



Sent via CRTC Submission Form

27 June 2023

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

**Re: Reply comments of the Canadian Association of Broadcasters with respect to
Broadcasting Notices of Consultation CRTC 2023-139 and 2023-140**

1. As the representative of small, medium and large Canadian owned and controlled radio and television stations and discretionary services, both independent and vertically integrated, the Canadian Association of Broadcasters (CAB) is pleased to file these reply comments with respect to the above two Notices of Consultation.
2. While there is a broad array of views on these first steps in the articulation of a modernized regulatory framework, some common themes have emerged:
 - The registration regulations and initial conditions of service should be minimally intrusive and not add to the administrative burden of broadcasting undertakings;
 - Thresholds for registration and initial conditions of service can and should be lower than the thresholds for contribution, ensuring that the Commission is able to “(1) *keep track of online undertakings operating in Canada, and (2) collect the most basic information from these undertakings*”¹ and (3) maintain basic regulatory oversight, including a general prohibition on undue preference and a related requirement to respond to complaints.

¹ *Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations*, Broadcasting Notice of Consultation 2023-139, para. 7.

Summary

3. Having reviewed the records of the proceedings so far, the CAB is focusing its reply comments on the following key issues:
 - To ensure fairness and more effectively achieve the Commission’s objectives, the threshold to register and abide by the basic conditions of service should be applied to individual online undertakings rather than being applied to broadcast groups;
 - Basic undue preference provisions and the obligation to respond to information requests from the Commission need to apply to all online undertakings operating in the Canadian broadcasting system, regardless of revenue level;
 - Other requirements need only apply to online undertakings above a certain revenue threshold – the CAB recommends \$20 million as a reasonable midpoint;
 - Registration regulations and initial conditions of service should be minimally intrusive, particularly with respect to the information that must be provided at registration;
 - The proposed classes of exempt undertakings should not include those whose purpose consists of providing “unique transactions,” unless licensed VOD services are similarly exempted, but should specifically include online sites that provide video and text-based news content; and
 - The Commission must be cautious in the articulation of the definition of “annual revenues” to ensure that revisions to the proposed definition do not negatively impact the objectives underlying registration and the eventual contribution regime or create further regulatory asymmetry with respect to how the contributions of Canadian broadcasting undertakings are calculated.
4. The CAB elaborates on each of these issues below.

The threshold to register should be applied on an undertaking basis

5. Although some parties have supported the Commission’s proposal to register online undertakings affiliated with broadcast groups that earn over \$10 million (for example, the CMPA), the CAB continues to believe that, for the purposes of the registration of online undertakings, it makes no sense and would be unfair to apply the exemption threshold on an ownership group basis. The concept of “synergies” cited by the CMPA as a rationale for treating broadcasters differently is not relevant to achieving the stated purpose of the Commission’s registration regime, which is to keep track of online undertakings and gather basic information.
6. The Ontario Association of Broadcasters summed up the issue succinctly:

The proposed metric would result in asymmetrical regulation. A start-up streaming company would be exempt from any regulatory burden until they reach the first \$10M of revenue. Inclusion of broadcast revenue would mean that a large proportion of radio [and television] broadcasters would be subject to regulation based upon their first dollar of streaming revenue.

7. The CAB agrees that it would be inequitable (and unnecessary) to require traditional broadcasting licensees to register their online undertakings when group revenues exceed the threshold. It would result in the vast majority of online undertakings operated by Canadian broadcasters being registered, even where they earn very little revenue.² Moreover, it adds a further administrative burden to traditional broadcasters while doing little to provide useful information to the Commission or advance the policy objectives in the *Broadcasting Act* (the Act). Consequently, the CAB reiterates that, for the purposes of exemption from registration, the revenue threshold for online undertakings should be assessed at the undertaking level, consistent with how the Commission currently treats other types of exempt broadcasting undertakings.³
8. The CAB notes that certain parties have suggested that a lower threshold for registration is required to ensure eligibility for support or funding. The CAB agrees that smaller players, including services offering Indigenous and ethnic programming or serving official language minority communities, must have equitable access to industry support mechanisms whether or not they fall below a revenue threshold for the purposes of the registration regime. Indeed, we note that current exemption thresholds have not prevented exempt undertakings from accessing funding in the past where appropriate (i.e., with respect to CMF funding). That said, the CAB sees merit in the IBG/GRI position regarding an “opt-in” approach to registration as one potential way to recognize smaller players as full-fledged participants in the broadcasting system.

