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COULD OR WOULD THE U.S. RETALIATE AGAINST THE ONLINE STREAMING ACT (C-11) NOW THAT IT IS LAW?

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EXECUTIVE SUMMARY

The U.S. government and that country's high-tech industry have raised various objections to Canada's Bill C-11, the *Online Streaming Act*, with the industry also bringing up the possibility of retaliation against Canada. However, as this paper explains there is no reason for Canada to fear retaliation from the U.S. with the enactment of the bill into law.

The act brings domestic and foreign streaming services operating in Canada under the *Broadcasting Act*, placing streaming content under the aegis of the Canadian Radio-Television and Telecommunications Commission (CRTC). It empowers the CRTC to review and potentially amend the definition of Canadian content. It also requires streaming services to contribute financially to producing Canadian content and it places discoverability requirements on platforms such as YouTube and Netflix, to make sure they are promoting Canadian content.

The Computer & Communications Industry Association (CCIA), whose members include big tech companies such as Google, Meta, Amazon and Apple, argues that the U.S. could challenge the act under the Canada-U.S.-Mexico Agreement (CUSMA). The CCIA claims the act violates CUSMA because it targets U.S. corporations and thus breaches CUSMA's provisions on national treatment requiring that domestic and foreign goods and services be treated "no less favourably" in like circumstances. The argument for retaliation is that the act discriminates against U.S. digital products by imposing prohibited performance requirements.

The CCIA believes that Canada will need to invoke the cultural industries exemption provided by CUSMA to justify the legislation. However, as this paper explains, Canada doesnot need to do that to achieve the new act's goals. When creating regulations, which will be done following public consultation, the CRTC just needs to be careful that it designs measures that do not unfairly discriminate between domestic and foreign streaming services.

Nor is promoting Canadian content discriminatory to U.S. interests. CUSMA requires that cross-border digital services be treated equally favourably on a national basis. Thus, if Canadian digital services are required to offer Canadian content, then U.S. services must be treated no less favourably when required to offer the same when streaming to Canadians. In fact, the new legislation's wording would seem to offer some leniency, as it requires Canadian digital services to make maximum use of Canadian content but requires U.S. services only to "make the greatest practicable use" of such content in the cause of equitable creation, production and presentation of CanCon.

In drafting regulations, the CRTC must be mindful that foreign streamers who contribute to Canadian productions need to be able to access, acquire and distribute them on an equal footing with Canadian streamers, who face no such limitations. With that proviso in place, the U.S. has no grounds for retaliation.

ABSTRACT

Canada has just enacted legislation to give the broadcast regulator, the Canadian Radio-television and Telecommunications Commission (CRTC), authority to regulate online streaming platforms, both domestic and international. This legislation, known as Bill C-11 as it passed through an extensive parliamentary review process, was highly controversial. The bill empowers the CRTC to review and possibly amend the definition of "Canadian content." It will also require that streaming services contribute financially to the production of Canadian content and will impose "discoverability" requirements on digital streaming platforms (like YouTube, Spotify, Netflix and others) to ensure that Canadian content is promoted. The CRTC will have broad leeway to issue and enforce regulations to achieve these ends.

The U.S. high-tech and streaming industry does not like this legislation and has used various tactics to oppose it. Among these are arguments that C-11 violates commitments that Canada made to the United States in the Canada-U.S.-Mexico Agreement (CUSMA), the replacement for NAFTA, and that implementation of C-11 will result in U.S. trade retaliation.

This paper analyzes the arguments to this effect put forth by the U.S. tech industry's trade association, the Computer & Communications Industry Association (CCIA), and refutes them, particularly the argument that Canada will need to invoke CUSMA Article 32.6 (the cultural exception clause) to justify its actions. At the same time, the paper cautions that the CRTC needs to be careful with respect to imposing a requirement on foreign streamers to contribute to Canadian production if at the same time it denies them the ability to acquire and exploit the production they have helped finance when no such limitation is imposed on equivalent Canadian streaming services.

"After further review in the Senate, Bill C-11, commonly referred to as the *Online Streaming Act*, has now become law" (Parliament of Canada 2023). The essential objective of C-11 is to bring streaming services operating in Canada, whether domestic or foreign, under the ambit of the *Broadcasting Act*, regulating streaming content in ways similar to broadcasting along the lines of what the EU has done with its Audiovisual Media Services Directive (European Commission, n.d.). This is a simplistic explanation of a complex and controversial piece of legislation that does a number of things in its quest to put streaming under the steely eye of the Canadian Radio-television and Telecommunications Commission (CRTC). It empowers the CRTC to review and possibly amend the definition of Canadian content, it requires that streaming services contribute financially to the production of Canadian content and it imposes "discoverability" requirements on digital streaming platforms (like YouTube, Spotify, Netflix and others) to ensure that Canadian content is promoted. How the CRTC will do this remains to be seen. It will hold public hearings as part of the process of developing regulations, although the legislation gives the Commission some guidelines to follow and a policy directive will be issued by the government.

