

Commentary



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Debate on Bill C-11 went nowhere, then it passed: Is it a bellwether?

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Introduction

Canada's second attempt at modernizing media legislation, Bill C-11, the *Online Streaming Act*, passed the House of Commons on June 21, 2022 on a vote of 208-117. It is in the Senate, where it will be studied by the Standing Senate Committee on Transport and Communications into fall 2022, with a vote scheduled for November 18. It has been a year since C-11's nearly identical predecessor, Bill C-10, failed to pass before Parliament dissolved for the 2021 federal election. Not this time.

Bill C-11's progress was strategically plotted, and may be a harbinger of what's ahead. C-11 is one of many upcoming Internet bills. These include C-18 (the *Online News Act*), C-26 (*Critical Cyber Systems Protection Act*), C-27 (*Digital Charter Implementation Act 2022*) and a yet unnamed online harms bill.

Presumably, Bill C-11 should have been the simplest of the Internet bills because its concern isn't the workings of the Internet, but the disruption of content distribution and monetization models that result in a global media market. There is nothing new about what entertainment audiences demand in the digital era: good stories well told. C-11 doesn't much concern consumers, who don't care if their show arrives by antennae, cable, or cloud. C-11 is about following media money.

Yet, nothing about C-11 – or its failed predecessor, C-10 – has been simple, reflecting the difficulty that governments like Canada have in dealing with issues related to the Internet. C-11, introduced by Liberals with support from the Bloc Québécois and the NDP (with the Green Party eventually splitting their two votes), left Conservatives as sole critics of a bill that is inherently apolitical. C-11 may be Canada’s first big test of whether Canada’s government can address the impact of 21st century technologies.

Tabled on February 2, 2022, C-11 purports to update Canada’s 1991 *Broadcasting Act* to the global, online era. Critics immediately said it did no such thing. The explosive issue was the same one that dogged C-10, defining a “program” as any audio-visual content and therefore granting the Canadian Radio-television and Telecommunications Commission (CRTC) power to regulate the entire Internet as broadcasting. Even before the bill was sent for consideration by the Standing Committee on Canadian Heritage (CHPC), critics observed its less than visionary attempt to shove the infinitely abundant Internet backwards into Canada’s outdated, scarcity-based policy framework.

Len St. Aubin, former Director General of telecommunications policy at Industry Canada and on the policy team for the 1991 *Broadcasting Act*, wrote that the government drank “the Kool-Aid” of regulatory capture by pre-Internet media with a result that is “appallingly out of touch.” According to St-Aubin, C-11 will “benefit only old media, while harming the thousands of (mostly young) Canadians who are online heroes of market driven, unsubsidized globally popular CanCon [Canadian content]” (St-Aubin 2022).

C-11’s whole-of-Internet scope triggered numerous secondary problems in the text, none more problematic than the question of ‘who’s in and who’s out?’ Despite Canadian Heritage Minister Pablo Rodriguez’s promise that user generated content (UGC) creators are excluded, CRTC Chair Ian Scott appeared before the Heritage committee and confirmed the opposite: that C-11 does include the right to regulate more than 160,000 new media entrepreneurs working on ungated platforms (Geist 2022a). This clarification brought more problems into focus, one example being the need to redefine Canadian content. C-11 also extends old media policy levers to new media, such as obligatory discoverability (including algorithmic manipulation) and advertising regulation. These instruments would directly impact the money earned by new media creators, who do not receive public funding – and are not requesting any.

The C-11 saga, an alchemy of complexity and politics, unfolded in the House of Commons (HOC) and on Parlvu in three acts: (1) witness testimony to the CHPC; (2) clause-by-clause review by the Heritage committee; and (3) report and vote in the HOC.

Witness testimony

The first phase took place May 24 – June 2, with an imposed limit of 20 hours of expert witness testimony to CHPC. About 32 of 48 witnesses played the patriotism card with familiar rhetoric about the need to protect Canadian culture. About 16 presented analyses of C-11's likely impact on the media economy. As this expertise did not make it into the bill, some excerpts follow:

