

## Canadian Heritage Releases Directions to CRTC for Implementation of Online Streaming Act

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On November 14, 2023, the Department of Canadian Heritage released the final version of its directions to the Canadian Radio-television and Telecommunications Commission (CRTC) on the implementation of Canada's federal *Online Streaming Act*. The CRTC continues to move forward with consultations and hearings on the creation of a new modernized Canadian framework for the regulation of broadcasting undertakings, including online streaming services, and these directions provide useful clarifications regarding priorities that the federal government wants addressed as part of that new framework.

### 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. One of the most notable amendments in the *Online Streaming Act* is the expansion of the classes of "broadcasting undertakings" in the *Broadcasting Act* to include a new class of "online undertakings" that fall within the purview of oversight and regulation by the CRTC. 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." The *Online Streaming Act* also refreshed and expanded Canada's broadcasting policy and enhanced the CRTC's authority to oversee and enforce that policy.

Shortly after the *Online Streaming Act* became law, the CRTC released a regulatory plan for its implementation. That plan confirmed that the CRTC is intent on building a new regulatory framework that will govern broadcasting undertakings (both traditional and online). The framework is expected to include regulations to address the types of contributions that broadcasting undertakings will be required to make to support Canada's broadcasting industry; requirements and incentives to showcase more Canadian and Indigenous content on their broadcasting platforms; and other ways these undertakings will be required to assist in the achievement of Canada's updated broadcasting policy.

Evidencing the importance of developing a modernized regulatory environment to fulfil the objectives of the *Online Streaming Act*, the CRTC initiated a series of public consultations in the summer of 2023, one of which is still ongoing, while the Department of Canadian Heritage's policy directive, "Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)" (the Directions),

remained only in draft form. The draft contained various provisions outlining what the federal government believed the CRTC must consider, prioritize, and impose when implementing its powers under the *Broadcasting Act* to regulate Canada's broadcasting sector. The federal government invited public comment on the draft in June and July 2023, resulting in over 350 submissions from individual members of the public, undertakings, and other broadcasting, production, and media industry groups.

## The Final Directions

The Department of Canadian Heritage posted the final version of the Directions online on November 14, 2023, in advance of its formal publication in the Canada Gazette on November 22, 2023. Despite the significant number of stakeholder comments in response to the earlier draft, the final version of the Directions is largely unchanged, other than minor phrasing revisions and a more explicit recognition of the need to foster collaboration between Canadian broadcasting undertakings and foreign broadcasting undertakings.

Three significant components of the final version of the Directions are particularly noteworthy:

**1. Social Media Creators Exempt from Broadcast Regulation.** The Directions underscore and reinforce, as did the earlier draft, that the *Online Streaming Act* is *not* intended to regulate individual content creators on social media. Section 10 of the Directions expressly prohibits the CRTC from imposing any regulatory requirements on “online undertakings in respect of the programs of social media creators,” with “social media creator” defined as a person who creates programs primarily intended for online distribution as user-uploaded programs through social media services. This clarification is a response to the significant controversy that arose while the *Online Streaming Act* was still in committee, with many social media platforms and prominent social media influencers around the world criticizing the bill as potentially authorizing the CRTC to limit or control free speech. Clearly, the regulation of social media creators will be a battle left for another day.

**2. An Emphasis on Shelf-Space Visibility for Canadian Programming and Canadian Creators.** The Directions emphasize the support, promotion, and discoverability of programming that is owned and created by Canadians. Section 4 of the Directions — one of the first substantive provisions in the document — directs the CRTC to impose requirements on undertakings that ensures that the Canadian broadcasting system strongly supports “Canadian programming” and “Canadian creators.” The remainder of the Directions include provisions related to ensuring that Canadian programming is discoverable and showcased (section 6) and that the Canadian broadcasting system maximizes the use of Canadian creatives and human resources in the creation, production, and presentation of programming (section 9). The press release by the Department of Canadian Heritage that was posted on the same day as the final Directions further emphasizes that, in the Department's view, the goal of the *Online Streaming Act* is to support Canadian and Indigenous stories and music.

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Historically, the CRTC has tried to focus on defining “Canadian” for broadcast content programming purposes by adopting the definition of that term used in the context of refundable Canadian film and video production tax credit purposes, as augmented by the recognition as “Canadian” of certain international co-ventures (principally US-Canadian co-ventures) certified by the CRTC. With this definition, the CRTC has required Canadian broadcasting undertakings — but so far not online undertakings — to devote a portion of their broadcasting day, during specified times of day, to Canadian programming and to contribute public benefits (i.e., a portion of their revenues) to recognized media production funds accessible by Canadian content producers for production funding purposes.

Although the Directions do not impose a new definition of “Canadian programming” for the purpose of the CRTC’s modernized regulatory framework, section 13 of the Directions does instruct the CRTC to consider certain factors when developing that new definition. Those factors include the need to support Canadian ownership of intellectual property, the need to support Canadians holding a broad range of key creative positions on productions, and the need to consider the role of Canadian independent producers and Canadian creative resources. One would expect a continued emphasis along traditional lines, with perhaps novel tweaking to recognize production particularities attendant to online undertakings, the challenges of Canadian visibility in a crowded and borderless online streaming environment, and the recognition that, while telling Canadian and Indigenous stories continues to be a cultural and economic imperative, so too is the development of world-class Canadian artistic and technical talent in an increasingly international marketplace.

**3. Technological Advancement Dictates being Nimble with Regulation.** The final Directions are consistent with both the CRTC’s and the Department of Canadian Heritage’s emphasis on ensuring that any requirements imposed on broadcasting undertakings under a new regulatory framework be flexible and adaptable. That emphasis includes the recognition throughout the Directions that the framework will apply not just to domestic Canadian broadcasters, but also to foreign broadcasters (especially online undertakings) that operate in Canada, and that there is a need to ensure that new regulatory requirements are not unduly onerous for foreign undertakings.

## Key Takeaways

While the Directions do not deviate much from the principles both the CRTC and the Department of Canadian Heritage have emphasized since the passage of the *Online Streaming Act* earlier this year, they do convert those general comments into legally binding directions that the CRTC is now required to follow. As a result, they are likely to have a significant influence on how the CRTC develops its modernized contribution framework, including how that framework will address social media content, Canadian programming, and the different priorities of domestic and foreign undertakings.

The impact of the Directions will likely begin to be felt very soon: the CRTC will be holding its first public

hearing related to the development of its modernized contribution framework beginning on November 20, 2023. It will also be interesting to watch whether the anticipated new CRTC definition of “Canadian” programming is ultimately adopted by the Departments of Finance and Canadian Heritage to concurrently refresh the definition of Canadian content for purposes of the Canadian Film or Video Production Tax Credit program.

The Cassels Entertainment & Sports and Intellectual Property Groups have been closely monitoring the implementation of the *Online Streaming Act*. If you have any questions about the *Online Streaming Act*, the Directions, or how they may affect your business, please contact any member of our Entertainment & Sports or Intellectual Property Groups.

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