Some corporate interests in the U.S. don't like the legislation and domestic opponents in Canada have latched on to this fact, warning that the *Online Streaming Act* could violate the provisions of the new NAFTA, the CUSMA (referred to in the U.S. as the USMCA).

Will the U.S. challenge C-11 under CUSMA, and if they do what are the chances that the U.S. will win? This paper examines the arguments put forward by a U.S. tech industry lobby group on behalf of U.S. companies opposed to the legislation.

In November 2022, U.S. Trade Representative Katherine Tai issued a statement "expressing concern" about some impending pieces of Canadian legislation, including C-11 (Office of the United States Trade Representative 2022). The criticism was echoed by the U.S. embassy in Ottawa (Djuric 2023). Since then, the U.S. Trade Representative's Office (Woolf 2023) and some members of Congress (United States Senate Committee on Finance 2023) upped their sabre-rattling on C-11 as a result of a push by the high-tech sector in Washington to bring pressure to bear on Canada. One of high-tech's chosen instruments is the Computer & Communications Industry Association, (CCIA), dominated by companies such as Google, Meta, Amazon and Apple. CCIA has criticized draft Canadian legislation before, most notably Bill C-18, the *Online News Act*, arguing it violates CUSMA because it is aimed at U.S. corporations (Google and Facebook) thus violating "national treatment" (treating domestic and foreign goods and services "no less favourably" in like circumstances) provisions. Its most recent effort is a paper criticizing C-11 for similar transgressions: "It is very likely that implementation of the proposed amendments (to the *Broadcasting Act*) would affect U.S. trade interests and thus justify U.S. retaliation" (CCIA 2023).

It makes much of the supposition that C-11 will be offside the CUSMA because measures to implement it would discriminate against U.S. digital products by denying national treatment and imposing prohibited performance requirements. Therefore, the CCIA argues, Canada would be required to resort to Article 32.6, the cultural exemption, given its violation of the terms of the agreement. This provision, picked up from the original Canada-U.S. Free Trade Agreement in 1987, and repeated in NAFTA and now in the CUSMA/USMCA, allows Canada to maintain or adopt a measure with respect to a cultural industry that is otherwise inconsistent with the agreement. However, there is a sting in the tail of the exemption because it allows the other partners, the U.S. and Mexico, to adopt similar measures, or to take measures "of equivalent commercial effect" (in other words, retaliation). Under Article 32.6, retaliation (which would take the form of withdrawal of equivalent market access benefits, i.e., reimposing tariffs or other trade restrictive measures) is not limited to the cultural sector. It is a provision that was never intended to be used, but which allowed the Canadian government to claim that "culture" was not included in the original FTA, and it's been maintained in subsequent iterations. The CCIA paper claims that "if challenged, Canada can be expected to invoke its cultural industries exception (Article 32.6) as a basis for justifying the inevitable discrimination the measure engenders." This is a doubtful conclusion. It is highly improbable Canada would invoke 32.6 to justify its actions on C-11, because it doesn't need to do so.

For Canada to invoke the cultural exception would be an admission that whatever measures it was taking in C-11 were a violation of the CUSMA, either national treatment provisions or some other commitment. It does not need to hide behind Article 32.6 to achieve the policy ends of C-11 (although the government through the legislation, and the CRTC through implementing regulations, need to be careful to design measures that are not discriminatory but apply equally to Canadian and foreign streaming services in like circumstances). Indeed, this is in part why the tech industry lobbied so hard. They wanted to stop the legislation

altogether, but having failed to do this, they can at least try to minimize its impact in such areas as the discoverability requirements or financial requirements that will be imposed on YouTube, among others.

The CCIA white paper strives mightily to find something in C-11 it can point to as discriminatory, which is difficult because so much of the actual implementation is left to the CRTC, and its requirements are not yet known. In trying to make its case, the CCIA produces two arguments. The first is that under Chapter 14, the Investment Chapter of CUSMA, the Parties agreed they would not impose "a given level or percentage of domestic content" as a condition for allowing an investment. The CCIA argues that Section 3 (1) f (i) of C-11, which requires that foreign online undertakings "make the greatest practicable use of Canadian creative and other human resources and … contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming," is a prohibited investment performance requirement. The only problem with this argument is that the "foreign online undertakings" referred to in the legislation are not foreign investments in Canada and the named conditions are not requirements for investment approval. Foreign online undertakings are "cross-border services," a form of trade which is governed by another chapter, Chapter 15.

