



12 June 2023

Filed online

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Secretary General,

Re: *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 (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 2023-139](#) (2023-139) is attached

2023-138 "invites comments that address the issues and questions" in the notice (paragraph 21). 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 2023-139 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 – Proposed Regulations
for the Registration of Online Streaming Services
and Proposed Exemption Order regarding those Regulations:**

When will the next shoes drop?

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

Monday, 12 June 2023

Monica Auer, M.A., LL.M.

Counsel

Contents

Executive Summary	1
I. Introduction	1
A. Lack of information limits informed comment by most parties	1
B. Haste makes waste	8
C. CRTC's threat regarding 'violations' of its registration requirements	9
D. Waiting for the next shoes to drop	11
II. FRPC comments on 2023-139	15
A. Implications of 'deregistration' are unclear	15
B. Failures to explain exclusions in sufficient detail	15
C. Drafting problems in the regulations proposed by 2023-139	17
1 Definitional issues	17
2 Clear description in the proposed Regulations of those who must register.	18
3 Application of the Online Undertakings Registration Regulations	18
4 Updates	18
III. CRTC's proposed exemption orders	19
A. Basis for exempting three classes of online undertaking from regulation is unclear	19
B. Updated information about exempted classes of offline and online broadcasters	21
C. Drafting issues	21
1 Definitional issues	21
2 Measurement issues	22
3 Operational issues	22
Appendices	23
Appendix 1 Proposed Online Undertakings Registration Regulations – line-by-line analysis	23
Appendix 1 Proposed exemption order respecting classes of online undertakings in relation to the proposed Online Undertakings Registration Regulations – line-by-line analysis	29

Executive Summary

- ES 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013. It undertakes research, legal analysis and quantitative research about communications, including broadcasting. FRPC believes that the public interest is served when it meets Parliament's objectives for the broadcasting system, as set out in section 3 of the current *Broadcasting Act*.
- ES 2 FRPC's comments regarding 2023-139 begin by setting out three matters related to procedural fairness.
- ES 3 First, FRPC notes the lack of information set out in 2023-139 despite the CRTC's collection of 2020/21 and 2021/22 data about digital media through its *Digital Media Survey* and 2023-139 confirmation that the CRTC has information, though "limited". The complete absence of relevant information in 2023-139 effectively prevents parties who lack such information from participating on a footing equal to that of more experienced participants, gives the CRTC nearly complete discretion to implement a regulatory framework it has already devised, prevents observers from understanding how the CRTC is applying its exemption authority under subsection 9(4) of the *Broadcasting Act*, and more generally leaves the impression that consultation with the public is a somewhat inconvenient afterthought that has little to offer the CRTC. The CRTC's decision to give interested parties 30 days to submit comments on 2023-139 and 2023-140 and to issue its decision denying requests for an extension of deadlines just one business day before the deadlines may have strengthened that impression: given the CRTC's fixed intent to retain the 2023-139 and -140 deadlines regardless of the impact on interveners the CRTC should have issued its determination within five business days of receiving that request (by 19 May 2023).
- ES 4 Second, the CRTC's haste to gather comments about the regulations and the exemption order proposed in 2023-139 simply heightens the risk that results from this and other unduly hasty proceedings will wind up being challenged before the Federal Court of Appeal.
- ES 5 Third, the CRTC's threat that failures to register as required by its proposed Online Undertakings Registration Regulations would be violations capable of resulting in fines of up to \$10 million is difficult to reconcile with the *Broadcasting Act*'s statement that anyone may broadcast online without being licensed or exempted from licensing. The CRTC has offered no explanation of why it believes threats of financial penalties are the best way to begin its regulation of online broadcasting.
- ES 6 Fourth, by railroading interested parties to the finish line of the 2023-139 and 2023-140 proceedings, the CRTC has distracted attention from the larger landscape of its regulatory "Plan". The proposed *Online Undertakings Registration Regulations* in fact collect so little data about individual online undertakings that one gains the impression that they are merely 'gateway regulations' to enable the CRTC to collect yet more information down the track (so to speak).