Undue preference provisions should apply to all online undertakings

9. In its initial comments, the CAB argued that the undue preference provisions (including the requirement to make content available over the internet) should apply to all online undertakings and not just those with revenues above a certain threshold. Applying the prohibition more broadly will ensure some degree of supervision over smaller online undertakings – for example, niche services serving ethnic and third-language audiences, which despite lower revenues still compete with Canadian services for content, subscribers and, in some cases, advertising – and will be more consistent with how the Commission applies rules of this nature to other industry players.
10. Canadian broadcasting companies and producers who commented on the issue generally supported such an approach, including, for example, CBC, DGC, IBG/GDI, CMPA, TLN and WildBrain.

² For example, a Canadian broadcaster with \$15 million in total revenue, but only \$100,000 in online revenue would need to register, whereas a standalone online undertaking with \$9.9 million in revenue would not.

³ For example, terrestrial BDUs below 20,000 subscribers are exempt from licensing even if owned by a BDU with licensed systems in other markets. The same is true of discretionary services under 200,000 subscribers. See: Broadcasting Order CRTC 2017-320, *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers* (31 August 2017); Broadcasting Order CRTC 2015-88, *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers* (12 March 2015).

11. While TELUS and Bragg/Eastlink also raised a number of additional concerns about the potential for anti-competitive behaviour, the CAB believes the bulk of their concerns can be addressed through robust application of the Commission's undue preference regime. Nevertheless, their comments which further support the CAB's position that undue preference provisions should apply to all online undertakings.

12. In its submission, CBC provided a real and current example of why there needs to be baseline undue preference provisions:

25. A recent example is Alphabet/YouTube requiring content providers to agree to new commercial terms in their YouTube Partner Program, which contemplates a new deduction from gross revenue called Country Pass-Through Costs ("CPTC"). The CPTC appears to be a way to circumvent upcoming regulatory fees.

...

In 2023, Alphabet/YouTube announced a global contract change for all participants in its Partner Program. This Partner Program provides certain benefits to participants, including sharing revenues from the advertising sold around their content uploaded to YouTube. Alphabet/YouTube have announced that all participants must accept the new commercial terms, which includes the CPTC, in order to continue participating in revenue sharing and other benefits. The new commercial terms must be accepted by July 10, 2023 to continue to monetize on YouTube. If participants do not sign, then participants are excluded from revenue sharing and other benefits from the Partner Program, while Alphabet/YouTube can continue to monetize the content uploaded and keep the revenues to itself.

13. Without an undue preference provision, contractual terms such as the CPTC will allow online undertakings to avoid and/or "pass on" any regulatory contributions and fees they may incur in the future resulting in even more financial pressure on content creators and suppliers.

14. The CAB notes that several, if not all of the foreign providers – including Amazon, AMC, Apple, Google, Spotify and those represented by MPA-Canada – argued that undue preference provisions are unnecessary in the online environment. They noted that online undertakings have the incentive of seeking the widest possible distribution of their services, including offering their services directly to Canadian consumers without restrictions.

15. Nevertheless, the CBC's description of the unilateral application of the CPTC is a prime example of why the Commission needs to apply undue preference provisions to all online undertakings.

16. The CAB continues to believe that undue preference provisions (and related obligations to file information/respond to complaints at the request of the Commission) should apply to all online undertakings to ensure that there is oversight and recourse if ever an undertaking, regardless of size, were to confer an *undue* preference or disadvantage. While the foreign services have expressed concern about possible 'regulatory uncertainty,' the Commission has a well established, open and transparent process for dealing with such claims.

