

COVID and after:
**A MANDATE FOR
RECOVERY**

2020 2021 2022
SEPTEMBER 2021

Back to the future: How Canada can become a global leader in digital communications policy

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Introduction

Can we at least agree that this is an auspicious moment? A hotly politicized debate on Bill C-10 to amend the *Broadcasting Act* is mercifully behind us. The Broadcasting and Telecommunications Legislative Review (BTLR), the fourth policy effort in five years addressing how to respond to the digital shift in communications, is even closer to the policy dustbin. Bill C-36, the so-called “online harms” bill, died when the election was called, leaving a crucial debate between free speech and censorship scarcely discussed.¹

With the election campaign underway, Canada has an opportunity to seize the global stage with what could be home-run policies for a borderless, global era that goes beyond simply copying approaches by the US, Europe and others. Regardless of the election’s outcome, Canada’s next government should re-set itself on communications policy by returning to the vision laid out by Prime Minister Justin Trudeau at his first summit at Davos in 2016. As he said at the time, Canada should be known for its “resourcefulness,” not just its resources. This, however, is only possible with visionary, forward-looking legislation, which requires looking towards a future goal –

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not looking back towards the past and proposing policies based on a bygone era with legislation such as Bills C-10 and C-36.

Only the government leadership knows why, but somewhere our policy-makers got off track. From 2013 to 2015, the Canadian Radio-television and Telecommunications Commission's (CRTC) *Let's Talk TV* process had a bold purpose: to figure out how Canada could build on its existing strength to embrace the new era. According to the CRTC, "[t]he roadmap to the future will not be found in the regulator's rearview mirror... The world is evolving and we must prepare for the future before it is too late" (quoted in Berkowitz 2021, 112).

This bold vision has been expressed by then-CRTC Vice-Chair, Peter Menzies (co-author of this report):

We can no longer define ourselves as gatekeepers in a world in which there may be no gates. How can we act as an enabler of Canadian expression, rather than as a protector? How can we shift our focus from rules and processes and procedures to outcomes? How can we help Canadian creators take advantage of all the opportunities in the new global environment, in which opportunities may exceed threats? (Menzies 2013)

Not since the invention of the printing press by Johannes Gutenberg around 1436 has there been a communications innovation with the power to change the world – its cultures, economies, notions of power and politics – as profound as the Internet.

The worldwide web has unleashed trillions of dollars' worth of innovation and given voice to billions of people who were previously muted by gated media structures. It has reinvented how we work, shop, learn and play; one-by-one, countless arenas of human activity have collapsed into a global, on-screen playlist. In its first 10 months, the COVID-19 pandemic arguably accelerated this shift by a decade. Digital innovations continue apace in all arenas, including health care and all manner of government services.

As we all know, corporate giants have emerged – such as Google, Facebook, and Amazon – that are global in scope and aligned with the powers of the Internet. Countless more companies, from Netflix to Uber to Saks.com, have found success in the borderless, global economy. For consumers, entirely new forms of interpersonal communications have become normalized, based on the commercialization of user-generated content. Not surprisingly, this global communications disruption has also ushered in entirely new societal issues and regulatory challenges involving the collection and use of data, privacy, copyright and anti-competitive behaviour. Some challenges, such as the power of disinformation, are having unanticipated, yet profound cultural, political and even public health consequences across the globe.

Every bit as significantly, the natural cycle of creative destruction (a term

coined by Austrian economist Joseph Schumpeter in 1942) has brought new ways of accessing entertainment and information content and undermined the prosperity, power and influence of previously siloed media, including newspapers and legacy broadcasting.

Whereas in other countries, this creative destruction has been a source of thrilling opportunity and transformation, the transition to digital in Canada has been fractious and resistant, with the panoply of established stakeholders reluctant to let go of entitlements deeply embedded in the old technologies, business, and regulatory models. Titans at the turn of the century, Canadian newspapers have been reduced to begging for (and getting) government assistance – a compromise of their independence that as little as 10 years ago was unimaginable. Two decades ago, it was the political class that begged the publishers for their indulgence. Today, as the saying goes, everyone needs journalism, but no one needs a newspaper.

In Canada's regulated media, linear broadcasters and content creators became very comfortable, over more than five decades, within a "walled garden" protected by the CRTC. Now, in addition to weakening business models, linear broadcasters have also seen their influence diminish as the democratic nature of the Internet has allowed ideas, perspectives, art and programming to flourish beyond national borders and, by extension, their control.



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Initially, the Internet was hailed by the political and media classes for its ability to empower democracy activists in countries such as Turkey, China, Nigeria, Iran and Egypt. The ability for people of diverse cultural backgrounds to connect with and learn from each other was widely praised and spoken of with a sense of awe.