- ES 7 What other plans does the CRTC have for additional regulations going forward – and when will those shoes drop?
- ES 8 In the remainder of its comments FRPC set out its comments regarding deregistration, the absence of clarity surrounding the purposes of the *Online Undertakings Registration Regulations*, and four sets of drafting problems in the proposed *Regulations*. Insofar as the proposed Exemption Order is concerned, FRPC notes the absence of any clear legal foundation for exempting “unique-transaction” online undertakings, a series of definitional issues, problems related to measurement and the lack of description showing how the *Regulations* and the Exemption Order interact. The Forum’s initial concern was triggered by the absence of any evidence showing that online broadcasters offering video game services are unable to contribute materially to implementing Parliament’s broadcasting policy for Canada. Parliament’s expectation is that the CRTC just make its decisions independently. But is it plausible that with no previous discussion on this point, the CRTC made its evidence-free proposal to exempt online video game broadcasters from regulation on 5 May 2023 entirely of its own accord when 34 days later Cabinet explicitly proposed to order the CRTC to exempt online video gaming services?
- ES 9 Appendix 1 provides detailed recommendations for clarifying the *Online Undertakings Registration Regulations*, while Appendix 2 provides similar recommendations for the proposed exemption order.

*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 and as specifically requested by Broadcasting Notice of Consultation 2023-139 (2023-139) FRPC provides “comments that address the issues and questions”¹ set out in 2023-139.
- 3 The Forum’s comments begin by addressing several matters related to procedural fairness: 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 shoes 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 *Online Undertakings Registration Regulations* and its proposed exemption order in terms of definitional lack of clarity, terminological inconsistency and uncertainty as to application. FRPC’ section-by-section concerns about the *Regulations* and the exemption order are set out in table format in Appendices 1 and 2, respectively.

A. *Lack of information limits informed comment by most parties*

*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 2023-139 provides no empirical information or objective data about the matters it addresses.

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.

6 The absence of such information in this ‘gateway’ proceeding is surprising for several reasons. First, the CRTC has known about the possibility of Parliament’s enacting new broadcasting legislation for the past seven years when the then-Heritage Minister said “she was willing to change laws such as the Broadcasting Act and the Telecommunications Act, as well as modify the mandates of the CBC and the CRTC — Canada’s broadcast regulator.”²

7 The lack of any information in 2023-139 about the state of online undertakings is also surprising because the CRTC itself filed detailed comments about proposed legislative changes in January 2019.³ By 8 December 2020⁴ it had assigned at least 123 of its staff⁵ to work on “key issues” related to legislative change in nine areas, as shown in Figure 1 (next page).



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² CBC News, “Heritage Minister Mélanie Joly urges change at CBC, CRTC to boost Canadian content in digital age”, CBC ([23 April 2016 at 7:25 PM EDT | Last updated April 24, 2016](#)).

³ When the CRTC submitted its written reply to the Broadcasting and Telecommunications Legislative Review Panel — see “[A call for comments](#)”.

⁴ CRTC, Access to information request A-2021-00074 – final release package.

⁵ CRTC, Access to information request A-2022-00019 – release package.

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?
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.

8 Second, the CRTC called “for comments on a new, annual digital media survey” four years ago⁶ and announced more than a year ago that it would launch the survey of “all [Digital Media Broadcasting Undertakings] that operate in whole or in part in Canada” in 2022.⁷ The CRTC required each digital media broadcasting undertaking to complete [Digital Media Survey – Registration Form – Form 157](#). Among other things, this form asked for the following information:

2. Information on the digital media broadcasting undertaking

- *Name of the DMBU:
- *Related licensed broadcasting undertakings
 - Stand-alone () or
 - Affiliated Canadian broadcasting undertakings ()
 - If so, identify (provide all call signs or service names):
- *Unique content (original programming) provided through DMBU? (yes or no)
- *Type of Service:
 - Audiovisual
 - AVOD (Advertisement-based video on demand) ()
 - SVOD (Subscription-based video on demand) ()
 - TVOD (Transactional-based video on demand) ()
 - HVID (Hybrid video on demand) ()
 - Audio
 - Advertisement-based audio ()
 - Subscription-based audio ()
 - Transactional-based audio ()
 - Hybrid audio ()
 - Over-the-air radio station broadcast live-streamed over the internet ()
 - Podcast service – free access ()
 - Podcast service – subscription-based ()
 - Other
 - BDU (e.g. revenues from DMBUs) ()
 - Live or on-demand broadcast of video game playthrough or competition (e.g. esports or speedruns) ()
 - Other – please specify:
- Language of content, if applicable [must total to 100%].
 - % English
 - % French
 - % Indigenous
 - % Other – please specify:
- *Website(s) address(es):
- *Launch date (in Canada) (year/month/day):
- *Country of incorporation:
- *Location of headquarters:

⁶ Call for comments on a new, annual digital media survey, [Broadcasting Notice of Consultation CRTC 2019-90](#) (Ottawa, 28 March 2019).