A revenue threshold of \$20 million is reasonable

17. The records of these proceedings include many different recommendations as to the correct threshold for registration and the application of basic conditions of service, as well as the eventual threshold(s) for contribution.
18. The Commission has clearly stated that it intends to focus on those online streaming services who contribute in a material manner to the implementation of the broadcasting policy set out in section 3(1) of the Act, while avoiding imposing an unnecessary burden on those that may not. Adopting too low a threshold – as recommended, for example, by ACTRA (\$5 million), la Fédération culturelle canadienne-française (FCCF) and Fédération des communautés francophones et acadienne (FCFA) (\$1 million), FRIENDS (\$1 million) or the National Campus and Community Radio Association/ l'Association nationale des radios étudiantes et communautaires ("NCRA/ANREC") (\$2.5 million) – would put considerable administrative burden on the industry, particularly nascent services, as well as stretch the resources of the Commission.
19. On the other hand, adopting too high a threshold would thwart the Commission's stated intent (at paragraph 7 of BNOc 2023-139) to *"(1) keep track of online undertakings operating in Canada, and (2) collect the most basic information from these undertakings."*
20. In addition, Bragg/Eastlink has suggested that all online undertakings associated with vertically integrated companies should be required to register, regardless of the revenue earned by those undertakings. We believe there is no valid policy reason to have separate registration requirements depending on ownership structure. Moreover, any conditions imposed at the set revenue threshold should be applied broadly and should not be dependent on ownership structure. As noted above, the concerns raised by Bragg/Eastlink will be addressed by the broad application of undue preference.
21. The CAB is of the view that the threshold for registration can and should be lower than the eventual threshold(s) for contribution, permitting the Commission to keep an eye on services as they grow and eventually reach a level that will require them to make contributions to the Canadian broadcasting system. Registration is also different from regulation. As noted earlier, online undertakings can be subject to basic requirements relating to such issues as undue preference, while still being exempt from registration requirements.
22. As we argued in our initial submission, we believe that the proposed threshold of \$10 million is too low. The largest online undertakings – Netflix, Disney+, Spotify – all have revenues exponentially higher than this amount. Further, as online undertaking revenues grow, \$10 million will quickly seem out of date, capturing services that do not make a material contribution to the system. The CAB believes that its proposal of \$20 million – for the purposes of registration and any base conditions of service – strikes the right balance.
23. Although some parties have argued in favour of a subscriber threshold, the CAB is concerned that such an approach might exclude a broad swath of services that are exclusively ad-supported (including, for example, free ad-supported television or "FAST" channels). Therefore, the CAB recommends that the Commission retain its proposed revenue threshold.

Initial registration information requirements should not be burdensome.

24. Although several parties have argued for more detailed information requirements as part of the registration returns, the CAB agrees with the Commission's intent to keep the registration requirements light, requiring only basic information about online streaming services. Such an approach would also respond to concerns expressed by several non-Canadian online providers, including Apple, DiMA, Google, and Spotify, including with respect to confidentiality.
25. With respect to the more detailed information sought by parties such as ADISQ, APFC, CMPA, DOC, and QEPC, the CAB notes that under the proposed conditions of service, the Commission will also have the ability to collect the information it considers necessary for the administration of the Act, including financial information and information related to programming expenditures or audience measurement. Indeed, the Commission already collects such information through the **Annual Digital Media Survey** according to principles set out in Broadcasting Regulatory Policy CRTC [2022-47](#) and Broadcasting Decision CRTC [2023-34](#), including with respect to the handling of confidential information. There is no need to add to the list of basic information required in the proposed registration regulations set out as Appendix 1 to BNOC 2023-139.
26. That said, in light of some of the comments in this proceeding, the Commission may wish to elaborate on the basic information required in section (e) of the registration return to ensure that parties fully describe their services, including whether they offer audio or video services (or both), and the languages in which they operate. All other information can be collected as part of the Annual Digital Media Survey or upon request by the Commission.

Other proposed exemption criteria

27. There seems to be significant concern about the Commission's proposal to exempt "*online undertakings whose single activity and purpose consists of providing unique transactions.*" The CAB reiterates that like undertakings need to be regulated in a like manner. As a result, transactional VOD, regardless of whether it is distributed by a BDU over a managed network or delivered over the internet, should either be regulated or not regulated. The mode of delivery – online or via a broadcast distribution undertaking (BDU) – is not a distinguishing factor.
28. As recommended by some of its members in their submissions, the CAB reiterates its support for the exemption of online news services. This would ensure consistency and fairness in the online news space, reduce pressure on the Commission to measure and track the point at which a news site ceases to be mainly textual (and thus outside the scope of the Act), and avoid the possible distortion of the Canadian online news market as operators seek to tailor their offerings to put a greater emphasis on text versus video solely to avoid registration.

29. The CAB notes that some parties have proposed that additional classes be added to the list of exemptions. We are concerned that some of these proposals – for example, Amazon recommends exempting aggregators of third party content, and Apple and Spotify recommend exempting podcasts – would result in the exemption of broad categories of online activities or exclude some or all of the revenues from such activities in direct opposition to the objectives of the Act.
30. The CAB is of the view that, subject to the above comments regarding unique transactions and its recommendation that the Commission exempt online news services, the Commission’s proposed exemption classes are sufficient at this point in time.

Definition of Annual Revenue

31. The CAB notes that several parties, including foreign online providers, have proposed amendments to the definition of “annual revenues” and “broadcasting activities.” The CAB urges the Commission to consider such proposed amendments with a high degree of caution to ensure that they do not result in excluding activities or revenue that should be captured, in light of the objectives of the *Broadcasting Act*. The Commission must also guard against any regulatory inequity between foreign online streaming services and Canadian broadcasting undertakings by establishing different methodologies for the eventual calculation of contribution requirements.
32. All of which is respectfully submitted.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'K. Desjardins', with a stylized flourish at the end.

Kevin Desjardins
President
Canadian Association of Broadcasters