In Canada, despite the uproar against streaming by broadcasters (who it must be noted, also own the new distribution technologies, broadband and wireless), the film and television sector, which for most of its existence has survived due to a complex web of federal subsidies supporting government-certified Canadian content, has just experienced the most successful decade in its existence. This has been expressly due to the work brought here by global streamers such as Netflix and Amazon Prime, entrepreneurial organizations who saw earlier than most how to monetize the borderless, global markets.

Nothing unnerves deeply embedded, vested interests like the threat of change. A hysterical response by coddled stakeholders, as embodied in Bill C-10, isn't limited to the Internet. Business icon, Michael E. Porter, has writ-

ten about how an embedded policy framework can be its own worst enemy (Porter 1990). He warned about the passion of stakeholders to defend their status quo and embed entitlements in the face of disruption. Furthermore, he cautioned that it's a government's role to lead, not to coddle, because nothing good will come of the latter. Luddites have never been on the right side of history.² The truth is that progress has marched on since the invention of fire and the wheel: creative destruction upon creative destruction.

Nevertheless, in Canada, years of lobbying by those with protected business models designed to meet regulatory goals (as opposed to market demands) came to fruition when the last government introduced Bills C-10 and C-36 (in a very preliminary form), both of which were heavily criticized for regulation described as at best heavy-handed and at worst unconstitutional for regulating freedom of expression. The death of these bills due to the election should not be mourned.

“ *What the country truly needs: a legislative vision that is purpose-driven and data-based.* ”

Somewhere in the last seven years, Canada choked. A detailed account of this recent history (see Berkowitz 2021) pegs the turn backward to the political fallout from the failure of then Liberal Heritage Minister Mélanie Joly's forward facing proposal, *Creative Canada Policy Framework*. Netflix panic, not facts, took hold, and so too did regulatory capture by a small sector. The account details how, despite a three-alarm fire closing in on the policy framework (torching linear broadcasting, cable delivery, and geographic monetization), Canada retreated and tried to “harness change” (per the title of CRTC's subsequent report (CRTC 2018)) in dealing with the most profound change in human communications in 600 years.

Now, a clean slate provides the next government with an opportunity to become a world leader in digital communications public policy, developed through a fresh new look at what the country truly needs: a legislative vision that is purpose-driven and data-based.

Debate over the efficacy of 1980s-era policies designed for over the air, cable and satellite broadcasters and telephone companies is now moot. The 20th century policy worked reasonably well. As a supply regime, it gave rise to linear broadcasting, advertising, and media production sectors. But that was then. We are now deep into the 21st century and the two foundations of that regime – protectionism and supply management – are not sustainable. The answer to technological change is not, as was attempted with Bill C-10, to continue to hide Canada behind a regulatory wall. To understand where we are going and why it's essential begins with the global picture; the global market holds the key to where we must go.

In the book *Mediaucracry*, this approach is named globality, defined as content with global reach and content popularity: in other words, global plus popularity (Berkowitz 2021). Globality is a feature of every successful content maker today, no matter where it originates, for instance, with TikTok. Nearly all successful 21st century commercial ventures (Airbnb to Uber to Waze to Zoom) have DNA that arises from globality. In an ecosystem where nearly everything has become a screen media product, these companies have learned the quintessential lesson: popularity has always been the only media business model.

For Canada, it might be the moment to make Trudeau's words true: for Canada to become known for resourcefulness.

Canada's position is unlike any other country. We are unique on the planet, likely the envy of many countries. We share the longest undefended border, same majority language, and a number of other shared commonalities (though thankfully, not everything) with the most powerful media maker on the planet. On the other hand, our small population and cultural values (e.g., diversity, universal health care, etc.) have much in common with European countries and give us a certain affinity with small nations around the world. We sit at intersecting concerns of small and large nations, offering a unique vantage point on both. Canada is perfectly positioned, not to follow, not to be derivative, but to take the global lead on regulatory policy for the new era. Such policy must be global, much like the Internet. This might be Canada's moment to lead.

What follows are some suggestions on how to move forward with a positive, progressive policy approach that embraces the new era. We believe in public policy that solves a problem that either the market can't or ensures cultural values important to a society. Therefore, we set the stage with the basics of Canada in a global perspective, identify the problems to be solved and then move to suggestions on must-have pillars for broadcasting and telecommunications legislation.

The big picture

The world is in the early stages of an unstoppable fourth industrial revolution. What the previous government failed to recognize was that while media disruption may have kicked off the revolution, it is the least complex of the changes now evident in manufacturing, medicine, mobility, money and more.