⁷ Annual Digital Media Survey, [Broadcasting Regulatory Policy CRTC 2022-47](#) (Ottawa, 23 February 2022).

- 9 Third, 2023-139 in fact confirms that the CRTC has at least some information about online undertakings operating in Canada: “[c]urrently the Commission has only limited information on online undertakings operating in Canada. ...”⁸
- 10 As, presumably, the purpose of this consultation is to enable interested members of the public to provide the CRTC with useful comments about the CRTC’s proposed *Online Undertakings Registration Regulations* and not to enable the CRTC to check ‘public consultation’ off a checklist, 2023-139 should have included more information. For instance, what does the CRTC now know about online broadcasting operating in Canada in whole or in part? What difficulties has it encountered in obtaining this information? Did participants in the last two surveys – covering the 2020-21 and 2021-22 broadcast years⁹ – state any concerns about the surveys? Most importantly – what did the CRTC learn about digital media broadcasting undertakings operating in whole or in part in Canada: how many such undertakings are operating wholly or only partially in Canada and did this figure change from one year to the next?
- 11 The absence of factual information in the 2023-139 and 2023-140 notices of consultation has four negative results.
- 12 The first result 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.

- 13 The second consequence of providing no factual information in the 2023-139 and 2023-140 notices of consultation and the impact this has on informed comments interested parties is that this lack of information effectively grants the CRTC nearly complete discretion to

⁸ 2023-139: “7. Currently the Commission has only limited information on online undertakings operating in Canada. ...”

⁹ *Ibid.*:

... Responses to the survey for the 2020-2021 broadcast year must be filed by 30 June 2022. Subsequent surveys will be administered each fall with a filing deadline of 30 November. Templates of the survey forms are included as Appendices 2 and 3 to this regulatory policy”

...

(unnumbered paragraph).

implement a regulatory framework or regulatory frameworks to which it has already given three years of its staff's time.

14 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 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”).

15 The third consequence of not providing factual information in 2023-139 is that there is no clear evidentiary foundation for the CRTC’s proposed \$10 million exemption-order threshold for online undertakings. The current Act establishes 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).

16 What then, is the rationale for the \$10 million figure, and how does this threshold compare with the thresholds established by the CRTC in the [42 exemption orders](#) listed on its website, setting out 13 categories of broadcasting services that it has exempted from licensing requirements: Table 1.

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.					

- 17 This question is difficult to answer because the CRTC does not publish a coherent set of information about the criteria it uses to determine whether a broadcast service is likely or is unlikely to contribute materially to the implementation of Parliament's broadcasting policy. The CRTC also does not publish such information about the thresholds at which specific classes of broadcasting undertakings are or are not exempted from regulation.
- 18 In fact, the CRTC appears to have developed different criteria for different broadcast media. For example, the CRTC has exempted seven types of radio programming undertaking from regulation:
- Exemption order for low-power tourist information related radio programming undertakings (see Broadcasting Order 2014-447);
 - Exemption order for low-power radio stations that provide programming from houses of worship (see Broadcasting Order 2013-621);
 - Exemption order respecting certain native radio undertakings (see Broadcasting Order 2014-448);
 - Exemption order respecting radio and television temporary network special event type 1 undertakings (see Broadcasting Order 2009-182);
 - Exemption order respecting low-power radio: Limited duration special event facilitating undertakings (see Public Notice 2000-10);
 - Exemption order respecting low-power radio: Ultra low power announcement service (LPAS) undertakings (see Public Notice 2000-10);
 - Exemption order respecting carrier current undertakings whose services are not carried on distribution undertakings (see Public Notice 2000-10).¹⁰
- 19 The CRTC then uses its regulations for radio broadcasters to require radio licensees whose total annual revenues exceed \$1.25 million to devote \$1,000 plus 0.5% of its revenues above \$1.25 million to initiatives eligible for Canadian content development funding:¹¹ meaning that radio licensees with revenues below \$1.25 million are effectively exempted from the requirement to allocate specified amounts to Canadian content development.
- 20 Meanwhile the CRTC has also exempted television programming undertakings based on subscriber levels or the relative novelty of their broadcasting service,¹² although its television and its distribution regulations do not state similar requirements.

