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Amy Awad  
Director General  
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Dear Ms. Awad:

I am a law professor at the University of Ottawa where I hold the Canada Research Chair in Internet and E-commerce Law and serve as a member of the Centre for Law, Technology and Society. I focus on the intersection between law and technology with an emphasis on digital policies. I submit this comment in a personal capacity representing only my own views. I am grateful to Kate Winiarz, a University of Ottawa law student, for her exceptional research assistance in preparing this submission.

I have been active participant in the policy development of Bill C-11, including appearances on the bill as an expert witness before the House of Commons Standing Committee on Canadian Heritage and the Senate Standing Committee on Transport and Communications.

My submission on Canadian Heritage's Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework) focuses on three main points. First, the direction on discoverability regulation should emphasize static promotion only and make clear algorithmic manipulation is beyond the scope of the legislation. Second, the policy direction should exclude all user-generated content from regulation regardless of the source or commercial nature of the work. Third, given the need to consult with a vast swath of new and diverse stakeholders, public and user participation should be explicitly supported in the policy direction.

## Discoverability

The Government's policy direction states that "in making regulations or imposing conditions in respect of discoverability and showcasing requirements, the Commission is directed to prioritize outcome-based regulations and conditions that minimize the need for broadcasting undertakings to make changes to their computer algorithms that impact the presentation of programs."<sup>1</sup> The reference to "minimizing" algorithmic regulation rather than excluding it entirely is a cause for concern. In order for the Commission's regulatory framework to be light-touch, there should be no need for online undertakings to make any changes to their algorithms to satisfy the new *Broadcasting Act*, not a minimized need. Promotion and discoverability regulatory requirements should focus on online and offline static method and not require the manipulation of algorithms. In fact, research has shown that the main discoverability method in Canada is word of mouth, and that fact should be reflected in policy direction and subsequent regulation.

Section 9.1(8) of the new Broadcasting Act states that "[t]he Commission shall not make an order under paragraph (1)(e) that would require the use of a specific computer algorithm or source code." In the development of Bill C-11, Canadian Heritage Minister Pablo Rodriguez assured Canadians in the House of Commons that "It's clearly written there that the CRTC cannot play with algorithms."<sup>2</sup> Further, his spokesperson, on June 23, 2022, confirmed this position by stating that a clause in the bill would keep the CRTC from making specific orders to manipulate algorithms.<sup>3</sup> Despite those assurances, the text of the policy direction now states that the Commission is directed to "minimize" the need for algorithmic manipulation - not exclude it altogether. This falls short of the government's commitment during the C-11 process and should be remedied.

Some perspective on discoverability in the digital environment is needed. The inclusion of discoverability requirements in Bill C-11 proved to be one of the most controversial elements of the bill, particularly with respect to user content. Yet even with respect to curated services such as Netflix or Disney+, the evidence suggests there is little need for extensive discoverability regulations focused on user feeds. If the government is committed to discoverability rules, those should focus on general promotional tools and marketing efforts, not intervention into the choices presented to users by Internet streaming services.

The emphasis on discoverability stems from a mistaken equivalence of conventional television and Internet streaming services. Canadian film and television production has long been a product of regulatory requirements with broadcasters required to air a certain percentage of Canadian content as a condition of licence. With a few notable exceptions, Canadian content has played a secondary role to more popular U.S. programming, which

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<sup>1</sup> C Gaz I, 157:23 Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework) at 1965, para 6 [*Policy Direction*].

<sup>2</sup> House of Commons, Standing Committee on Canadian Heritage, *Evidence*, 44-1, No 031 (6 June 2022) at 1550.

<sup>3</sup> Marie Woolf, "YouTube might be asked to manipulate algorithms under online streaming bill: CRTC chair" (24 June 2022), online: *Global News* <<https://globalnews.ca/news/8944590/canada-bill-c-11-youtube-algorithm/>>.

has meant that broadcasters are more likely to air the Canadian programs at less popular times. Moreover, given the reliance on simultaneous substitution, changes in U.S. programming times has had a spillover effect on Canada, with Canadian broadcasters forced to change their schedules in response to U.S. changes. That has meant that Canadian programs often lack a consistent time in the programming schedule.