In a study of 138 countries, the World Economic Forum (WEF) found Canada's number-one weakness to be its lack of capacity to innovate – a shortcoming that Bill C-10 was destined to amplify by giving the CRTC dominion, absurdly, over the entire global Internet.

Further, that legislation was a solution in search of a problem. Amidst pan-

demic-era joblessness, Canada’s legacy content creators – 1 percent of our national workforce – have remained fully employed. Netflix has spent \$2.5-billion on Canadian productions since 2017, saying they’re in for the long haul because “the density of talent in Canada is remarkable” (Ahearn 2021). *Anne with an E*, *Jusqu’à Declin*, *Kim’s Convenience* and *Schitt’s Creek* are just a few shows that appear when you click “Canadian movies and TV” on Netflix.ca. In Alberta, the film and television sector is boasting about another record year of investment and job creation.

On YouTube – and in the absence of the subsidies, quotas or government certification used to prop up the regulated TV and film worlds – Canadian creators have taken the world stage. According to a study at Audience Lab, a research group at Ryerson University’s faculty of communication and design, 16.5 percent of Canadian creators were from Quebec, 18 percent were visible minorities, and 9 percent had a physical disability. About 160,000 Canadian creators of varied ethnicity, gender, and ability lead YouTube genres and generate millions, even billions of views (Berkowitz, Davis and Smith 2019).



With 90 percent of views from outside the country, Canadian creators rank first in export on YouTube.

With 90 percent of views from outside the country, Canadian creators rank first in export on YouTube, underscoring creators’ dependence on monetizing Canadian content around the world. This same study found that 84 percent of Canadian users did not want the government to play a role in what they watch on YouTube. Many responses had the same theme: “We live in a global world” (Berkowitz, Davis and Smith 2019, 108).

The study also found a majority of Canadian creators reject government meddling in “discoverability” because they fear forced prioritization in Canada could trigger deprioritization elsewhere, undercutting earning power that they’ve built without government help, using a timeless media model: competing for popularity (Berkowitz, Davis and Smith 2019).

Arguably, Canada has misappropriated the concept of “discoverability,” a term that entered the zeitgeist in 2015 at the TV biz confab, National Association of Television Program Executives. A Hollywood exec worried about how painful “discovering” your favourite TV show had become, i.e., the contrast between an antiquated remote and an instant Internet search (on Netflix, for instance). The mortal fear was that discoverability was TV problem number one and there would be no number two (O’Brien 2015). If the problem of discovering shows audiences want to watch wasn’t solved, they would do whatever was easy online from 8-11 pm (YouTube, Facebook, Twitter, email, banking, shopping, etc.). Watching TV stories, and the 50 percent of global

advertising it represented, was at grave risk. As a result, every US network today is available online and the streaming wars are full on.

Canada's current discoverability problem fails to acknowledge that only must-see content – popularity – solves discoverability. But we knew that, didn't we? In 1999, a one-thousand page report on the CRTC expressed profound worry that the Internet would cause the Canadian TV model to collapse (Standing Committee on Canadian Heritage 2003). CBC president, Robert Rabinowitz was quoted: "No one can make anyone watch anything and no one wants to." Two decades later, does the CRTC want to make us watch stuff? Good luck with that.

Broadcasting: How to go forward

Canadian media exuberance, described above in legacy and new media, would seem to make a case for simplifying regulation, but the opposite was happening with Bill C-10. It completely failed to contemplate the policy implications, much less the views of those Canadian creators flourishing outside the embrace of the CRTC and its "system" of regulatory bargaining in which subsidies are exchanged for content compliance.

Further, it envisioned a vast expansion of the bureaucracy needed to enable the CRTC to monitor more than 100 million active global websites (of more than one billion total). On YouTube's global platform alone, more than 500 hours of video are uploaded every minute. The legislation failed to acknowledge that these platforms are ungated. Even the world's largest platforms cannot manage the scale and scope of content moderation, even with substantive financial motivation to get it done. Being advertising supported, platforms like YouTube and Facebook and Twitter have a vested interest to be as squeaky clean as prime time TV. But the scope of clean-up is so unimaginable that even they employ legions of offshore workers (in places like the Philippines) to attempt to clean their sites from the most venomous content by pressing "ignore" or "delete" under sweatshop working conditions that are also psychologically damaging (Naughton 2019).

On the legacy media side, in the case of television, five decades of CRTC regulation did not convince Canadians to watch English-language Canadian content, which consumes the majority of Canadian television's public funds. Putting the agency that failed to succeed in television in charge of the Internet seems a poor idea, and one that overlooks the possibility that it is not the broadcasters but the regulator and its rules that are the problem. A new government should at least consider that the trail to a vibrant, popular media sector is perhaps best blazed with less rather than more regulation.