The CCIA's second argument is that the Digital Trade Chapter, Chapter 19, includes the following CUSMA language with respect to a digital product (Article 19.4.1):

> *"No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products."*

The CCIA contends that by promoting Canadian content (CanCon) for digital AV products, with CanCon being defined, among other things, by the nationality of the producer or writer, this is discriminatory and is a violation of national treatment. But there is another flaw in their argument. Article 19.2.4 states that:

> *"For greater certainty, a measure that affects the supply of a service delivered or performed electronically is subject to Chapter 14 (Investment), Chapter 15 (Cross-Border Trade in Services), and Chapter 17 (Financial Services), including any exception or non- conforming measure set out in this Agreement that is applicable to the obligations contained in those Chapters."*

So, the digital products article, (19.4.1) is subject to the chapter on cross-border trade in services. When it comes to national treatment for cross-border services, such as digital streamers based outside Canada, the Agreement (Article 15.3.1) says:

> *"Each Party shall accord to services or service suppliers of another Party treatment no less favorable than that it accords, <u>in like circumstances</u>, to its own services and service suppliers."* (Emphasis added).

The question then arises, are U.S. digital services and Canadian streamers, like CBC Gem and Bell Media's Crave, in comparable situations? Does the descriptor "in like circumstances" apply? If it does not, then national treatment arguments do not apply. However, let's assume they are considered to be equivalent for the purposes of CUSMA. In that case, Canada is obligated to treat U.S. digital content providers "no less favourably" than domestic suppliers of the same services. Now that C-11 is law, Canadian online streamers will be expected to meet certain CanCon requirements, just as regulated broadcast services do. In the legislation's words, Canadian online undertakings will be required to "employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming …" On the other hand, foreign online undertakings are only required to "make the greatest practicable use of Canadian creative and other human resources, and … contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming." As a result, foreign online undertakings are not only not discriminated against, but they are also given greater flexibility and subject to less restrictive requirements than competing domestic streaming services. There is no violation of national treatment. In short, CCIA's arguments that C-11 violates the USMCA/CUSMA are unsupported.

Broad assertions of discrimination have to be proven. Trade agreements are carefully negotiated, and national legislation is just as carefully drafted to ensure compliance with the commitments made in the text of agreements. The CCIA's objective is to cast doubt and to try to remind the Canadian government that the U.S. industry is watching. That is fair enough but is a long way from triggering any form of U.S. trade retaliation.

Where Canada and the CRTC do need to be careful is with respect to imposing a requirement on foreign streamers to contribute to Canadian production while at the same time denying them the ability to acquire and exploit that production, when no such limitation is imposed on equivalent Canadian streaming services. There is an ongoing debate in Canada as to how to define Canadian content, with some arguing that to encourage Canadian production, the financing, production and copyright must remain in Canadian hands. Others focus more on the stories, the writing, the locations, the use of local production facilities, etc., but are agnostic as to the source of the funding and who, ultimately, has the rights to the production. C-11 requires the CRTC to take a number of factors into account in determining what constitutes Canadian content, subject to a set of guidelines provided by the government through a policy directive. It is up to the Commission to make a recommendation. In doing so, it needs to be careful not to create a discriminatory standard. Those who contribute to Canadian productions should be allowed to access, acquire and distribute them on an equal basis.

In answer to the original question: Could the U.S. retaliate against the *Online Streaming Act*? in the end the answer depends on how the CRTC implements the legislation. The devil will be in the detail. The CCIA's arguments do not hold water. However, at the same time, Canada needs to be careful when the CRTC finally designs the regulations to define Canadian content that it does not impose regulatory barriers that would deny foreign streamers access to content they have been required to support through equitable financial contributions. Now that the legislation has been enacted, the real work — development of the implementing regulations by the CRTC — begins.

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During his 30-year career in the Canadian foreign service, he served at Canadian missions in Beirut, Hong Kong, Beijing, Islamabad, Seoul and Taipei (as Head of Mission), on assignment to the Trade Negotiations Office and as Assistant Deputy Minister for Policy and Communications at the Department of Foreign Affairs and International Trade in Ottawa. In 2001 became Senior Vice President (Public Policy) for Asia-Pacific for Time Warner based in Hong Kong. He left Time Warner in 2013 and after retirement returned to Canada. He has written regularly extensively on domestic and international copyright and trade issues and maintains a weekly blog on this subject at www.hughstephensblog.net

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