



12 June 2023

Filed online

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Secretary General,

Re: *Call for comments Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings, Broadcasting Notice of Consultation 2023-140 (Ottawa, 12 May 2023)*

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian communications system that serves the public interest as defined by Parliament in the *Broadcasting Act* to which Royal Assent was given on 27 April 2023. FRPC asks to appear before the CRTC should it hold a public hearing regarding this notice of consultation.

The Forum's intervention regarding [Broadcasting Notices of Consultation 2023-140](#) (2023-140) is attached

2023-140 "invites comments that address the issues and question set out" in the notice (paragraph 42). Meanwhile subsections 27(2)(a) and (b) of the [Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure](#) (SOR/2010-277) restrict replies "to the points raised in" interveners' documents, and to admitting or denying the facts these documents raise. Given this statement and the fact that the CRTC on 9 June 2023 denied the 12-party procedural request submitted 21 days earlier on 12 May 2023 to extend the deadlines for the 2023-140 proceeding, so as in part to enable interested parties to gather and submit relevant evidence, the Forum reserves the right to submit evidence in its replies and also filed a procedural request about this matter on 10 June 2023.

FRPC looks forward to reviewing other parties' comments.

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***Call for comments – Review of exemption orders and transition
from conditions of exemption to conditions of service
for broadcasting online undertakings***

**Broadcasting Notice of Consultation CRTC 2023-140
(Ottawa, 5 May 2023)**

**Railroading interveners onto uneven tracks leading to
asymmetrical destinations**

Comments of the Forum for Research and Policy in Communications (FRPC)

Monday, 12 June 2023

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Executive Summary

ES 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.

ES 2 FRPC begins by addressing several matters related to procedural fairness which were not raised in 2023-140: its lack of meaningful information and its straitened deadline preclude substantive and informed comment by the public, including by FRPC. These troubling problems and the risk that decisions made in 2023-139 and 2023-140 may be used to bootstrap and justify additional and even-more problematic regulatory requirements down the track, heighten the risk of court challenges of any determinations reached by the CRTC in these proceedings.

ES 3 While 2023-140 says it is simply offering “some basic regulatory oversight for online undertakings” that “would serve to ensure symmetry between online undertakings and licensed broadcasters in respect of requirements set out in the current exemption orders” (paragraph 6), it is difficult to understand from the notice how the existing exemption orders that are in some cases more than a dozen pages long will operate (if they exist at all) in conjunction with the proposed, 3-page long exemption order.

ES 4 FRPC then addresses several issues.

First, it argues that Exemption order 2012-409 (DMEO) and Exemption order 2015-356 (VOD/HVOD), which refer to licensed undertakings could be amended to remove these references, and re-issued as conditions of service that apply to all (relevant) broadcasting undertakings.

Second, it notes that the absence of a detailed comparison of the impact of the CRTC’s proposals on offline and online broadcasters alike makes it difficult in the time provided by the Commission for these consultations to evaluate the impact of the change it is proposing: FRPC does **not** support proposals whose effect would be to eliminate all, many or most legal requirements now being met by Canadian online broadcasters.

Third, amending what is currently an intricate structure of obligations, responsibilities and ‘rights’ may have unintended consequences, including the clear possibility that regulation will become entirely asymmetrical.

Fourth, neither 2023-139 nor 2023-140 should enable the CRTC, through reporting requirements imposed on online undertakings, to breach Canadians’ privacy rights.

Fifth, neither 2023-139 nor 2023-140 have provided any evidence to support the exemption from regulation of online undertakings with less than \$10 in annual revenues, of video games or of single-transaction online broadcasters. (Granted that the Minister of Canadian Heritage has since the publication of 2023-139 and 2023-140 announced his intention to direct the CRTC not to regulate the latter two categories of online undertaking – as 2023-139 and 2023-140 were issued before this intention was published, the CRTC bore an onus to explain how its proposals meet subsection 9(4)'s test for exemption.

and

Sixth, 2023-139's proposed exemption order uses wording that is vague, inconsistent and confusing. Given their importance to existing broadcasters and newly-scoped-in online broadcasters alike, this wording should be made precise, consistent and clear.

*Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu
le loisir de la faire plus courte.*
Blaise Pascal, *Lettres provinciales*, N° 16 (1657), cited by [Le figaro](#)

I. Introduction

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.
- 2 In the pages that follow FRPC provides comments addressing “the matters raised” in 2023-140.¹
- 3 The Forum’s comments begin, however, by addressing several matters related to procedural fairness which were not raised in 2023-140: the lack of information provided by the CRTC in this notice, the implications of a rushed public process and the lack of clarity about the next steps that will drop as a result of decisions made by the CRTC in this and the 2023-140 proceeding.
- 4 FRPC then addresses the CRTC’s proposed exemption order in terms of the asymmetry it will cement between offline and online broadcasters operating in Canada, and the challenges presented by inadequate definitions.

A. Lack of information limits informed comment by most parties

We encourage everyone to participate in these consultations
and to share your ideas so that, together,
we can design the broadcasting system of the future.
CRTC, [Creating the future today. Together. Right Now.](#)”

Speech to the Canadian Chapter of the International Institute of Communications (Ottawa, 15 May 2023).

As we embark on this journey, I’m reminded of the proverb:

“If you want to go fast, go alone. If you want to go far, go together.”

CRTC Chairperson, “Going Fast and Far Together: Our Journey to Create the Broadcasting System of the Future”, Vicky Eatrides to the Banff World Media Festival delivered in Banff on 12 June 2023, e-mail from the CRTC delivered at 12:04 PM ET

¹ BNoC 2023-139, at paragraph 21:

The Commission invites comments that address the issues and questions set out above. The Commission will accept comments that it receives on or before 12 June 2023. Only parties who file comments may file a reply to matters raised during the comment period. The deadline for the filing of replies is 27 June 2023. All parties who file comments will also have the opportunity to file a final reply to any replies received. The deadline for the filing of final replies is 12 July 2023.

Well, a democracy just can't work without the people having information. That is key to making decisions around how you vote. It's key to making informed decisions. We're in this age of social media where people are substituting opinions for facts. Facts are absolutely basic to good democratic governance and accountability.

Former Supreme Court of Canada Chief Justice Beverley McLachlin, quoted in Robyn Doolittle, ["Beverley McLachlin: 'A democracy just can't work without the people having information'"](#), *Globe and Mail* (7 June 2023)

- 5 A fundamental challenge set out by the CRTC's 2023-140 notice of consultation is that it lacks relevant context and empirical information alike about the matters it raises. If these gaps preclude many interested participants from providing the CRTC with clear, researched and well-developed ideas to design "the broadcasting system of the future", the CRTC will be 'walking alone so that it can go fast' (see second citation set out above). How surprised will anyone be if non-Canadian online broadcasters apply to the Federal Court of Appeal and perhaps thereafter, to the Supreme Court of Canada, for answers regarding questions of the CRTC's jurisdiction and its authority in the new *Act*?
- 6 The lack of any information in 2023-140 about amending or rescinding exemption orders is also somewhat surprising because by 8 December 2020,² the CRTC had assigned 123 of its staff³ to work on "key issues" related to legislative change in nine areas, as shown in Figure 1.

Figure 1 CRTC response to ATIA A-2021-00074 showing working groups established by 8 December 2020

Group	Key issues to be addressed
1. Data Collection	What information needs to be collected from online undertakings and traditional undertakings in the future? How should competitively sensitive information be treated?
2. Ownership/Registration/Transactions	How should we determine which undertakings are subject to regulation? What ownership transactions might be in the public interest and/or what conditions could be placed on transactions to ensure they are in the public interest?
3. Contribution Framework	Who might be subject to contribution requirements to support Cancon, and at what level (revenue/subscriber thresholds)? How could we ensure equitability between new online entities and traditional services/groups?
4. Updated Cancon certification and regulatory support	How should Canadian content be defined, and what incentives and other regulatory measures could be used to optimize its production, distribution and promotion in the digital age?
5. Regulatory obligations/regulatory obligations from old to new system	Which of the existing regulations might best be adapted to the new Act, left in place, or eliminated?
6. Operational Change management/Business transformation	What changes will be necessary to the Commission's processes and operations to accommodate its new potential responsibilities? How can the impact of changes be managed most effectively?

² CRTC, Access to information request A-2021-00074 – final release package.

³ CRTC, Access to information request A-2022-00019 – release package.