- I appeared on May 24 to assert that Bill C-11 does not support Canadian storytelling, but rather, obsolete ways of defining and distributing Canadian stories. I expressed concern that Bill C-11 would chill Canadian media innovation in a sector exploding with exuberance, employment, and revenue, proving global competition is making us stronger. I lamented C-11's politicization, citing Prime Minister Justin Trudeau's promise that Canada would be known for resourcefulness, not resources (Wherry 2016).
- Stephan Cardin, the public policy head at Netflix, reminded the committee that Netflix has invested more than \$3.5 billion in Canadian production since 2017. A major contributor to the sector's record employment, Netflix has also made stars of Canadians, such as Maitreye Ramakrishan (*Never Have I Ever*). Its original productions include explicitly Canadian stories, such as *Jusqu'au Declin*, which don't count as Cancon because of the outdated definition. Netflix' global distribution boosted CBC's *Schitt's Creek* to global hit status – with an Emmy slam.
- Tim Denton and Philip Palmer, highly credentialed attorneys and on the 1991 *Broadcasting Act* team, testified that they do not support C-11's approach. They referenced the natural process of creative destruction since the creation of the wheel, fire, assembly line, and automobile. As Palmer noted, C-11 is like requiring gas pedal manufacturers to subsidize buggy whip makers, because buggy whips are going obsolete.
- Morghan Fortier, CEO of Canada's #1 YouTube channel, *Super Simple Songs* (with over 35 billion views), pointed out that business models of old and new media are non-overlapping, and together expanding Canada's media economy. Fortier said that C-11 seemed to be written by people who don't understand new media.
- Michael Geist, Canada Research Chair of Internet and e-commerce law, explained that no other country in the world has sought to regulate UGC and recommended that uncertainty around this be removed from C-11. Geist suggested following Europe's approach, distinguishing between curated and non-curated services.
- Matt Hatfield of OpenMedia criticized C-11's discoverability provision, asserting Canadians would never tolerate government making rules that specify which books would be placed at the front of bookstores.

- J.J. McCullough, a Canadian YouTube creator with over 240 million views, listened to exhortations about old media’s rules and regulations, then reacted: “As a new media creator, I do not want to live in old media. Leave us out of it. Thousands of Canadian creators are thriving because they appeal to a global audience.”
- Jeanette Patell, YouTube’s public policy head, underscored the business model of an ungated platform is fuelled by audience demand. Financial harm will result if a regulator gets between the creator and the audience, particularly when Canadian YouTubers earn 90 percent of their money from global demand.

In the end, there was no debate. It was 20 hours of political theatre, complete with grandstanding. MPs asked questions of witnesses who supported their positions. The final scene of this phase began on Thursday, June 2 with what could have been a skit on Canadian Lorne Michael’s 47-year hit, *Saturday Night Live*. Minister Rodriguez waited to provide remarks, but departed because time ran out during a filibuster of motions and sub-motions. Rodriguez returned Monday, June 6 and made the expected speech. He touted the “decades” since Canadians decided to “defend our culture,” but ignored how the Internet has empowered Canadian culture in these decades.

What the minister did not say is that the Internet solved Canada’s 20th century policy problem: our small domestic audience. Or that Canadian media is thriving in the global, online era.

Clause-by-clause review

Next up was the clause-by-clause review to debate and vote on more than 150 amendments to C-11. It commenced at 3:30 pm, June 14, with a 9pm deadline, when all amendments would be deemed moved, as ordered by the House of Commons.

In an attempt to narrow the bill with financial thresholds, MP Rachel Thomas cited former CRTC Vice Chair, Peter Menzies’ remarks as a witness. Menzies had called out the bill’s true intent: “If the government’s goal is to get money from web giants, then just do that.” Referencing an op-ed by himself and former CRTC Chair, Konrad Von Finckenstein (Menzies and Von Finckenstein 2021), Menzies suggested narrowing C-11’s focus to streaming companies with \$150 million in revenues, but leaving the rest of the Internet to flourish. Countering claims the Internet has harmed Canada’s TV production sector, Menzies noted “80% growth since 2010, to a \$9.5B industry” – thanks to the web giants.

Thomas proposed lower and lower financial thresholds. All were stonewalled.

At the stroke of 9pm, time was up. The scene that followed was tragic comedy (perhaps only the screenwriter in me sees the comedy). It was hours of MP Hedy Fry reading only alpha-numeric IDs of the remaining amendments, each followed by a vote. Again and again, the Parlvu audience could hear the committee's partisan split vote of seven-to-four. Conservatives' requests for amendment contents to be read aloud were denied, Fry repeatedly reading the order that all amendments had been deemed moved.

The losers voted in sullen tones. The winners' mood was jocular. Fry made a joke about Laurel and Hardy that might have been objected to as insulting in other circumstances. There was a box of chocolates, in what might be a perfect nod to that famous line from Forrest Gump, "you never know what you're going to get." Indeed, the Parlvu audience had no idea what was being voted on.