Let's not forget that Netflix went after the narrative fiction content market precisely because it is the most lucrative media market on the planet: the most popular, the most in-demand. Canada never built demand into regula-

tion because we were busy building a broadcasting industry and media workforce (done and done). Now's the moment.

Today's global market was not imaginable. It seems clear that today's policy problem on the legacy side is how to incentivize and reward popular content. It's time to leverage global market forces with a demand-driven policy regime. It's time to make hits, not shows. Such an approach will enrich all stakeholders in the sector. The Canada Media Fund's (CMF) return on investment has been stuck at 2 percent for years. The paradigm along which the sector is not booming is popularity and global export. And CMF knows this fact; it has been troubled by this resistant challenge for years and wants things to change.

Telecommunications: How to go forward

The telecommunications industry in Canada – primarily telephone, mobile devices/cell phones and Internet – is more than three times the size of the broadcasting industry. Unfortunately, the latter tends to capture the attention of politicians and media to a disproportionate extent. This is particularly problematic in the current pandemic age when the value of access to an affordable communications network has never been more obvious. Without Internet access, millions of Canadians could not have continued to work from home and millions more school children would not have been able to continue their learning.

When it comes to social, cultural and economic stability, it seems almost trite to point out that expanding and improving Internet access and pricing should be far more important to policy-makers than the number of independent Canadian producers who received funding to produce so many hours of certified Canadian TV and film content. This is particularly the case given that, as illustrated above, the industry itself is actually flourishing.

Canada's next government should focus on creating a new *Communications Act* centred on the Internet and the needs of citizens to access it at a price they can afford. The concept of net neutrality must be at the centre of new legislation both in practice and in spirit – by extending it to ensure non-preferential treatment of legal content (which to be clear includes programming/speech) and not just data.

Prior to Bill C-10, the CRTC and successive governments governed in a manner that upheld the principle of net neutrality. We strongly encourage a return to that line of thinking and protection of the longstanding principle of common carriage. The free flow of legal information, goods, speech and expression is necessary to ensure the long-term health of the Internet and Canadian society more broadly.

Common carriage is among the oldest legal traditions practised. It can be traced at least as far back as laws put in place during the Roman Empire and

over the years it has been extended, largely in the fields of transportation and communications, to ensure that common carriers from medieval ferrymen to modern Internet providers do not give preferential treatment to those seeking their services. Common carriers are typically characterized by the following:

In terms of telecommunications, this has always meant the provider is agnostic to the content moving through its systems and networks. In terms of the Internet, threats to it have generally been associated with traffic management practices which, while at times necessary to the maintenance of networks, must be practised in a thoroughly transparent fashion that treats all customers equally.

The previous government clearly wandered away from this principle with talk of “discoverability” regulations that would force online platforms to give preferential treatment to content of which the CRTC might approve. This would clearly violate the principle of non-interference that has always applied by recognizing that the core function of the Internet is as a vehicle for unfettered speech controlled only by the preferences of the consumer.



The concept of net neutrality must be at the centre of new legislation both in practice and in spirit.

The significance of the Internet and how it differentiates itself from closed communications networks such as cable and broadcasting cannot be understated. The latter are closed networks that developed within a closed access culture that required those delivering content to do so only through permission of the state via licensing. The essence of the Internet is that state permission is not required either to build a network or to place content upon it and communicate through it. In that sense, it is Gutenberg all over again.

The current *Telecommunications Act* states in Section 7 (F) that increased dependence on market forces should be fostered. While this sounds like a “no-brainer,” the history of Canada’s telecommunications industry in Canada is deeply embedded in traditions of regulated monopolies and the concept of dependence on market forces remains relatively new.

Key to this sentiment is some sort of sensible resolution to the issue of competitor access rates that has now dragged on for the better part of a decade. Following the setting of interim rates in 2016, the CRTC came out with rates highly favourable to service-based competitors. Then, in a complete turnaround (and following some carpet bomb lobbying resulting in not very subtle eyebrow-raising by cabinet) CRTC Chair Ian Scott determined final rates that so strongly favour network operators they risk stunting any hope of growth in service- and fee-based competition. The government must decide, essentially, whether it favours a system designed to serve Canadians or one

which is designed to maintain a traditional oligopoly.

In other words, does it wish to comply with Section 7(h) of the current *Telecommunications Act* that states that among its policy objectives is: “to respond to the economic and social requirements of users of telecommunications services.” This should be strengthened to read (or words to this effect): “to ensure the needs and interests of citizens – economic and social – are at the centre of the system.”