(Figure 1, continued)

7. AMPs and compliance activities	How could AMPs and other enforcement techniques be used to ensure compliance with the new provisions of the Act?
8. Inclusion	How could we ensure that the needs and interests of diverse groups are served and reflected in Canadian broadcasting? Such groups include Indigenous peoples, persons with disabilities, racialized communities and Canadians of diverse ethno-cultural backgrounds, socioeconomic statuses, sexual orientations, gender identities and expressions and ages.
9. Communicating changes	How should we best communicate all of the changes in the system, both internally and externally, including with existing stakeholders, new stakeholders and the public in general.

7 In other words, does 2023-140 tacitly admit that over the 125 weeks between early December 2020 and 5 May 2023 the CRTC has been unable to develop any ideas about an appropriate approach to exemption orders during the transition phase set out in the *Broadcasting Act*? (In which case, does the CRTC’s decision to grant the public four weeks to achieve what the CRTC was unable to accomplish in 2.4 years imply a superabundance of confidence in the public, or a preference to proceed on its course without informed comments of the public?)

8 Alternatively, is the CRTC perhaps attempting to best or to provide supportive wording regarding the two-year timeline for full implementation of the *Act* set out in the Minister’s proposed *Direction* to the CRTC?:

Implementation

19 The Commission is directed to make changes to its regulatory framework that are necessary for the purposes of the implementation of this Order within two years after the day on which it comes into force. In doing so, the Commission is directed to prioritize the implementation of sections 13 to 16 and to ensure that changes to its regulatory framework are made as soon as feasible and on a continual basis during that two-year period.

Mise en œuvre

19 Il est ordonné au Conseil d’effectuer, dans les deux ans de la date d’entrée en vigueur du présent décret, tout changement nécessaire à son cadre réglementaire pour la mise en œuvre du présent décret. Il est ordonné au Conseil, ce faisant, d’accorder la priorité à la mise en œuvre des articles 13 à 16 et de veiller à ce que ces changements soient effectués aussitôt que possible et sur une base continue au cours de cette période de deux ans.

Canada Gazette, Part I, Volume 157, Number 23: [Order Issuing Directions to the CRTC \(Sustainable and Equitable Broadcasting Regulatory Framework\)](#)

9 Whatever the CRTC’s reasoning, launching three related proceedings on the same day and setting four-week deadlines for two of these including this one scarcely invites Canadians to ‘journey together’ with the CRTC as it implements the *Broadcasting Act*. In fact, it is more likely that the rushed timelines, the absence of context and the lack of relevant information will dissuade them from participating or limit the scope of their comments (with potential implications for further replies down the track).

10 The absence of factual information in the 2023-139 and 2023-140 notices of consultation has four negative results. The first is that the CRTC’s failure to provide factual information prevents parties who lack detailed understanding of or experience with online broadcasting

undertakings from participating on a footing equal to that of online broadcasting undertakings now operating in whole or in part in Canada: this prevents many smaller organizations and civil society groups from providing the CRTC with informed comments.

Ministers of Canadian Heritage and Innovation, Science and Economic Development, *New CRTC Chair's Leadership Will Help Shape the Future of Canada's Communication System*, [News Release](#), (Gatineau, 6 February 2023):

Public interest decision making requires hearing from diverse interests. Right now, there is a perception among many that access to CRTC processes is unequal. While the regulator's open and evidence-based processes are a core strength, barriers to participation remain. Smaller organizations and civil society groups, in particular, expressed concern about not having the same level of resources as large corporate interests to participate in CRTC proceedings.

- 11 The second consequence of providing no factual information is that parties' inability to participate effectively grants the CRTC near-complete discretion to implement a regulatory framework or regulatory frameworks to which it has already given three years of its staff's time. Even if the CRTC subsequently assures participants that the decisions it makes now are merely interim – because it could always modify its decisions within the next two years or beyond – interim CRTC decisions have an unfortunate tendency to govern future decision-making and to render changes in a prospective future entirely moot (“we’ve been doing it this way for some time, so we will continue to do so”).
- 12 The third consequence of not providing factual information in 2023-140 is that there is no way at this time to assess whether the requirement for exemptions in the *Act* regarding orders that 2023-140 proposes to amend, issue or rescind has been met. Subsection 9(4) stipulates that the CRTC may only exempt broadcasting undertakings from its Part II requirements when imposing such requirements “will not contribute in a material manner” to implementation of Parliament’s subsection 3(1) broadcasting policy:

Broadcasting Act, section 9:

Exemptions

(4) The Commission shall, by order, on the terms and conditions that it considers appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part, of an order made under section 9.1 or of a regulation made under this Part if the Commission is satisfied that compliance with those requirements **will not contribute in a material manner** to the implementation of the broadcasting policy set out in subsection 3(1).

