algorithms are off the table, because messing with them is messing with Canadian businesses and access to their audiences”. Some Senators are very concerned that this message was ignored by the Government-appointed majority.

Another troubling aspect of this legislation is the thwarting of attempts to ensure that any funds collected from social media services be directed back to digital creators who use those platforms. While amendments designed to attain this goal were defeated, similar amendments to allocate further funds to struggling traditional media were included.

Some Senators are further concerned that Canada will now be in the vanguard of a policy approach that not only risks harming digital creators (witness testimony has been very clear on that point), but also risks making Canadian cultural policy highly protectionist. This protectionism puts at risk the tremendous economic gains that our country has made, and the tremendous opportunities that have been generated for so many businesses and creators. We are not only risking blunting the success of Canadian creators outside Canada from a technical standpoint based on audience retention and declining global ranking but also because of possible reciprocity in other jurisdictions. And there is also the threat of retaliatory measures under CUSMA that could affect other sectors of Canada’s economy. All of the success Canadian creators have been enjoying as a result of the no to low barrier internet may now be at risk and Canada may become a model for global cultural protectionism. Vivek Krishnamurthy, Director Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, University of Ottawa told the Committee: “Like it or not, other countries are watching and they will emulate our example. If we, in Canada, can say our cultural policy promoting the voices of Canadians is so important that we can regulate all online content, what is to prevent Viktor Orbán’s Hungary, or India’s Narendra Modi, who have their own particular views of whom is Indian or Hungarian, from imposing similar views and pointing to our example? All this behooves us to be more careful”.

### **Canadian content rules**

The challenges posed by the current definition of what constitutes Canadian Content and how and to whom it will be applied is another concern that remains for some Senators on two fronts. The Committee heard considerable testimony from witnesses as to the fact that Canadian content rules are both inflexible and difficult for smaller players to wade through.

Once again, some Senators are concerned, that it is smaller creators who may pay the greatest price. Oorbee Roy, who is by her own description, a smaller player in the area of content creation, asked our Committee on September 28 why the Bill is not addressing the issue of the inequity in Canadian content creation and pushing the issue off to a distant future decision? Ms. Roy was quite explicit in criticizing the Minister’s response during a House Committee meeting to do just that. She asked: “Why is this bill pushing off Canadian digital content creators into the future, but then including user-generated content platforms now? Aren’t we the very people this bill is supposed to be helping?”

Ms. Roy pointed to the major hurdles in the way of small content creators like herself, in getting approved as Canadian content. She asked: “Do I have to hire my ten-year-old son to help me register each piece of skateboarding content for CanCon approval?”

Ms. Roy asked the Committee to make it easier to qualify as CanCon or we should create a new category for digital content creators.

Digital creator Vanessa Brousseau expressed to our committee how discouraging it is for her, as an indigenous woman, to again have to prove or attest to being Canadian. She referred to having to do so for her passport and other government paperwork as being one thing, but said that having to now do it over and over again as a requirement for posting her content on the internet is not, as an indigenous woman, a way toward reconciliation.

Some Senators are concerned that there remains no clarity as to how digital creators will be left to navigate this requirement and the impacts it will have on their businesses.

The ramifications of Cancon requirements on foreign streamers who behave like broadcasters is somewhat different and presented different concerns; in particular as it pertains to ensuring these streaming services “pay their fair share”.

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.

- Foreign investment in production in Canada accounts for \$6 billion annually.
- In 2021, Motion Picture Association studios spent \$2.3 billion on local production good and services in Canada.
- They supported more than 47,000 businesses in Canada.
- They supported more than 200,000 workers in the Canadian creative industries.

However, these contributions were not counted toward cancon requirements. The example of programs such as the Handmaids Tale was raised by several witnesses. This is a program broadcast by an online platform that is written by a Canadian, shot in Canada, is in part about Canada, employs Canadian actors and production people and brings millions of dollars to Canada. Yet, under Canadian content rules, is not considered “Canadian content” because the production company happens to be American.

Major foreign companies have raised this issue as a matter of concern. David Fares, Vice President of Global Public Policy for Walt Disney, noted the scope of investment his company has made in Canada. He said: “Over the last three years, we spent approximately \$3 billion on content production in Canada. Each one of the productions contributes to the hiring and development of high-skilled talent in Canada and infrastructure, which actually benefits the entire Audio-Visual ecosystem. We are also working with the local production companies ... We’re hiring people as we build out the virtual production. We need a flexible regime to allow us to be able to do that”.

