

## Business

# Bringing Canada's Broadcasting Act into digital age

By **Monica Song and Margot Patterson**



Monica Song

(November 9, 2020, 8:23 AM EST) -- On Nov. 3, 2020, the Minister of Canadian Heritage, Steven Guilbeault, tabled Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* in the House of Commons, which he characterized as proposing "major changes" to the *Broadcasting Act*.

### Background

The existing *Broadcasting Act* was last extensively amended in 1991, long before radio and television stations were referred to as "traditional" broadcasters, and before connectivity to the Internet and the provision of all manner of services via the Internet became widespread. Over the past three years, a series of statements, consultations, reports and media stories have signalled, in evolving and sometimes contradictory ways, how Canada's approach to regulating broadcasting could — or should — be modernized.



Margot Patterson

The proposed amendments to the *Broadcasting Act* respond to key recommendations in relation to the audiovisual sector contained in *Canada's communication future: Time to act*, the final report of the Broadcasting and Telecommunications Legislative Review panel (BTLR) appointed by the federal government to review the legislative framework governing the telecommunications, broadcasting and online new media sectors.

### What are the key proposed changes?

The amendments to the *Broadcasting Act* in Bill C-10 include proposed changes to:

**Regulate digital service providers.** "Online undertakings" would become a distinct class of broadcasting undertaking to be regulated by the CRTC, alongside traditional broadcasters. This new class would cover undertakings for transmitting or retransmitting programs to the public over the Internet.

**Move towards balancing regulatory obligations as between traditional and online broadcasters.** By replacing the concept of "conditions of licence" with that of "conditions of service" that the CRTC could impose on both traditional and online broadcasters alike, or on classes of services, the bill signals a shift towards regulating undertakings engaged in similar undertakings in a similar fashion.

**Update the Canadian broadcasting policy.** The Act would be amended to require the Canadian broadcasting system to better reflect Canada's Indigenous peoples, persons with disabilities and Canada's diversity.

**Update the regulatory toolkit.** Significant expansion of CRTC powers to impose new requirements on all or some classes of broadcasting undertakings, including in relation to:

- registration with the CRTC;
- oversight of certain types of agreements;
- expanded information gathering and information sharing powers;
- content discoverability;
- accessibility obligations;
- mandatory carriage of emergency messages;
- imposition of conditions of service on persons having "programming control" over a broadcasting undertaking to ensure that the programming is of a high standard; and
- fees to fund the CRTC's operations.

**Impose expenditure requirements.** The bill would give the CRTC new regulation-making powers to require broadcasting undertakings to spend on:

- the development, financing, production and promotion of Canadian content;
- support for and promotion and training of Canadian audiovisual content creators; and
- support for public participation in CRTC proceedings. According to the government's estimates, if the CRTC were to require online broadcasters to contribute to Canadian content at a similar rate to traditional broadcasters, the new regime "could result in online broadcasters being required to invest more than \$800 million [almost US\$600 million] in our creators, music and stories by 2023."

**Add more direct, stronger enforcement powers for CRTC.** The regulator would have the authority to issue administrative monetary penalties for non-compliance with its requirements.

**Update approach to regulation.** The CRTC would have the legislative scope to apply a flexible, tailored approach to regulating the broadcasting system, and it could determine whether its orders and regulations should apply to all or some classes of broadcasting undertakings.

### **What's not being touched**

The government has stated in the press releases and backgrounders accompanying Bill C-10 that it does not intend that the new framework in Bill C-10 would apply to users of social media services (which is not defined) or social media platforms and services themselves in respect of content posted by their users. Likewise, the intent is that online gaming services will not be regulated under the *Broadcasting Act*.

One of the key recommendations of the BTLR panel that was not adopted in the bill as tabled is a provision giving the CRTC oversight over the "terms of trade" in agreements between audiovisual content producers and traditional broadcasters and online content providers.

### **What's next?**

Bill C-10 is the first part of a multipronged approach driven in part by the realities of operating as a minority government, and in part because the government will not move unilaterally on issues such as the Organisation for Economic Co-operation and Development's (OECD) proposed three per cent tax on multinational online service providers. With speculation that the minority Liberal government may trigger a general federal election in 2021 (well in advance of the preset October 2023 date), the fate of Bill C-10 in the 43rd Parliament is uncertain. If the bill passes into law, the government has already signalled that it will be directing the CRTC to undertake a significant number of regulatory proceedings and measures to modernize and rebalance the regulatory framework governing the Canadian audiovisual sector.

The coming weeks and months will be active ones for stakeholders. Broadcasters, distributors, OTT services and content producers have a great deal riding on how Canada shapes its regulatory regime, including whether Canada follows or diverges from trends now emerging in other countries. That changing shape may arise from the bill, from government directions to the CRTC, or from the regulator's own policy decisions, in the months to come.

*Monica Song is a partner and leads the communications law practice at Dentons Canada LLP. She was also a member of the Broadcasting and Telecommunications Legislative Review panel (2018-2020). Margot Patterson is counsel at Dentons Canada with a practice focused on media and intellectual property. Before entering private practice, she was general counsel for the Canadian Association of Broadcasters.*

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