Marginal note: Repeal or amendment

(5) The Commission shall repeal or amend an exemption order made under subsection (4) if the Commission considers that doing so will contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

- 13 If the exemption orders issued under the former *Act* failed to meet that *Act*'s objectives, the CRTC should then have arguably said so in 2023-140 to justify amendments to those orders under the current *Act*. 2023-140 does not, however, make this point.

14 More perplexing still is that 2023-140 refers to the entire group of online undertakings in its Appendix. As shown in Table 1, below, the CRTC’s website identifies just two (2) hybrid video-on-demand services that may (or may not) be operating online:⁴ how many online undertakings will be covered by the exemption order set out in the Appendix to 2023-140? 2023-140 does not say – but if the answer is ‘many’, that answer alone and the complexity of the proposals it discusses again beg the question of, why such haste?

Table 1 Exempted offline broadcasting services operating in Canada

Type of “Service subtype”		Number	Type of “Service subtype”		Number
1	Audio Programming	1	7	On-demand Service (Hybrid VOD)	2
2	Cable	1215	8	On-demand Service (Video-on-demand)	10
3	Cable (Class 2)	3	9	Radio (tourist/weather/traffic/Env. Can)	7
4	Digital Media Audio	5	10	Specialty (category A service)	1
5	Discretionary Service	316	11	Specialty (category B service)	4
6	Discretionary Service (Mainstream Sports)	2	12	Television (SatCab) (other)	1
			13	Video-on-Demand	2
Total					1569

Source: CRTC, [Radio, TV and Cable Broadcasting Services that do and do not need a licence](#), exempted services only (11 June 2023); number based on count of “Call Sign/Name of service” shown in the CRTC’s list.

15 Finally, the CRTC’s new, information-free approach to inviting public comment on complex issues effectively transforms the CRTC’s ‘public consultations’ into pre-scripted theatre. This relegates the public to the role of extras whose voices, if heard at all, may be ignored. Shortened deadlines, lack of information and the absence of context all free the CRTC to ‘travel alone’ wherever it wishes.

B. Haste makes waste

16 A second, equally-serious problem flows from the first set out above. The CRTC has explained its decisions to impose four-week deadlines in this proceeding and in the related 2023-139 proceeding, to launch simultaneously a third related proceeding (2023-138), and to deny a procedural request to extend the deadlines in the 2023-140 proceeding one business day before the deadline, on the basis of its intention

... to proceed as expeditiously as possible in order to support the Commission’s subsequent policy development [and a]ny extension of time would delay the timely implementation of the amendments to the *Broadcasting Act* and the Commission’s *Regulatory Plan to modernize Canada’s broadcasting system*.⁵

⁴ Again, lack of information in and the decision to deny extensions in the 2023-139 and 2023-140 consultations preclude detailed understanding of just what the CRTC is doing or is attempting to do.

⁵ Secretary General, *RE: Broadcasting Notice of Consultation CRTC 2023-139 – Procedural Request*, Broadcasting - Secretary General Letter addressed to the Distribution List [unnumbered paragraphs], “Commission’s Determination”. FRPC received this letter by e-mail at 4:12 pm ET.

- 17 That the CRTC – despite its Chairperson’s public commitment ‘to ‘move matters along expeditiously’ in some areas of its work⁶ – required a full three weeks (21 calendar days including the 9 calendar days following the CRTC’s receipt on 31 May 2023 of the 12-party answer to interventions that were filed the previous day on 30 May 2023) to decide whether to grant an extension in this proceeding may well remain a mystery for the ages.
- 18 Another mystery is the basis of the CRTC’s remark in the third paragraph of the 2023-140 “Summary” that the Commission
- ... is also examining whether there is a need to transition to new regulatory requirements (conditions of service) that would replace certain of the conditions of exemption that were previously set out in those exemption orders and to whom those conditions of service should apply.
- 19 The CRTC’s comment raises a basic question about timing: surely, if the Commission does not yet know whether it needs to transition, it needed to and should have answered that question before issuing 2023-140?
- 20 Second, subsection 90(3) specifically deems all orders previously issued by the CRTC to have been made by the CRTC under the new *Act* as long as the orders do not contradict the new *Act*:
- [90](3) **Every decision, order, rule and regulation issued, rendered or made under the former Act by the Commission or Executive Committee that is in force on the coming into force of this subsection and that is not inconsistent with this Act or any other Act of Parliament shall be deemed to have been issued, rendered or made by the Commission under this Act.**
[bold font added]
- 21 As 2023-140 does not mention this transitional provision of the current *Act*, parties may be unaware that the CRTC could have simply amended any references to ‘licensing’ in those orders – either by removing them or by adding a reference to ‘registration’. Assuming the CRTC had solid grounds not to propose this option itself, what were these?
- 22 The central problem with the CRTC’s desire to proceed “expeditiously” and its apparent belief that what it essentially describes as transitional requirements is that the hastier and less procedurally fair the CRTC’s proceedings, the greater the likelihood of serious questions being raised before the Federal Court of Appeal about the determinations reached by the CRTC on the basis of its proceedings. Section 31(2) of the current *Broadcasting Act* continues to