Years of this experience may leave some fearing that their programs won't be found unless efforts are made to make them more discoverable. Yet the reality of Internet streaming services is that they have no reason to make it hard to discover programs that their subscribers want to watch. Indeed, in a very competitive market in which subscribers can cancel at any time, the opposite is true. For companies such as Netflix, they must ensure that subscribers find the content they want to watch or they risk losing them as customers. In this scenario, it is not regulation that drives access to Canadian content but rather subscriber demand.

Despite several studies, there is little actual evidence of the need for discoverability measures. The Broadcasting and Telecommunications Legislative Review panel included a recommendation to implement discoverability measures,<sup>4</sup> yet was unable to find reliable evidence to support the recommendation.

The BTLR contains two footnotes that point to two reports as the basis for its recommendation: a 2017 Price Waterhouse Cooper report called *How Tech Will Transform Content Discovery* and a 2016 report from Telefilm Canada titled *Discoverability: Toward a Common Frame of Reference Part 2: The Audience Journey* (the Telefilm Canada report is incorrectly cited as a 2018 report but actually dates to 2016).<sup>5</sup>

The Price Waterhouse Coopers report involved a survey of 1,000 U.S. residents, had nothing to do with Canada, and said absolutely nothing about the ability to find or recognize Canadian content.<sup>6</sup> The Telefilm Canada report was focused on Canada but did not find that Canadians have trouble finding Canadian content. Rather, it found a range of experiences and emphasized that “word-of-mouth is Canadians’ main discoverability method.”<sup>7</sup>

Given the limited evidence to support discoverability measures, policy direction should provide solid guidance on this issue. This is particularly true with respect to the exclusion

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<sup>4</sup> Innovation, Science, and Economic Development Canada, “Canada’s Communications future: Time to act” (January 2020), online: <<https://ised-isde.canada.ca/site/broadcasting-telecommunications-legislative-review/en/canadas-communications-future-time-act>> at 3.8.1.

<sup>5</sup> Telefilm Canada, *Discoverability: Toward a Common Frame of Reference Part 2: The Audience Journey* (2106), online: <<https://telefilm.ca/wp-content/uploads/2022/01/discoverability-audience-journey.pdf>>.

<sup>6</sup> Michael Geist, “Bill C-11’s Foundational Faults, Part Three: Why the Discoverability Rules Are a Flawed Solution in Search of a Problem” (10 March 2022), online: <<https://www.michaelgeist.ca/2022/03/bill-c-11s-foundational-faults-part-three-why-the-discoverability-rules-are-a-flawed-solution-in-search-of-a-problem/>>

<sup>7</sup> *Ibid.*

of algorithmic manipulation as a discoverability method to promote Canadian content online.

If the government is to support the CRTC’s objective of ensuring “Canadians continue to have access to a wide range of choice of high-quality audio and video content that is made by and for Canadians, as well as the best content from around the world, regardless of the platform, device or technology they wish to use,”<sup>8</sup> static promotion methods, most widely used of the options in the EU’s Audiovisual Media Services Directive (AVMSD), should be employed.

The AVMSD, the most widely regarded regulatory approach on Internet streaming, does not require algorithmic manipulation of any sort, and policy direction should follow suit. Recital 35 of the EU’s AVMSD lists recommended methods to ensure prominence of European works by video service providers. These include dedicated sections for the display of European works on the homepage of their service, search tools that have European-search functionality, promotional and ad campaigns for European works, or promotion of a certain percentage of European works from the catalogue via banners or similar tools.<sup>9</sup>