The session concluded at 1:17am Wednesday, June 15. C-11 had been rushed through, as Geist noted, on a "rocket docket" that was a "betrayal of democratic norms" (Geist 2022b)

The vote

With C-11 back in the HOC Friday, June 17, Parliamentary Secretary Mark Gerretsen led by reading testimony by the Tragically Hip's Gordon Sinclair. Crafted to tug at Canadians' heart strings (mine included), Sinclair's words also made steam come out of my ears: surely he knows better! Yes, the Tragically Hip benefited from 20th century Canadian radio music quotas. But the 21st century Internet gives any Canadian a chance to find a global audience or stream a concert during a pandemic. Many have, including Justin Bieber, Shawn Mendes, Drake, The Weekend, Alessia Cara, and more.

Bill C-11, the *Online Streaming Act*, passed in the House of Commons on June 21, 2022, with support from the Bloc, NDP, and one Green Party MP. It was scarcely amended from when it was tabled on February 2, 2022.

Why

Months of public debate on Bill C-11 went nowhere. Then it passed. Why? The teacher in me knows.

CEO Fortier was correct. Those who support C-11 may not understand new media. Sheltered by Canada's closed system, they can't see the global view. They're afraid of the unknown. In 1990, before the Internet, Harvard business icon Michael E Porter analysed entrenched stakeholders: "Policy entitlements

are an invisible dry rot, slowing the pace of innovation...successive generations of managers want to eliminate excessive competition to make life more predictable” (Porter 1990, 170).

Such analysis creates empathy for C-11 supporters. They don't see access to a global audience as a solution that came along just as Canada was ready with a world-class media workforce; just as technology enabled any Canadian to be a producer and consumer of global media. If they did understand, Canadian media policy could have adapted years ago, from “correct and protect” to “send and receive.”

I also empathize because of a graduate media seminar I teach in The Creative School at Toronto Metropolitan University. Students respond to the seminar, titled “Exponential potential: Media growth and innovation,” with comments like “best course ever.” Even with the school's innovation DNA, graduate students fear their imminent job search. Seeing no jobs at legacy TV networks or newspapers, they panic.

“ *There is zero chance that public policy will keep pace with accelerating technologies.* ”

A recent guest in my seminar was Jeff Elgie, CEO of Village Media, a born-digital network that champions local news and is quickly growing in size, advertising for employees nearly every week on LinkedIn. Village Media and other guests open my students' eyes to many growing Canadian media businesses.

I introduce the Fourth Industrial Revolution. We explore how public policy resists change, explained by Canadian Salim Ismail in a still riveting 2016 Ted Talk, “How do we fix civilization?” (Ismail 2016). This YouTube video should be required viewing for MPs with this extra-credit question: is it Cancan? Hint: it stars a Canadian and is produced in Canada.

Could education fix this mess? I could give an executive version of my course. and clone a new word for the result: *glational*, national policy informed by mastery of global dynamics. Yet the fix may not be so simple. A difficult question must be asked: do the ministers and MPs (1) not understand, (2) pretend to not understand for political expediency, or (3) not want to understand?

Not wanting to understand something seems normal. I don't get the science of TV, but find physics daunting, so I avoid learning it. The Ted Talk by Salim Ismail sets out a compelling explanation for this exact behaviour on an organizational level. Organizations, especially the public sector, have a powerful “immune system” response to change. There is zero chance that public policy will keep pace with accelerating technologies.

Ismail's analysis also explains why I was periodically jolted out of my Parlvu

stupor when amendments such as the Conservatives' CPC 1.11, the Liberals' LIB 3.1, and NDP 1.3 were passed unanimously (Canada, House of Commons Standing Committee on Canadian Heritage 2022). All these amendments concern issues of diversity and free expression. The committee did come together to support values on which Canadians *do* have a shared cultural consensus and do not depend on understanding new technologies.

However, understanding new technologies is not a nice-to-have for a government. Humanity's drive to creativity and innovation is unstoppable. Luddites, so named after 19th century protests in Britain against the assembly line, led by Ned Ludlam, have never been on history's right side. The passage of C-11 signals Canada's first big missed opportunity to be a global policy leader, per a Macdonald-Laurier Institute paper by Peter Menzies and myself, *Back to the future: How Canada can become a leader in digital communications* (Berkowitz and Menzies 2021).

This brings me to the simplest answer why C-11 passed: society is not yet acclimated to the Internet. People are afraid of the unknown, and adverse to learning about it. Preference for one's comfort zone, even being anti-expertise, may be a default human condition. From this vantage, is C-11 a bellwether for more complex Internet legislation ahead?

Nobel prize-winning German physicist, Max Planck (1858-1947) may have an answer, but it's the dark and often cited observation that progress happens one funeral at a time (Planck, as cited in Coy, 2017): "A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."

A shorter version of this article recently appeared in cartt.ca as "Debate on C-11 went nowhere; I think I know why."

About the author



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