⁶ On 15 May 2023 the Chairperson said
... We are doing our part for Canadians, and we need you to do yours.
That means abiding by our timelines. Giving us the information we need so that we can do our jobs. Filing only valid Part 1s that are within the scope of our mandate. And on final offer arbitration, and dispute resolution more generally, that means moving matters along expeditiously.
CRTC, [Creating the future today. Together. Right Now.](#)” Speech to the Canadian Chapter of the International Institute of Communications (Ottawa, 15 May 2023).

provide that Court as an avenue for challenging the CRTC's decisions on questions of law or jurisdiction:

31 (1) Except as provided in this Part, every decision and order of the Commission is final and conclusive.

(2) An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

23 As the *Broadcasting Act* also now defines 'decision' broadly – section 2 states that “decision includes a determination made by the Commission in any form; (décision)” – parties may now file applications to appeal not just the CRTC's decisions but its regulatory policies. The subtle difficulty is that if the decisions from 2023-139 or 2023-140 lead to other regulatory requirements, a party's failure to object to the 2023-139 and 2023-140 decisions may preclude objection at a later date.

24 Equally important is the fact that railroading interveners – allegedly because of the CRTC's goal to be expeditious – leaves interested parties very little time to consider a range of questions that are related to the proposals it has raised.

25 For instance the CRTC working group assigned to “Data Collection (see Figure 1) apparently directed itself to consider the treatment of “competitively sensitive information” but not the treatment of information defined as “private” by the [Privacy](#) and the [Personal Information Protection and Electronic Documents Acts](#). ‘Giving’ inadequate time to analyze and discuss with others the implications of the CRTC's proposals may result in determinations that will, as noted above, result in court challenges. Doubtless this is why the expression ‘haste makes waste’ exists.

C. Waiting for the next shoes to drop

26 Finally, FRPC notes that the Commission says that 2023-140 simply offers “some basic regulatory oversight for online undertakings” that “would serve to ensure symmetry between online undertakings and licensed broadcasters in respect of requirements set out in the current exemption orders” (paragraph 6).

27 This statement is difficult to understand, as a comparison of the existing exemption orders for digital media, hybrid and video-on-demand undertakings with 2023-140's proposed exemption order shows major gaps. For one thing, [the proposed exemption order](#) is 3 pages long. The two appendices in the revised 2015 video-on-demand exemption ([Broadcasting Order 2015-356](#)) cover 13 pages. The statement's use of “some” also implies that more will follow.

28 It would have been preferable if the CRTC had, in its Regulatory Plan, offered substantive clarity about the interplay of determinations it reaches in 2023-139 and 2023-140.

II. FRPC comments on 2023-140

29 This section sets out comments regarding the references to licensing in the CRTC's current exemption orders for digital media undertakings, video on demand and hybrid video on demand. It then addresses the importance of 'regulatory symmetry'. It continues by addressing risks to Canadians' privacy from broadened information-gathering requirements, and the lack of evidence Forum's comments regarding the proposed exemption order in 2023-140. It notes the absence of evidence to support the Commission's proposal not to seek material support for the implementation of Canada's broadcasting policy from online broadcasters earning from \$2 million to \$10 million per year. Finally, it provides a line-by-line analysis of drafting problems in the Appendix to 2023-140.

A. *Remove references to licensing*

30 Exemption order 2012-409 (DMEO) and Exemption order 2015-356 (VOD/HVOD) make references to licensed undertakings, making them difficult to apply to online undertakings that require neither licences nor exemption to operate in Canada.

