



Intervention

Submitted to the CRTC

**Re: Application by Public Interest Advocacy Centre (PIAC) regarding section 12 of
*An Act respecting mainly the implementation of certain provisions of
the Budget Speech of 26 March 2015, L.Q. 2016, ch.7 (Bill 74),
CRTC File No.: 8663-P8-201607186***

Comments of OpenMedia Engagement Network (OpenMedia)

16 September 2016

*OpenMedia is a community-based organization that works to
keep the Internet open, affordable, and surveillance free.*

www.openmedia.org

*OpenMedia Engagement Network P.O. Box 21674, 1424 Commercial Dr.
Vancouver, BC, Canada V5L 5G3 // [604-633-2744](tel:604-633-2744)*

16 September 2016

VIA GC KEY

Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Ms. May-Cuconato,

Re: Application by Public Interest Advocacy Centre (PIAC) regarding section 12 of *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015*, L.Q. 2016, ch.7 (Bill 74), CRTC File No.: 8663-P8-201607186 – Comments of OpenMedia Engagement Network (OpenMedia)

1. The OpenMedia Engagement Network (“OpenMedia”) is in receipt of the Commission’s letter of 1 September 2016 (“the letter”) and has reviewed the record of this proceeding, including the Part 1 Application that the Public Interest Advocacy Centre (“PIAC”) submitted on 8 July 2016. In accordance with the letter and sections 26 and 7 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (“the Rules”), OpenMedia wishes to be considered an intervener in this proceeding, and provides below its comments on the Commission’s preliminary views as set out in the letter.

A. Suspension of PIAC’s Application (Without Dismissal) Is Acceptable

2. OpenMedia supports PIAC’s Part 1 application, including the positions and requests for relief expressed therein. Given the circumstances, however, OpenMedia has no objection to the Commission’s preliminary view in suspending consideration of PIAC’s application. This approach would promote procedural efficiency, by minimizing duplication of work and resources in two separate legal fora. It would also lead to a more fulsome record and better informed proceeding if the Commission has cause to revisit PIAC’s application in the future, after the matter launched by the Canadian Wireless Telecommunications Association (CWTA) comes to a close at the Superior Court of Quebec.
3. OpenMedia would like to emphasize that the Commission should merely suspend consideration of PIAC’s application, and otherwise keep the matter open, rather than close or dismiss it. First, pending the court’s disposition of CWTA’s challenge, there remains a possibility that the Commission will still have to consider the constitutional and related matters in PIAC’s application. This would be appropriate for the Commission to do, given its federal jurisdiction combined with its specialized expertise in telecommunications law and policy.¹ In light of the unique circumstances and far-reaching implications, maintaining PIAC’s Part 1 application as a live, if dormant, matter would be prudent, until after resolution of the CWTA’s case at court.
4. Second, while suspension promotes procedural efficiency now, keeping PIAC’s Part 1 application open would preserve the same for potential future circumstances. If the Commission sees fit to address constitutional or other issues in PIAC’s application after CWTA’s challenge ends before the courts, then the Commission and interested parties would have the current proceeding and record to return to. The alternative would be to devote additional time and resources to setting up

¹ Examples of the Commission addressing and disposing of constitutional issues in the context of telecommunications include Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code* (2 June 2013), at paras. 19 and 26; and Telecom Decision CRTC 2007-8, *Rogers Cable Communications Inc. - Part VII application seeking access to highways controlled by the Department of Transportation of the Province of New Brunswick on terms consistent with Leducor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*, *Decision CRTC 2001-23, 25 January 2001* (8 February 2007), at paras. 12-44. The latter is also an example of the Commission moving forward with an application despite a related matter progressing through a court (albeit not one with inherent jurisdiction).

and administering a new proceeding, which would in any case have to incorporate the current one for the sake of continuity and completion.

5. Thus, OpenMedia supports suspending consideration of PIAC's Part 1 Application, so long as the Commission does not close or dismiss the application until after final court resolution of the issues in question.