¹⁰ *Call for comments on proposed amendments to exemption orders for various types of radio programming undertakings*, [Broadcasting Notice of Consultation CRTC 2016-427](#), (Ottawa, 26 October 2016), at paragraph 10.

¹¹ [Radio Regulations, 1986](#), s. 15(2).

¹² The CRTC referred in 2015 to the "new and evolving nature of many [Video-on-Demand or VOD] services" in *Call for comments on proposed amendments to the exemption order for video-on-demand undertakings and to the standard conditions of licence for video-on-demand undertakings*, Broadcasting Notice of Consultation CRTC 2015-87 (Ottawa, 12 March 2015), paragraph 4.

As set out in Broadcasting Regulatory Policy 2014-444, licensed VOD services are required to contribute to Canadian programming in the following ways:

- 100% of revenues from Canadian feature films must be remitted to the Canadian rights holder, subject to an agreement to the contrary;
- not less than 5% of the English-language feature films in the inventory available to subscribers are Canadian;
- not less than 8% of the French-language feature films in the inventory available to subscribers are Canadian;
- not less than 20% of all programming other than feature films in the inventory available to subscribers are Canadian;
- the feature film inventory must include all new Canadian feature films;
- not less than 25% of the titles promoted each month on any barker channel are Canadian titles; and
- 5% of gross annual revenues are to be contributed to an existing Canadian program production fund administered independently of the undertaking.

Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming, Broadcasting Notice of Consultation CRTC 2015-86 (Ottawa, 12 March 2015), at paragraph 80.

- 21 FRPC agrees with the CRTC's comments in January 2019 that all regulatable participants in Canada's broadcasting system must bear a share of the responsibilities set out in Parliament's broadcasting policy for Canada:

Perpetuating a regulatory system that places a disproportionate emphasis on national players and their domestic activities will place increasing burdens on those players and will not enable either the regulator or the Canadian broadcasting system to achieve Parliament's public policy outcomes, since it ignores the full impacts—both positive and negative—of non-traditional service providers.¹³

- 22 Unfortunately, incoherence on the part of the regulator when it comes to offline radio, television and distribution broadcasters raises fears that a similar level of incoherence will emerge concerning as-yet unknown classes of online undertaking.
- 23 The final consequence of the lack of information in 2023-139 is that it creates the impression that the Commission is actually indifferent to the opinions and ideas of the public.
- 24 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 that relegates the public to the role of extras whose voices, if heard at all, are ignored.

B. *Haste makes waste*

- 25 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 2023-140 proceeding, to launch simultaneously a third related proceeding, and to deny a procedural

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CRTC, [Written Public Submission to the Legislative Review Panel](#), (Ottawa, January 2019) at page 10.

request to extend the deadlines in the 2023-139 and 2023-140 proceedings 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*.¹⁴

- 26 The central problem with the CRTC's desire to proceed "expeditiously" 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 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.

- 27 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 are now at liberty to file applications to appeal not just the CRTC's decisions but its regulatory policies.

C. *CRTC's threat regarding 'violations' of its registration requirements*

- 28 The CRTC proposes to require the following undertakings to complete its registration form:

- Online undertakings with more than one type of activity – as those with the single activity of video game services or the single activity of "providing unique transactions" need not register¹⁵
- Online undertakings not affiliated with a broadcasting ownership group (Canadian, presumably?)
- Online undertakings "affiliated with a broadcasting ownership group" (Canadian, presumably?) with more than \$10 million in gross revenues in the previous year from Canadian broadcasting activities

¹⁴ 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.

¹⁵ 2023-139, paragraph 17.