31 Given the transitional deeming provision in section 90(3) of the *Act*, the CRTC could address this legal issue by removing references to licensing in the existing Exemption orders, and re-issuing the orders as conditions of service that apply to online broadcasting undertakings.

B. *Ensure regulatory symmetry*

32 2023-140 states at paragraph 6 that online broadcasters require 'some basic regulatory oversight' to ensure symmetry between online and offline broadcasters:

... some basic regulatory oversight for online undertakings should be maintained until the numerous issues that will need to be dealt with in the transition to the current Broadcasting Act can be more fully addressed. Such oversight would serve to ensure symmetry between online undertakings and licensed broadcasters in respect of requirements set out in the current exemption orders, such as the prohibition on giving an undue preference, and the requirement to provide basic information to the Commission.

33 Comparing the exemption-order requirements in the 2023-140 Appendix with the requirements previously set out by the CRTC for 'licensable' undertakings shows, for example, that while the proposed exemption order in 2023-140 takes a total of in fact, that implementation of 2023-140's proposals will establish a regulatory approach to online and offline broadcasting that is wildly asymmetrical.

34 The absence of a detailed comparison of the impact of the CRTC's proposals on offline and online broadcasters alike – a comparison that neither 2023-139 nor 2023-140 provides – makes it difficult in the time provided by the Commission for these consultations to evaluate the impact of the change it is proposing.

35 FRPC does **not** support proposals whose effect would be to eliminate all, many or most legal requirements now being met by Canadian online broadcasters for two reasons.

- 36 First, the CRTC developed these requirements in 2012 and 2015 on the heels of more than a decade of experience with new problems raised by online broadcasting. The CRTC took 17 months to issue its first exemption related to online broadcasting in [mid-December 1999](#), after inviting comments on what then “New Media” at the end of July 1998. The [current \(2012\) DMEQ](#) emerged 21 months after the CRTC [first sought comments about the matter in fall 2010](#).
- 37 In that context, the **one-month timeframe** for review of changes proposed by 2023-140 is unworkable for evaluating the impact of changing these requirements. In our view, the requirements were designed to expand Canadians’ access to programming choices, and to ensure reasonable treatment by distribution services of programming services. Dropping or amending bits and pieces of an intricate structure of obligations, responsibilities and ‘rights’, may have unintended consequences, including rapid applications by offline broadcasters for commensurate regulatory relaxation.
- 38 Second, Parliament cannot have intended that the CRTC would ‘move fast and break things’ on the ground that the *Broadcasting Act* in subsection 5(2)(g) says that the CRTC “should” be “sensitive” to administrative burdens – because if, in several years, the CRTC’s decisions have weakened Canada’s broadcasting system the same subsection will be used to argue that the CRTC cannot change what it has already wrought. As a result, changes made as a consequence of 2023-140 cannot be viewed as merely ‘transitional’: they must be evaluated to determine how they will affect the broadcasting system after two years.
- C. *Broadened information gathering requirements and Canadians’ privacy rights***
- 39 CRTC’s failure to provide relevant information about its proposals in 2023-140 leaves uncertainty about their true scope. For example, 2023-140 refers at paragraph 28 to a “broadened information gathering condition ...to have the ability in the future ... to understand ... the habits and preferences of online viewers”. (FRPC assumes that the term, ‘viewers’, may also encompass those using online broadcasting services who do not ‘view’ the services.)
- 40 While it remains somewhat uncertain how this requirement will play out, Parliament has clearly directed the CRTC to ensure that the interpretation and application of the *Broadcasting Act* “is consistent with ... the right to privacy of individuals” (section 3).
- 41 FRPC considers that all requirements imposed by the CRTC on broadcasters – whether offline or online, whether through registration requirements, conditions of service or exemption orders - must ensure that individuals are not inadvertently or advertently re-identified. Much of the data obtained through the CRTC’s requirements is likely to be considered highly confidential. Even Canada’s six-character postal codes may disclose information that is confidential, leading the Federal Court to reconfirm (in a case involving postal codes) the Supreme Court’s position regarding privacy:

... in a clash between access to information and individuals’ privacy rights, privacy must prevail. That is also Parliament’s intention, as is evident from the relationship between the *ATIA* and the *Privacy Act*.

