

A “Stream” of New Regulation: CRTC Implements Registration Requirements and Conditions of Service for Online Streaming Services in Canada

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October 4, 2023

On September 29, 2023, the Canadian Radio-television and Telecommunications Commission (CRTC) announced the immediate implementation of its first two regulatory steps under Canada's *Online Streaming Act*: requiring non-exempt online streaming services that operate in Canada to register with the CRTC and to adhere to certain conditions of service. These new requirements follow a series of CRTC public consultations convened over the summer of 2023, examining how the CRTC ought to implement its new authority under the *Online Streaming Act* to regulate online broadcasting undertakings in Canada. The new conditions of service are now in effect, while the requirement for certain streaming services to register with the CRTC must be completed by November 28, 2023.

Background

As discussed in our previous Cassels Comment, the *Online Streaming Act* received royal assent in April 2023, providing Canada's *Broadcasting Act* with its most expansive refresh in over 30 years. Arguably the most notable amendment that the *Online Streaming Act* made to the *Broadcasting Act* was to expand the classes of “broadcasting undertakings” under the *Broadcasting Act* to include a new class of “online undertakings.” Online undertakings are defined as undertakings that transmit or retransmit programs over the Internet for reception by the public by means of broadcasting receiving apparatus, including undertakings more commonly known as online streaming services.

Shortly after the *Online Streaming Act* became law, the CRTC announced a set of three public consultations relating to the extent to which online undertakings should be required to financially contribute to the Canadian broadcasting system; which online undertakings should be required to register with the CRTC; and what (if any) conditions of service ought to be imposed upon online undertakings while operating in Canada. The latter two consultation periods closed in July 2023, while the first will culminate in a public hearing beginning in November 2023.

New Registration Requirements for Online Streaming Services

The CRTC's first publication on September 29, 2023 was its Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330, which brings the *Online Undertakings Registration Regulations* into force and introduces a requirement on certain online streaming services to register with the CRTC.

As the CRTC emphasized throughout its policy decision and order, the new registration requirement is relatively minimal and is intended to allow the CRTC to maintain an up-to-date registry of online undertakings operating in Canada. Online undertakings that operate in Canada and are not otherwise exempt from the registration requirement must complete an online registration form setting out:

- the name of the online undertaking;
- the name, mailing address, phone number and email address of the operator of the undertaking;
- the location where the operator was incorporated or formed and the location of its head office; and
- the types of broadcasting services offered by the undertaking (e.g., whether it offers video services, audio services, or a combination of both).

However, not all streaming services that operate in Canada are required to register. The CRTC has concurrently published an exemption order that sets out certain types of online undertakings that are exempt from this registration requirement. The main category of exemption is revenue threshold-based – online undertakings with less than \$10 million in annual Canadian gross revenues from broadcasting activities will not be required to register. For online undertakings that are part of larger broadcasting ownership groups, the group's collective or aggregated annual Canadian gross revenues from broadcasting activities must be less than \$10 million for the online undertaking to be exempt from registration.

The exemption order also exempts from registration two other categories of online undertakings; namely, online undertakings that only provide video game services and online undertakings that only provide audiobook services. Notably, the CRTC decided not to create a category of exemption for online undertakings who exclusively offer “unique transactions” (such as rentals or one-time purchases) despite proposing this category during the public consultation process. The CRTC also rejected various other exemption categories that had been proposed by industry stakeholder groups during the consultation process, such as exemptions for online news broadcasters, streaming services that exclusively offer niche or thematic content, and streaming services that exclusively transmit or retransmit certain types of podcasts that are not already excluded from the application of the *Broadcasting Act*.

The CRTC also used Broadcasting Regulatory Policy CRTC 2023-329 to reiterate that although *undertakings* that provide social media services are required to register, *users* of those social media services are not required to register, even if those users individually meet the \$10 million annual revenue threshold. This restatement is likely the CRTC's response to backlash from social media platforms and content creators, who expressed concerns that the *Online Streaming Act* could lead to restrictive regulation of the type of content that is shared by social media users in Canada.

Online undertakings that are not exempt from the registration requirement must register with the CRTC by **November 28, 2023**. Going forward, new online undertakings or online undertakings that do not currently meet the \$10 million revenue threshold will be required to register with the CRTC within 30 days after the end of the broadcasting year in which their revenues met the threshold.

New Conditions of Service for Online Streaming Services

The CRTC's second publication on September 29, 2023, was Broadcasting Regulatory Policy CRTC 2023-331 and Broadcasting Order CRTC 2023-332, which repeals the CRTC's long standing *Digital Media Exemption Order* (DMEO) and replaces it with a new conditions of service order that non-exempt online undertakings are immediately required to follow in order to operate or continue to operate in Canada.

Prior to the new CRTC Broadcast Regulatory Policy and Broadcasting Order, broadcasting undertakings not licensed by the CRTC could still operate in Canada if they fell within the fence posts of a CRTC exemption order, such as the DMEO. Since the current *Broadcasting Act* no longer requires online undertakings to be licensed, the CRTC has determined that the DMEO is no longer the most appropriate tool to regulate online undertakings, and the conditions once included in the DMEO should instead be included in a new conditions of service order applicable to all non-exempt online undertakings.

The conditions of service that online undertakings operating in Canada must now follow include:

- providing the CRTC, when requested, with information related to the undertaking's online activities in Canada, subscribership and finances, and evidence of compliance with the *Broadcasting Act*, its regulations, and other industry standards;
- prohibiting the online service from giving undue preference to any person or subjecting any person to an undue disadvantage;
- prohibiting the online service from offering programming in Canada over the Internet in a way that is dependent upon or tied to a person having a subscription to a specific retail Internet access service or mobile service; and
- filing a "fee return" with the CRTC, when requested, which discloses the online undertaking's annual revenues from its Canadian broadcasting activities.

Despite being an exemption condition in the former DMEO, the CRTC chose not to impose an "anti-competitive head start rule" as a continuing condition of service in the new CRTC Broadcasting Regulatory Policy and Broadcasting Order. The anti-competitive head start rule prohibited an undertaking from making new discretionary services available only on certain broadcasting distribution undertakings' platforms without making those services available to all other broadcasting distribution undertakings. The CRTC noted that such a condition would be unnecessary given the current business model of most online undertakings that are already inherently incentivized to distribute their services over the Internet in the broadest manner

possible. The CRTC also declined to impose at this time a condition of service relating to dispute resolution, deferring an appropriate dispute resolution process for consideration during a future CRTC public proceeding.

The online undertakings that are subject to these conditions of service are the same categories of online undertakings that are subject to the registration requirements discussed above, i.e., undertakings that meet the \$10 million threshold of Canadian annual gross revenues from broadcasting activities and that do not fall under the video game or audiobook exemptions.

Key Takeaways

These two new CRTC policies and orders represent the CRTC's first significant steps in the implementation of its new authority to regulate online undertakings following the passage of the *Online Streaming Act*. Although these initial requirements will likely not be burdensome for most online undertakings, non-exempt undertakings should be mindful of their immediate effect – the conditions of service are already in force, and the registration requirement must be satisfied by November 28, 2023.

Further, more substantial regulation of online streaming services is likely to come in the near term once the CRTC completes its follow-along public consultation related to the modernization of the contribution framework whereby certain online undertakings will likely be required to financially contribute to the maintenance and promotion of Canada's broadcasting sector. More information about this framework will likely follow the CRTC's public hearing to be concluded in December 2023.

If you have any questions about the new regulatory requirements on online undertakings discussed in this article and how they may impact your business, please do not hesitate to contact any member of the Cassels Entertainment & Sports Group.

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