- 29 While 2023-139 states that its “registration requirements are meant to be light” (without defining what this means), it also states that failure to register “would constitute a violation under the current *Broadcasting Act*”,¹⁶ presumably under section 33 of the *Act*.¹⁷
- 30 Violations of the CRTC’s registration regulations could attract significant fines. Part II.2 of the *Act* permits fines¹⁸ to be imposed for contravening the CRTC’s regulations or orders:¹⁹ (first) violations of up to \$25,000 (for individuals) and up to \$10 million for all other persons’ (first) violations, subject to any regulations set by Cabinet.²⁰ The *Act* also permits the CRTC to levy such fines up to three years after the regulations or orders were contravened.²¹
- 31 The *Act* does not specifically state that those broadcasting online without registering with the Commission are to be penalized. Rather, section 32 sets fines for broadcasting offline without a licence and without being exempted from licensing (as required by section 31.1(1)) while section 31.1 (2) allows all persons to broadcast online without being licensed and without being exempted from licensing requirements.

Broadcasting behaviour	<i>Broadcasting Act</i>	2023-139
Broadcasting offline without a licence or without being exempted from licensing	31.1(1): Prohibited 32: Penalty => fines (1 st time) - Up to \$25K/day for individuals - Up to \$250K/day for corporations	
Broadcasting online	31.1(2): Not prohibited => No fine	34.4(1)(a) Violation when online undertakings do not register
Contravening regulation or order	34.4(1)(a): Violation 34.5: Penalty => fines (1 st time) - Up to \$25K/day for individuals - Up to \$10 M/day for all others	
Carrying on a broadcasting undertaking contrary to 31.1	Online broadcasters may operate without being licensed or exempted No penalty	

- 32 Acknowledging that the CRTC is trying to implement a statute that at times appears incoherent – the CRTC may not review and vary broadcasting decisions unless these may disadvantage official-language minority communities – it remains unclear why breaching a administrative

¹⁶ *Ibid.*, paragraph 10..

¹⁷ S. 33:

33 Every person who contravenes any regulation or order made under this Part is guilty of an offence punishable on summary conviction and is liable

(a) in the case of an individual, to a fine of not more than \$25,000 for a first offence and of not more than \$50,000 for each subsequent offence; or

(b) in the case of a corporation, to a fine of not more than \$250,000 for a first offence and of not more than \$500,000 for each subsequent offence.

¹⁸ *Act*, s. 34.6.

¹⁹ *Act*, s. 34.4(1)(a).

²⁰ *Act*, s. 34.995.

²¹ S. 34.97(1).

tribunal's regulatory requirement to register could attract penalties that could be up to 40 times more than the penalties for broadcasting without a licence.²²

- 33 Surely a more reasonable way to approaching the matter of *Registration* violations would have been for the CRTC to revise and update its current 'policy' regarding licensee non-compliance to prepare for the prospect of new fining powers (as these had already been proposed to the House of Commons in Bill C-10 on 3 November 2020²³), to present any findings from the working group the CRTC had established to answer "How could AMPs and other enforcement techniques be used to ensure compliance with the new provisions of the Act?"²⁴ and – at least – to explain in 2023-139 that its goal is to encourage and facilitate online broadcasters' registration rather than to subject them to onerous penalties. One has instead been left with the impression that AMPs may be viewed as a useful marketing tool and source of supplemental income.

D. *Waiting for the next shoes to drop*

- 34 Finally, comparing 2023-139's stated goals for the regulations and exemptions it proposes, with the regulations and exemptions that the CRTC has actually proposed makes it clear that other shoes are yet to drop in this multi-year implementation process.
- 35 2023-139 says at paragraph 8 that its proposed *Online Undertakings Registration Regulations* would obtain information that

... would enable the Commission to achieve the policy objectives set out in paragraphs 3(1)(a.1), (f.1), (q) and (r) of the current Broadcasting Act.²⁵

- 36 These sections of the *Act* are set out below:

3(1)	3 (1) It is hereby declared as the broadcasting policy for Canada that
(a.1)	(a.1) each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy set out in this subsection in a manner that is appropriate in consideration of the nature of the services provided by the undertaking ;
(f.1)	(f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources , and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve ;
(q)	(q) online undertakings that provide the programming services of other broadcasting undertakings should <ul style="list-style-type: none"> (i) ensure the discoverability of Canadian programming services and original Canadian programs, including original French language programs, in an equitable proportion,

²² \$10,000,000 % \$250,000 = 40.