[Cain v. Canada \(Health\)](#), 2023 FC 55 (CanLII), at paragraph 192; see also Dr. Teresa Scassa, University of Ottawa Canada Research Chair in Information Law and Policy, [“Federal Court Dismisses Application for an Order against Facebook - and Raises Some Issues for PIPEDA Reform”](#) (17 April 2023).

42 The scope of the CRTC’s proposal in paragraph 28 is unclear: could it result in the CRTC’s requests for information about users’ specific interests in youtube, OnlyFans, PornHub, political sites or in other sites whose disclosure could be highly sensitive? FRPC does not support potential intrusive reviews of users’ habits and preferences.

43 The CRTC must therefore ensure, in its determination in this matter, in its information bulletins and in any other guidance provided to all broadcasters subject to these new information-collection requirements that it cautions broadcasters gathering such information about Canadian privacy-based limits to information collection.

D. No evidence justifying exemption for undertakings with \$2 million to \$10 million in annual revenues

44 The Appendix to 2023-140 includes a \$10 million threshold below which online undertakings will not be required to support Canada’s broadcasting policy. In the absence of any evidence to meet the subsection 9(4) exemption criteria – such as facts – the legal of this exemption threshold is, at best, uncertain.

E. Drafting problems in the CRTC’s proposed exemption order

1 “annual revenues”

45 The CRTC’s proposed exemption order begins by referring to “annual revenues”.

Annual revenues means revenues **attributable** to the person or that person’s subsidiaries and/or **associates**, if any, **collected** from the **Canadian broadcasting system across all services** during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year for which the revenue calculation is being filed), whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings. This includes online undertakings that operate **in whole or in part** in Canada and those that **collect revenue** from other online undertakings by offering bundled services on a subscription basis. The Commission will accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

46 At least six terms (see yellow highlighting above) are undefined and could create ambiguities:

“attributable”

Attributable by whom?

“associates”

What legal relationship exists between online undertakings and associates?

“collected”	Does the CRTC envisage parties merely gathering money from other sources, earning revenues or some other type of ‘collection’
“Canadian broadcasting system”	Is this from all entities who use the system such as unregulatable advertisers, licensees, registrants and all other online broadcasters?
“across all services”	All <i>broadcasting services</i> , or some other services?
“in whole or in part”	What does “in part” mean and how will the CRTC determine when an undertaking is operating wholly or only partly in Canada?

2 *Additional ambiguities*

47 The following table sets out additional concerns about the wording used in the Appendix to 2023-139.

Appendix to Broadcasting Notice of Consultation CRTC 2023-140	
Proposed conditions for carrying on certain online undertakings	
The Commission hereby proposes, pursuant to subsections 9.1(1) and (4) of the Broadcasting Act (the Act), to impose the following conditions on certain persons carrying on online undertakings, as defined in the Act.	It is unclear from 2023-140 what persons will not be governed by these conditions
Interpretation	
The following definitions apply in this order.	
Annual revenues means revenues attributable to the person or that person’s subsidiaries and/or associates , if any, collected from the Canadian broadcasting system across all services during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year for which the revenue calculation is being filed), whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings. This includes online undertakings that operate in whole or in part in Canada and those that collect revenue from other online undertakings by offering bundled services on a subscription basis . The Commission will accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.	<p>What is the definition of “attributable” and who will undertake the ‘attributing’?</p> <p>Does ‘subsidiaries’ refer solely to broadcasting subsidiaries? How are “associates” defined?</p> <p>Are revenues “collected” or “earned”?</p> <p>What is the scope of “collected from the Canadian broadcasting system across all services”? Does it include advertisers? Does it encompass all activities undertaking within the broadcasting system (because, as the CBC explained during its 2019-22 licence renewal process, it now also provides, earns revenue and incurs expenses from non-programming services), or is it limited to broadcasting activities?</p> <p>Is the “revenue calculation” a new CRTC form?</p> <p>How is “traditional broadcasting undertakings” defined? (Does this actually refer to broadcasting undertakings that operate offline?)</p>