While the AVMSD allows member states to define additional prominence requirements, most have relied on the EU’s basic definition and not strayed into algorithmic manipulation.<sup>10</sup> In consultation on discoverability and prominence requirements for the AVMSD, there were concerns raised in the consultation by Irish, Dutch, Latvian, and Polish providers around the use of algorithms in relation to artificiality in recommendations and how that relates to transparency for the end user.<sup>11</sup> Algorithmic manipulation could also lead to users losing trust in the provider and damaging the provider’s reputation when algorithms prioritize irrelevant content. This was flagged as a large issue for smaller or new providers, especially if they have smaller catalogues and are forced to suggest irrelevant content to users.<sup>12</sup>

## **Exclusion of social media users and their content from regulation**

The prospect of regulating user content as a result of Bill C-11 raised enormous concerns among Canadians, particularly digital creators who feared that new regulations could

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<sup>8</sup> Canada Radio-television and Telecommunications Commission, *Broadcasting Notice of Consultation 2023-138* (12 May 2023), online: < <https://crtc.gc.ca/eng/archive/2023/2023-138.htm> > at para 19.

<sup>9</sup> EU Directive 2018/1808 at Recital 35 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&rid=9>>.

<sup>10</sup> AVMSD countries not requiring algorithmic manipulation: Czech Republic, Denmark, Finland, Greece, Hungary, Netherlands, Portugal, Slovakia, Spain, Sweden.

<sup>11</sup> European Regulators Group for Audiovisual Media Service, “Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability)” (2020), online: <[https://erga-online.eu/wp-content/uploads/2021/01/ERGA\\_SG3\\_2020\\_Report\\_Art.131\\_final.pdf](https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.131_final.pdf)> at 12.

<sup>12</sup> *Ibid* at 13.

result in significant harms.<sup>13</sup> The government responded with assurances that it would exclude user content and its policy direction speaks to “excluding social media users and creators and their content from regulation” as well as “supporting greater inclusion of equity-seeking groups in the broadcasting system,” and “supporting Canadian creators and media, including independent and community-run elements.”<sup>14</sup> Regulation of user-generated content would erect significant barriers to entry for Canadian content creators and artists that depend on user-generated content platforms, most notably members of equity-seeking groups.

The Government’s policy direction does indeed emphasize the exclusion of social media creators and the content they make from regulation. However, given the limited specificity in the policy direction, there have been groups involved in the CRTC’s consultation process that have still called for the inclusion of some user content on social media platforms. Amendments are needed to clarify that exemption of user content regulation applies to individuals and corporations alike.

As part of the CRTC’s Bill C-11 consultation process, ACTRA suggested that “individual persons” should be exempted from regulation on social media while corporate entities should be regulated.<sup>15</sup> They continue by clarifying that “this exemption relates strictly to an individual acting on their own, who is using a publicly-accessible digital service whose sole purpose is to permit free exchange between individuals and communities.”<sup>16</sup> The proposed approach is a distinction without a difference since many individual creators may operate under a corporate umbrella.

ADISQ similarly supported exclusion of individual social media users, but suggested that if the activity is in direct competition with other broadcasting undertakings, then it should be regulated.<sup>17</sup> ADISQ took a specific focus on streaming music as an activity.

Minister Rodriguez insisted that Bill C-11 “is about platforms, it is not about users.”<sup>18</sup> An exemption for users requires clarity of a full exemption, regardless of the legal nature of the user account or its impact on the market. In order to advance access and reduce barriers, the policy direction should be sufficiently broad to ensure user-generated content in all its forms will not be caught by regulation and that the exclusion found in the direction broadened to clarify the intent to fully exempt user content.

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<sup>13</sup> Michael Geist, “The Bill C-11 Hearings Are Back, Part Two: The Risks to Canadian Creators” (13 September 2022), online: <<https://www.michaelgeist.ca/2022/09/the-bill-c-11-hearings-are-back-part-two-the-risks-to-canadian-creators/>>.

<sup>14</sup> *Policy Direction*, *supra* note 1 at 1946.