Wendy Noss, President, Motion Picture Association, who appeared before our Committee on October 4 stated that: QUOTE “The CRTC must create a modern, flexible definition of Canadian programs in order to expand opportunities for Canadian creatives; promote content made by, with or about Canadians; and bring Canadian stories to the world”.

The committee did adopt an amendment to section 10 to ensure that “no one factor is determinative” as the regulator considers the full range of policy objectives in establishing a new approach to defining the scope of Canadian program. Senators believe that this is a crucial amendment that reflects the Minister’s acknowledgement of the need for an updated, modern and flexible definition of Canadian programming that embraces the reality of global streaming in our broadcast landscape and not one that should be left to the discretion of the regulator. It will be incumbent upon the Senate to defend this position when it receives the Government’s response on this specific issue. It will also be important for Parliament to monitor carefully the manner in which the Commission implements this provision.

### **Fair play and trade implications**

Numerous witnesses appeared before the Committee who addressed the impact that this Bill may have on Canada’s international trading obligations. Konrad von Finkenstein, former chair of the CRTC, cautioned that while the CRTC has the power to make regulations requiring undertakings to make expenditures and contributions to funds for the production of Canadian content, entitlement to the benefits from such expenditures should not be limited to Canadian ownership or control of producers or Canadian ownership of intellectual property rights. Doing so, Mr. von Finkenstein warned, would put Canada at high risk of creating a conflict with the United States in particular under the Under the Canada-United States-Mexico Agreement.

In this context, 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. Language was recommended by several witnesses to acknowledge that the interests of consumers and audiences should be at the core of Canadian broadcasting policy. Some Senators are concerned that Government-appointed Senators repeatedly rejected efforts to acknowledge the centrality of both consumer interests and market forces in the Bill.

In this context, the Bill also inadequately recognizes that major contributions that online platforms make to Canadian broadcasting and to promoting Canadian creators. Garrett Levin, President and Chief Executive Officer, Digital Media Association told our Committee: “On average, audio streaming services pay out 65 to 70% of their revenues in royalties. As I discussed with your colleagues, those royalties are the cost of licensing and using the works. The similar cost to licensing and using the works by commercial radio broadcasters sits at roughly 8.2% of their revenue”.

Some Senators are concerned that this remains inadequately acknowledged in the Bill. These Senators certainly believe that an important principle for Canadian broadcasting should be that if global online undertakings “play they should also pay” to benefit Canadian broadcasting. However, an equally important principle is that if global broadcast undertakings “pay” they should also be able to “play”. It is concerning that the Committee rejected all amendments which would have ensured a principle of reciprocity in the Bill enabling online undertakings compelled to pay into Canadian programs, to also benefit from such programs when their investments contribute to Canada’s cultural industries and to Canada’s wellbeing.

These Senators are particularly concerned about this gap in light of the warnings from numerous witnesses that this violates Canada’s international trade obligations and will provoke retaliation that may end up significantly harming Canadian businesses and jobs.

A primary role for the Senate of Canada is to speak for political minorities when it comes to the impacts of legislation. When an unprecedented number of witnesses, many of whom are ordinary Canadians who normally may not engage this actively in the political process, appear before a Senate Committee to voice serious concerns about the impact of a piece of Government legislation, it is incumbent upon Senators to actually hear and understand those concerns. Conservative Senators are concerned that the majority of members on the Senate Transport and Communications Committee have failed in this duty. The consequences of this will be serious, not only for Canadian broadcasting, but for Canada itself.

### **Radio Canada International**

The brief filed with the Committee by the RCI Action Committee raised considerable concerns about both the neglect of Radio Canada International and the CBC's management of it. Through the past 30 years, domestic budget issues at CBC translated into disproportionate cuts passed on to the RCI budget, personnel, services and resources with no concern for the impact on the world service. Some Senators were disappointed that the majority of government-appointed members on the Committee rejected amendments designed to address this serious problem. The Committee recommends that the Senate should, either at the Transportation and Communications Committee or the Foreign Affairs Committee, examine the role of Radio Canada International, its importance for Canada and the manner in which it is being managed.