	<p>May online undertakings “collect revenue from” offline undertakings? In what country or countries may the other online undertakings be located? Can “offering bundled services on a subscription basis” include a subscribe fee charged to obtain easy access to other services that provide unique transactions?</p>
Broadcast year means the period beginning on September 1 and ending on August 31.	
Broadcasting ownership group means a person that controls one or more persons that carry on one or more affiliated broadcasting undertakings to which the Broadcasting Act applies and includes all persons that carry on those broadcasting undertakings.	<p>Has the CRTC defined “control”? How is affiliated defined in this context? (Is it related to networking?)</p>
Excluded revenue means revenue that originates from providing video games services or unique transactions.	FRPC does not support the exception that this definition will enable.
Unique transaction means a one-time rental or purchase of an individual program transmitted or retransmitted over the Internet.	How many times can a one-time rental of the same program be made? Can a service offer a one-time rental with unlimited repeat uses?
Video game means an electronic game which involves the interaction of a user by means of an Internet connected device, where the user is primarily engaged in active interaction with, as opposed to the passive reception of, sounds or visual images, or a combination of sounds and visual images.	2023-139 does not provide any evidence to support this exemption (made, one assumes, under subsection 9(4) of the Act)
Video games service means the transmission or retransmission of video games over the Internet to enable users to select and play video games.	
Application	
This Order does not apply to persons carrying on broadcasting undertakings defined by any of the following four classes:	2023-139 does not provide any evidence to support this exemption (made, one assumes, under subsection 9(4) of the Act)
i. online undertakings whose single activity and purpose consists of providing video games services;	May online undertakings control services that include single-activity video game undertakings?
ii. online undertakings whose single activity and purpose consists of providing unique transactions;	May online undertakings control services that include unique-transaction undertakings?
iii. online undertakings affiliated with a broadcasting ownership group that has, after deducting any excluded revenue, annual revenues of less than \$10 million; or	No rationale has been provided for the \$10 million threshold.
iv. online undertakings that have no affiliation whatsoever with a broadcasting ownership group and have, after deducting any excluded revenue, annual revenues of less than \$10 million.	
Condition of Service – Information Gathering	
1 An online undertaking shall provide, in such form and at such time as requested by the Commission:	
a. information regarding the undertaking’s online activities in Canada, and such other information that is required by the	This wording is inexplicably vague.

<p>Commission in order to monitor the development of online broadcasting;</p>	
<p>b. information regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking’s technical operations, subscribership or financial affairs in Canada;</p>	
<p>c. information regarding the undertaking’s adherence to the conditions of service, the Act, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and</p>	
<p>d response to a complaint filed by a person.</p>	
<p>Condition of Service – Undue Preference</p>	
<p>2. The online undertaking shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.</p>	
<p>Condition of Service – Availability of Content</p>	
<p>3. All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific broadcasting distribution undertaking, or mobile service, or retail Internet access service.</p>	
<p>Condition of Service – Fee Return</p>	
<p>4 (a) An online undertaking shall, on or before 30 November each year, file a fee return, on the form provided by the Commission and containing the information required in the form for the broadcast year, for the one-year period beginning 1 September of the year preceding the calendar year in which the return is required to be filed.</p>	<p>Has this return been developed?</p>
<p>(b) For the purposes of paragraph (a), fee revenue, in respect of an online undertaking, means the gross revenue derived during a broadcast year from the Canadian broadcasting activity of the online undertaking, or by an affiliate, and, without limiting the generality of the foregoing, includes</p>	<p>Canadian broadcasting activity is undefined, vague and inconsistent with the wording used in (b)(i), below</p>
<p>i. the gross annual Canadian broadcasting revenue, as reported by the online undertaking and validated by the Commission, where the undertaking has not filed a fee return covering 12 months of the most recently completed return year; or,</p>	<p>What is the difference between ‘gross revenue derived from Canadian broadcasting activity’ and ‘gross annual Canadian broadcasting revenue’? If there is no difference, why use different wording?</p>
<p>ii. if such information is not available, the gross annual Canadian broadcasting revenue that, based on the trends of the market in which the undertaking operates, its business plan and its previous financial performance, the Commission considers to be related to its broadcasting activity.</p>	<p>“trends”, “market” “business plan” and “previous financial performance” and “related to its broadcasting activity” are undefined</p>
<p>This definition does not include any amount received by an online undertaking from another broadcasting undertaking to</p>	<p>It is unclear what this text is intended to achieve</p>



which the Broadcasting Licence Fee Regulations, 1997 apply, other than the amounts received from the Canadian Broadcasting Corporation for the sale of airtime.	
(c) This condition will be of no force or effect 30 days after any amendments to the Broadcasting Licence Fee Regulations, 1997, or new regulations, come into effect.	

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