Providing Canadians ubiquitous access to world-class communications at prices they can afford has always been the primary ambition of policy-makers in this field. Of all the things that have changed in the world due to the Internet, this is one that should stay the same.

Free speech versus online harm: How to go forward

A debate critical to democracy – namely, on the risks of free speech versus censorship and the role of the fourth estate – has been making headlines around the world for years. Before Parliament dissolved, Bill C-36 and its focus on “online harms” was a cynosure of attention.

Protection from harmful online content, ensuring user data privacy, and algorithmic accountability are global issues, affecting most major media platforms and concerning policy-makers across the globe. It is worth bearing in mind that throughout history, nearly every technology has been appropriated by those with power for harmful purposes – from fire and gunpowder to the printing press and media to automobiles and airplanes. The Internet, like any other technology, has not been immune from such abuses.

In March 2019, a massacre in a mosque in Christchurch, New Zealand, killed 50 people and injured 50 more. Previous murderous attacks had spread on YouTube, but none were live streamed. Since YouTube strictly controls live stream permission, the videos hit Facebook and spread virally to YouTube. A team of YouTube incident commanders worked through the night to identify and take down tens of thousands of videos, trying human and algorithmic intervention in the process (Dvoskin and Timberg 2019); neither worked perfectly.

A takeaway from the New Zealand incident is that neither artificial intelligence nor algorithms, even those invented by Google, are sophisticated enough to outwit all human evil-doers. Consequently, efforts to address legitimately harmful online activity must involve a strategic combination of automated and human intervention.

A second lesson from the tragedy is that the truism “don’t shoot the messenger” applies to the Internet. Less than two weeks after the attack, New Zealand took action to ban semi-automatic assault weapons, a technology with no benefit to civil society. New Zealand did not ban the Internet.

A third takeaway is that regulatory efforts in this arena must be global to be effective. Without a global approach, fundamental questions arise about national legislation. Was Bill C-36 purposed to protect Canadian consumers, who can download content from anywhere? Or to control Canadian creators, who can upload from anywhere?

In the sweep of history, the Internet is still new and society is still getting used to it as it reshapes our world. Yes, the Internet can be effectively controlled: one only needs to look at China. Is that the direction Canada wants to go? Is that the direction Canada wants to lead?

All of this needs to be achieved via legislation centred around the realization that the Internet is something revolutionary, dynamic and democratic in ways previous communications structures and legislation could not have imagined. The growing effort to achieve state control over free speech on the Internet is not a solution to many of its genuine issues but a threat to its democratic nature.

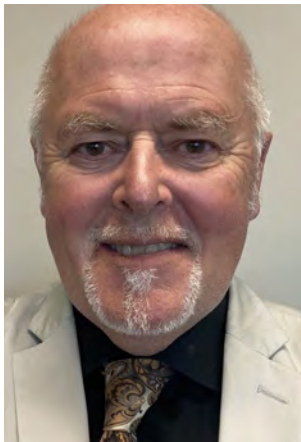
Conclusion

Both the new and old communications worlds are filled with – some may say mired in – complexities involving business models and competitive structures; protectionism versus competition; promotion versus popularity; and lack of access and affordability. All deserve examination. But none can be addressed unless Canada’s next government sets the policy stage with progressive legislation that looks forward and not back to the last century; that envisions a Canadian creative sector that aggressively seeks global markets instead of building walls behind which to seek protection.

About the authors



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He is a regular commentator on these and other matters and his work has appeared in the *National Post*, *Toronto Star*, *Globe and Mail*, *The Line*, *Convivium magazine*, and, through Troy Media, the *Victoria Times-Colonist*, *Winnipeg Free Press*, *Hamilton Spectator*, *Halifax Chronicle Herald*, *Charlottetown Guardian*, and many other newspapers and online media. Prior to his time at the CRTC, Menzies spent three decades as a working journalist and newspaper executive, most notably with the *Calgary Herald*, where he served as its editorial page editor, editor-in-chief, and, finally, publisher.

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Legislation

Telecommunications Act. SC 1993, c. 38.

Endnotes

- 1 We acknowledge that some phrases and segments of this policy paper have previously appeared in papers and commentary that each of us has published on this and other platforms. All is our original work.
- 2 Luddites get their name from the violent, deadly outbursts in Britain led by Ned Ludd in 1779 to protest the first industrial revolution.

constructive *important* *forward-thinking*
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The Honourable Jody Wilson-Raybould

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The Honourable Irwin Cotler

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The Honourable Pierre Poilievre

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