B. The Commission's Interpretation of Section 36 is Based in Sound Law and Policy

6. OpenMedia supports the Commission's interpretation of section 36 of the *Telecommunications Act*,² as set out in the letter and applied in the current proceeding. The Commission's preliminary views rest on a solid foundation of law and policy rooted in legislation such as the section 7 telecommunications policy objectives; CRTC decisions such as Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* (the "ITMP Framework"); several Supreme Court of Canada and Federal Court of Appeal decisions affirming ISPs' necessarily hands-off relationship to content control;³ and the views and experiences of everyday Internet users in Canada, as expressed through OpenMedia campaigns such as an ongoing one regarding Bill 74 (discussed in the next section). OpenMedia submits that this same foundation of law and policy mandates against granting section 36 approval to Internet service providers (ISPs) for the sake of complying with section 12 of Bill 74 in Quebec.
7. For the purposes of this submission, however, the rest of OpenMedia's comments below will be focused on the pillar of free expression. While net neutrality and freedom of expression are both primary concerns to OpenMedia's community, Bill 74's overt aspects of government censorship and its implications for the open Internet warrant a distinct focus on the latter. More specifically, OpenMedia will highlight the crucial role that Internet service providers play in upholding freedom of expression in Canada, making it all the more critical that the Commission not allow them to fall to destructive laws such as section 12 of Bill 74. To conclude, OpenMedia notes how courts in Quebec have also recognized the importance of protecting federally regulated communications undertakings from provincial encroachment.

C. Allowing ISP Blocking Will Harm Freedom of Expression in Canada

8. It is trite by this point to note that freedom of expression, and the Internet's connection to it, is one of the most valued and essential principles in Canada today. As PIAC stated,

[T]he Commission can take notice of the vital role that the Internet plays in the preservation and promotion of fundamental human rights, including freedom of expression. The importance of maintaining a free and open Internet, subject to constitutionally reasonable limits in respect of legitimate purposes regarding law enforcement and hate speech, are well documented by numerous legal experts and scholars.⁴

9. Internet users across Canada have shown that they agree with this and care that the impugned provisions in Bill 74 are struck down. In August 2016, OpenMedia launched a campaign in conjunction with Canadian Journalists for Free Expression ("CJFE"), which involved informing Canadians about Bill 74 and collecting signatures for a petition asking the Quebec government to repeal section 12. As of writing, just over 18,000 Canadians have signed to express their opposition to the bill, comprising approximately 15,500 on the English-language petition and 2,600 on the French-language petition. The petition is available at <act.openmedia.org/bill74>.

² "Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public." *Telecommunications Act*, SC 1993, c 38, s 36.

³ See, e.g., *Reference re Broadcasting Act*, 2012 SCC 4, affirming *Canadian Radio-television and Telecommunications Commission (Re)*, 2010 FCA 178; *Bell Mobility Inc. v. Klass*, 2016 FCA 185; and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45.

⁴ PIAC Part 1 Application, at paras 77-78.

10. Maintaining a free and open Internet particularly requires ensuring that ISPs remain open conduits for neutral transmission of communications.⁵ This may occur through regulating the ISPs themselves, such as with net neutrality rules in the ITMP Framework, as well as through protecting ISPs from private sector industries, law enforcement, or the government, all of whom have attempted to turn ISPs into proxies for government surveillance, moral adjudication, or ad hoc intellectual property tribunals, for instance.⁶ Bill 74 constitutes Quebec attempting to recruit ISPs as enforcement agents for the Régie des alcools, des courses et des jeux.⁷
11. The Commission must not allow the province to unlawfully deputize ISPs in this manner, both for the law itself and due to the example such a precedent would set. PIAC warns that if the Commission permits website blocking under Bill 74, “there likely will be an unending stream of provincial ‘consumer protection’ or indeed any other regulatory goals that will ‘justify’ similar attempts to block telecommunications”.⁸ Academic literature on the topic supports this prediction, in terms of establishing patterns of open-ended expansion of government powers and control over the Internet, for a variety of justifications:

Despite the new opportunities provided by the Internet (or perhaps because of them), Internet filtering, content regulation and online surveillance are increasing in scale, scope and sophistication around the world, in both democratic countries as well as in authoritarian states (Deibert et al. 2010: xv). [...] We are facing a strategic shift away from direct interdictions of digital content and toward control of Internet speech indirectly through the establishment of a form of cooperation with Internet service providers (Szuskin et al. 2009). [...]

In order to contain information and maintain control over access, a number of countries, including the United States, the United Kingdom, Canada and Australia, have made legislative attempts to regulate and monitor digital content. Virtually every industrialized country and many developing countries have passed laws that expand “the capacities of state intelligence and law enforcement agencies to monitor internet communications” (Deibert and Rohozinski 2008: 138). [...]

The advent of the Internet has had a profound and revolutionary impact on the general framework of media regulation and on the government of the broadcasting sector in general (Price 2002; DeNardis 2009). This has often led to the adoption of legislative measures criticized for their inability to reconcile technological progress with economic and other interests.⁹

The impugned provisions in Bill 74 provide a clear instance of Quebec’s “inability to reconcile” how the Internet works with its own interest in controlling online gambling revenues, and the Commission should not permit Canadians to suffer for that through the loss of an open Internet.