<sup>15</sup> Broadcasting Notice of Consultation 2023-138: Interventions, *ACTRA* (11 July 2023), online: <<https://applications.crtc.gc.ca/ListeInterventionList/Documents.aspx?ID=316912>> at para 5.

<sup>16</sup> *Ibid* at page 9, Q5.

<sup>17</sup> Broadcasting Notice of Consultation 2023-138: Interventions, *ADISQ* (11 July 2023), online: <<https://applications.crtc.gc.ca/ListeInterventionList/Documents.aspx?ID=316976>> at para 15.

<sup>18</sup> Tara Deschamps, “Online Streaming Act won’t police user-generated content: heritage minister” (22 November 2022), online: *Ottawa Citizen* <<https://ottawacitizen.com/news/online-streaming-act-wont-police-user-generated-content-heritage-minister>>.

## Participation support as part of the policy direction

The policy direction includes specific emphasis on the participation of Indigenous peoples, equity-seeking groups (including Black and other racialized communities as well as “other equity-seeking groups”, which is quite broad), and official language minority communities.<sup>19</sup> The policy direction should ensure that appropriate time, funding, and educational resources are available to these groups to ensure that any consultation is meaningful. The Black Screen Office shared in its submission to the CRTC that it had to re-allocate funds that were earmarked for operations to be able to engage in CRTC consultation.<sup>20</sup> If the policy direction does not include an explicit need to support the groups that it has identified, it may actually be inflicting hardship on the very groups it purports to support.

A salient example to highlight is the submission of the James Bay Cree Communications Society, whose lands were experiencing wildfires during the short consultation window of BNC 2023-138. Ensuring public participation requires acknowledging the realities that many of the groups outlined in the policy direction live on a day-to-day basis, the time and financial burdens that consultation can take, and if consultations are, all things considered, actually meaningful. Coupled with Indigenous creators’ experiences of intimidation in previous consultation with the CRTC,<sup>21</sup> the situation becomes even more worrisome.

Further, the list of groups eligible for specific support should explicitly include support for public and user participation. The Public Interest Advocacy Centre outlined in its submission on BNC 2023-138 that the Broadcasting Participation Fund and Broadcasting Accessibility Fund’s available resources already do not meet the needs of public interest participation.<sup>22</sup> Given that policy direction requires an increased level of participation from groups and individual creators that may not have historically interacted with the Commission, explicit direction on participation and access to hearings is essential.

Many groups and individuals have not participated in CRTC hearings in the past, owing to the fact that their online expression has previously not been subject to regulation. The wide net cast by the Act means that creators and the public will be implicated in an even more direct way than ever before. Policy direction should reflect that reality.

Thank you for your consideration.

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<sup>19</sup> *Policy Direction*, supra note 1 at 1969-1970, sections 14-17.

<sup>20</sup> Broadcasting Notice of Consultation 2023-138: Interventions, *Black Screen Office* (11 July 2023), online: <<https://applications.crtc.gc.ca/ListeInterventionList/Documents.aspx?ID=316911>> at para 18.

<sup>21</sup> Raisa Patel, “‘I felt gaslit’: Indigenous TikTok creator says federal officials were disrespectful in ‘tense’ meeting” (1 December 2022), online: *Toronto Star* <[https://www.thestar.com/politics/federal/i-felt-gaslit-indigenous-tiktok-creator-says-federal-officials-were-disrespectful-in-tense-meeting/article\\_2d794a4a-1edc-5f7f-b578-27fe5cfb67c6.html?>](https://www.thestar.com/politics/federal/i-felt-gaslit-indigenous-tiktok-creator-says-federal-officials-were-disrespectful-in-tense-meeting/article_2d794a4a-1edc-5f7f-b578-27fe5cfb67c6.html?>).

<sup>22</sup> Broadcasting Notice of Consultation 2023-138: Interventions, *Public Interest Advocacy Centre* (11 July 2023), online: <<https://applications.crtc.gc.ca/ListeInterventionList/Documents.aspx?ID=316997>> at para 22.

Respectfully submitted,

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