A Coherent Domestic and Foreign Digital Policy for Canada?

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Introduction

The laissez-faire era of technology regulation is now well and truly over. Governments around the world are racing to regulate technology companies large and small, as well as the impacts of the companies' products, services, and business models on the societies they govern.

Canada is no stranger to these global trends. There are currently three significant bills before the Canadian Parliament that seek to regulate the technology sector and its impacts (C-11, C-18, and C-27), with more legislation under development. As this policy brief will show, however, there are significant tensions emerging between key elements of Canada's domestic regulatory framework for the technology sector, and Canada's stated foreign policy objectives in the digital sphere.

This brief will begin by exploring some of Canada's key foreign policy objectives in the digital sphere, before describing how they are in tension with how key provisions of Bills C-11 and C-18 have been drafted. I will conclude with some thoughts on how Canada can and should achieve greater coherence between the domestic and foreign aspects of digital policymaking.

Canada's Digital Foreign Policy, Summarized

Canada has long been seen on the world stage as a powerful advocate for human rights. While some observers have questioned whether Canada currently has a coherent foreign policy in place, Canada does have a long track record of international advocacy in support of a global, free, open, interoperable, secure, and reliable Internet. The strength of Canada's commitment can be seen in the leadership role Canada has played in the Freedom Online Coalition (FOC)—a multilateral coalition of 36 like-minded governments that work together to

advance Internet freedom worldwide. As the chair of the FOC in 2022, Canada led the drafting of the "Ottawa Agenda," which sets forth 11 key principles for FOC member-states to pursue both at home and abroad. Three of the principles are especially relevant here:

1. A commitment to "inclusive and open multi-stakeholder governance of digital technologies, including the Internet, and to sustained dialogue with external stakeholders to share knowledge and expertise…" (Principle B)
2. A pledge to "advocate for a global, free, open, interoperable, secure and reliable Internet, to resist Internet fragmentation and promote accountable, inclusive, and responsive democratic societies…" (Principle D); and
3. An undertaking to "[l]ead by example in upholding our commitments as members of the Coalition to respect our human rights obligations, as well as the principles of the rule of law, legitimate purpose, non-arbitrariness, [and] effective oversight, while calling for greater transparency and accountability within the private sector…" (Principle K).

Unfortunately, some provisions of Canada's Bills C-11 and C-18 are difficult to reconcile with the key tenets of the FOC's Ottawa Agenda.

Bill C-11 and the Regulation of Online Audiovisual Content

A first area of tension relates to Bill C-11's treatment of online audiovisual content, especially user-generated content.

Bill C-11 is an act intended to reform and modernize Canada's *Broadcasting Act*, which was last overhauled in the 1990s. Free expression scholars and courts around the world have long viewed the regulation of broadcasting as an exceptional area of law, where significant government interference with the right to free expression is justified on two grounds. The first is the scarcity of electromagnetic spectrum for conventional, over-the-air broadcasting, and the second is the "invasive" nature of broadcasting signals, which are "pushed" to radio and TV receivers located in the privacy of one's home. Correspondingly, free expression law has long permitted greater restrictions on broadcasting than on other media of expression—such as print, film, or the online sphere.

Even so, following the government's recent rejection of amendments adopted by the Senate, clauses 4.1 and 4.2 of Bill C-11 vest Canada's broadcasting regulator—the CRTC—with the power to enact regulations that would apply to any

audiovisual content hosted by a social media service that "directly or indirectly generates revenues." The effect of these provisions is to empower the CRTC to regulate *all* audiovisual content hosted on social media platforms pursuant to its statutory authority. This is so because *all* content hosted by social media platforms *indirectly* generate revenues by increasing user engagement with their services, which is the foundation upon which their business models are built.

Regardless of the rationale for rejecting the Senate amendments, legislation that empowers a government body to enact regulations based on broadcasting law that could apply to *all* audiovisual content hosted by social media platforms is problematic from a free expression perspective. Under applicable international human rights law, legal restrictions on the right to free expression are valid only if they are intended to advance one of a small number of enumerated purposes, and then only if they are necessary and proportionate to achieving those purposes. Correspondingly, a broad grant of power to a regulator that encompasses all online audiovisual content is not consistent with Canada's "human rights obligations, as well as the principles of the rule of law, legitimate purpose, [and] non-arbitrariness" emphasized in the FOC's Ottawa Agenda.

Bill C-18 and the Future of the Internet

The text of Canada's proposed Bill C-18 and recent developments in the House of Commons committee responsible for this proposed legislation exhibit further tensions between Canada's digital foreign policy vision and its current approach to domestic legislation. While Bill C-18's policy objective of ensuring the financial viability of Canadian journalistic organizations is laudable, the means being used do not align well with Canada's foreign policy vision for an open and interoperable internet.

Bill C-18, which is also known as the Online News Act, seeks to require online intermediaries—such as those that operate search engines and social media platforms— to financially compensate Canadian news organizations for (1) facilitating access to news content "by any means"—including indexing, aggregating, and ranking news content and (2) reproducing "any portion" of any news content on their services.

There are many problems with the proposed legislation that have been the subject of extensive analysis and commentary by a range of actors. For present purposes,

what is most problematic about the legislation is its premise that the facilitation of access to Canadian news content by search engines and social media platforms should result in such platforms paying financial compensation to news publishers. This notion fundamentally challenges the possibility of a free, open, and interoperable internet, especially since facilitation of access is a vague and amorphous concept that sweeps in hyperlinks. Should facilitation of access to internet content "by any means" become conditional on payment to copyright holders, significant tears may begin to appear in the fabric of the World Wide Web—which is ultimately nothing more than a collection of hyperlinked hypertext webpages.

These problems are amplified by Bill C-18 making key limitations and exceptions to copyright—including fair dealing—unavailable to online intermediaries for the purposes of the legislation. In Canada, fair dealing furnishes the legal basis that search engines rely upon to index and rank content and make search results intelligible to their users. Fair dealing is also key to ensuring that the restrictions on free expression that are inherent in the protection of copyright are compatible with the *Charter*. Restricting the ability of online platforms that are subject to Bill C-18 to rely upon copyright exceptions such as fair dealing in reproducing or facilitating access to news content is therefore problematic from a free expression perspective, and these measures further amplify the challenge the bill poses to an open and interoperable internet.

Conclusion

This policy brief highlights some of the emerging tensions between Canada's powerful *international* advocacy for online freedom and its *domestic* approach to digital policymaking. Explaining these tensions and inconsistencies is beyond the scope of this brief, although it is notable that Canada could achieve policy coherence simply by using more precisely drafted legislation to achieve its domestic policy achieves. Regardless, it behooves Canada to pursue domestic technology policy initiatives that are consistent with its foreign policy vision for the internet if our government is to be taken seriously on the world stage on these issues.