12. In response to another attempt to obstruct flows of information online, the Supreme Court of Canada affirmed the integral role that ISPs play in making freedom of expression possible. The Court also made clear how integral respecting ISPs’ status and function as passive transmitters is to ISPs being able to fulfill that role:

The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential “chill” in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict

⁵ See generally Rebecca MacKinnon, *et al*, “Fostering Freedom Online: The Role of Internet Intermediaries”, UNESCO/Internet Society, 2014, online: < <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf> >.

⁶ See, e.g., Michael Geist, “Is a Canadian Telco Allowing the Government To Mirror Its Subscriber Communications?” (1 May 2014), online: <<http://www.michaelgeist.ca/2014/05/canadian-mirror-network-data/>>; and Claire Brownell, “Pirates in your neighbourhood: How new online copyright infringement laws are affecting Canadians one year later,” (12 February 2016) *National Post*, online: <<http://business.financialpost.com/>>.

⁷ Bill 74, *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015*, 1st Sess, 41th Leg, Quebec, 2016 (assented to 18 May 2016), SQ 2016, c 7, s 12 [“Bill 74”].

⁸ PIAC Part 1 Application, at para 39.

⁹ Nicola Lucchi, “Freedom of expression and the right of access to the Internet” in Monroe E Price *et al*, eds, *Routledge Handbook of Media Law* (New York: Routledge, 2013) 157 at pages 158-59, 161, 163.

application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity. [...]

In *Bunt v. Tilley*, [2006] EWHC 407, [2006] 3 All E.R. 336 (Eng. Q.B.), the defendant ISPs were found not to be publishers because, even though they provided services, their role in the publication process was a passive one. This aspect of the decision in *Bunt* is a welcome development and should be incorporated into the Canadian common law.¹⁰

13. The Supreme Court of the United States went even further in *Reno v ACLU* (1997), which struck down sections of the United States *Communications Decency Act* (“CDA”) to do with protecting minors from explicit, obscene, or sexual material online. Nicola Lucchi notes:

[T]he Opinion, as written by Justice Stevens, reported one of the District Court’s conclusions: “As ‘the most participatory form of mass speech yet developed’... [the Internet] is ‘entitled to the highest protection from governmental intrusion’” (*Reno v ACLU* (1997), 863). [...] As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”¹¹

Section 230 of the CDA¹² further reinforces this recognition through enshrining ISPs’ legal status as neutral conduits, and is described by the Electronic Frontier Foundation as “one of the most valuable tools for protecting freedom of expression and innovation on the Internet”.¹³

14. While, of course, United States law does not directly apply to the Commission or parties in this matter, the above gives further context to just how important content-neutral intermediaries such as ISPs are, when it comes to preserving freedom of expression. In fact, Lucchi concludes that in some ways, “the constitutional principle of freedom of expression has been formally expanded to include Internet access as part of freedom of speech.”¹⁴ This high-level legal recognition in Canada and peer jurisdictions should inform the Commission’s decision in this matter, to deny section 36 approval to ISPs blocking websites under Bill 74.

D. Courts Recognize it is Important to Protect Communication Intermediaries in Provincial Context

15. OpenMedia notes that both the Supreme Court of Canada and the Quebec Court have addressed cases similar to the current matter, where the Government of Quebec defended a provincial law against charges of trespassing on a federal head of power. While the province succeeded in these cases, the courts’ reasoning in them in fact lend further support against Bill 74, and reinforce the necessary inviolability of ISPs as a passive medium of communication. The cases are: *Attorney General (Que.) v. Kellogg’s Co. of Canada et al.* (“*Kellogg’s*”),¹⁵ *Irwin Toy Ltd. v. Quebec (Attorney General)* (“*Irwin Toy*”),¹⁶ and the more recent *Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie’s)*.¹⁷ The passages below demonstrate that these cases turned precisely on the fact that the provincial law was *not* aimed at the broadcasting or telecommunications providers themselves, but rather at the actors who were responsible for the impugned actions, with broadcasting and telecommunications only incidental.

16. In *Irwin Toy* and *Kellogg’s*, for example, the challenged provincial law banned businesses from engaging in commercial advertising targeted at minors under thirteen years-old. The Supreme Court of Canada upheld the provincial law in both cases, despite charges that it violated federal jurisdiction over broadcasting due to the law including commercial advertising on television. While

¹⁰ *Crookes v Newton*, 2011 SSCC 47, [2011] 3 SCR 269, at paras 36, 89.

¹¹ Lucchi, *supra* note 9 at page 164.

¹² “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 USC § 230(c)(1) (1996).

¹³ Electronic Frontier Foundation, “CDA 230,” online: <<https://www.eff.org/issues/cda230>>.

¹⁴ Lucchi, *supra* note 9 at page 170.

¹⁵ *Attorney General (Que.) v. Kellogg’s Co. of Canada et al.*, [1978] 2 SCR 211 [“*Kellogg’s*”].

¹⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 [“*Irwin Toy*”].

¹⁷ *Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie’s)*, 2015 QCCQ 354.

the Court decided *Irwin Toy* under the *Charter* and *Kellogg's* was pre-*Charter*, the two cases share the following crucial point, as Dickson CJ, and Lamer and Wilson JJ emphasized in *Irwin Toy* about Martland J's analysis in *Kellogg's*:

Martland J. stressed the fact that the regulation was being applied and the injunction sought *against Kellogg and not against a television station*. [...] The implication of the distinction emphasized by Martland J. between application to the advertiser and application to a broadcast undertaking is that provincial legislation of general application with respect to advertising content would only be considered to encroach on exclusive federal jurisdiction with respect to broadcast content to the extent it was applied to a broadcast undertaking, that is, *to the control over content* exercised by such an undertaking rather than by an advertiser. (emphasis added)¹⁸

17. The Court of Quebec recently reiterated this point, in the context of the *Charter of the French Language* (CFL) and advertising on the Internet:

"While proof of the medium will virtually always be necessary particularly if it is specified in the charge it nevertheless is not in the context of the statute an essential element of the offence. It may well however determinate as to whether or not the publication is commercial in nature. Had the legislator elected, whether in the statute or in the regulation to specify or *spell out the potential vehicles of transmission* then the situation would have been different." [citing Justice Fraser Martin in *Reid v. Court of Québec*, 2003 CanLII 17980 (QC CS), emphasis added]

Though not formulated as such, the essence of Justice Fraser Martin's decision was to the effect that the enactment and enforcement of s. 52 of the *CFL* should not be equated with a governmental effort to *regulate the means used to transmit the message*. Instead, the governmental action reflects its will to regulate the *content of the message* being transmitted. It matters not at all if the message and its contents were transmitted in a paper form (such as the old Eaton's catalogues) or transmitted digitally via the internet. The medium is not the message. (emphasis added)¹⁹

18. The courts are unequivocal in the above cases: the provincial law survived challenge due to the fact that it regulated the message (or the sender) and not the medium (the transmitter). Bill 74, however, does exactly the latter: it regulates the medium directly, going after ISPs rather than those who are setting up the online gambling websites. Accordingly, the Commission should follow the courts' lead and decline to grant section 36 approval to ISPs for the purpose of complying with Bill 74.

19. While OpenMedia engages with many different issues, the following principle guides its work in Free Expression, and unites the organization's community, such as the more than 18,000 Canadians who signed the Bill 74 petition:

An open Internet is a place of free dialogue and creative expression, a place where we can all connect and collaborate in shaping the solutions to the world's problems. Censorship and interference—like government takedowns or content blocking—are the enemies of the Internet.²⁰

OpenMedia believes this principle applies particularly to the ISP provisions in Bill 74, if not for the sake of gambling sites in their own right, then for what they represent as canaries in the digital coal mine. In cases like the present matter, one of OpenMedia's perennial tasks is to apply the above principle to everyday Internet users' social and economic realities, and convert that into actionable policies that are rooted in those realities. In light of that, OpenMedia has been impressed throughout recent proceedings by the Commission's demonstrating genuine understanding of these on-the-ground struggles and experiences,²¹ and urges the Commission to continue using citizens' voices as a compass to guide its decision-making. This includes following through with its preliminary views regarding Bill 74 and section 36 as set out in the 1 September 2016 letter, such that Canadians can trust both their ISPs and the Commission to be custodians of an Internet that does not threaten and chill, but promotes and cultivates free expression.

¹⁸ *Irwin Toy*, *supra* note 16 at page 951(g).

¹⁹ *Boulangerie Maxie's*, *supra* note 17 at paras 117 and 121.

²⁰ OpenMedia, "How we operate", online: <<https://openmedia.org/en/ca/how-we-work>>.

²¹ See, e.g., Transcript (14 April 2016), *Review of basic telecommunications services* (9 April 2015), TNC CRTC 2015-134, online: CRTC <<http://www.crtc.gc.ca/eng/transcripts/2016/tt0414.htm>>.



Regards,

[original signed]

Cynthia Khoo
Legal Counsel (External)
OpenMedia

CC: Josh Tabish, OpenMedia, josh@openmedia.org
Katy Anderson, OpenMedia, katy@openmedia.org

Adam Balkovec, CRTC, adam.balkovec@crtc.gc.ca
Laurie Ventura, CRTC, laurie.ventura@crtc.gc.ca
Geoff White, PIAC, gwhite@piac.ca

Distribution List (in Commission Letter, 1 September 2016)

Attorney General of Quebec

*** END OF DOCUMENT ***