²³ Canadian Heritage, [Bill C-10, An Act to modernize the Broadcasting Act](#); at [First reading](#) the bill allowed "for the imposition of administrative monetary penalties for violations of certain provisions" of the *Broadcasting Act* or the *Accessible Canada Act*, at Summary paragraph k.

²⁴ Figure 1, Working Group 7 ("AMPs and compliance activities").

²⁵ At paragraph 8.

	(ii) when programming services are supplied to them by other broadcasting undertakings under contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services , and (iii) ensure the delivery of programming at affordable rates ;
(r)	(r) online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages , and ensure that any means of control of the programming generates results allowing its discovery;

37 Paragraphs 7 and 9 of 2023-139 then add three more reasons for creating a public registry of online streaming services:

- a. To track online undertakings operating in Canada
- b. To collect “the most basic information from these undertakings”
- c. “to better understand the Canadian online broadcasting landscape more generally”

38 Comparing the purposes set out in 2023-139 with the actual *Online Undertakings Registration Regulations* proposed by the CRTC reveals gaps. As presented, for example, they do not ask online undertaking operators about each of their undertaking’s use of Canadian ‘resources’, their creation, production and presentation of Canadian programming, the market(s) they serve, or the language in which they operate. How will this enable the public, the CRTC or Parliament to “better understand the Canadian online broadcasting landscape more generally”?

Paragraph <i>Online Undertakings Registration Regulations</i>	Stated purposes of the <i>Regulations</i> Grey shading: purpose that does not apply to the specific <i>Regulation</i>
1 In these Regulations, operator means a person who carries on an online undertaking to which the Broadcasting Act applies.	
2 An operator must register each of? their online undertaking by submitting to the Commission, within 30 days after the day on which they begin to carry on the undertaking, a registration return that contains the following information:•	
• the online undertaking’s name;	3(1)(f.1) each foreign online undertaking [shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;]
• the operator’s name, mailing address, phone number and email address;	
• if different than the contact information filed under paragraph (b), contact information for a contact person for the operator, such as their name, title, mailing address, phone number and email address;	
• the place where the online undertaking is	

Paragraph <i>Online Undertakings Registration Regulations</i>	Stated purposes of the <i>Regulations</i> Grey shading: purpose that does not apply to the specific <i>Regulation</i>
incorporated or otherwise formed, if any, and the location of its head office; and	
<ul style="list-style-type: none"> the broadcasting services offered by the online undertaking. 	
3 (1) If it appears to the Commission that a registration return is incorrect or incomplete, the Commission may request that the operator submit any information that is necessary to correct or complete the registration return.	
4 An operator must notify the Commission of any change to information previously submitted by submitting the updated information with 30 days after the day on which the change occurs.	
5 (1) An operator must submit a request to deregister their online undertaking within 30 days after the day on which they cease to carry on the undertaking.	
(2) An online undertaking must be deregistered if, after an attempt to contact the operator using the information on file, the Commission is unable to verify that the operator continues to carry on the undertaking.	
6 All information that is submitted under these Regulations must be submitted electronically in the format specified by the Commission.	
7 If an operator began carrying on an online undertaking before the day on which these Regulations come into force, the operator must register the undertaking by submitting to the Commission, within 60 days after that day, a registration return that contains the information referred to in section 2.	
	3(1)(a.1) each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy set out in this subsection in a manner that is appropriate in consideration of the nature of the services provided by the undertaking;
	3(1)(f.1) [each foreign online undertaking shall] make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;
	(q) online undertakings that provide the programming services of other broadcasting undertakings should

Paragraph <i>Online Undertakings Registration Regulations</i>	Stated purposes of the <i>Regulations</i> Grey shading: purpose that does not apply to the specific <i>Regulation</i>
	<ul style="list-style-type: none"> (i) ensure the discoverability of Canadian programming services and original Canadian programs, including original French language programs, in an equitable proportion, (ii) when programming services are supplied to them by other broadcasting undertakings under contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and (iii) ensure the delivery of programming at affordable rates;
	(r) online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery;

39 The true purpose of the *Online Undertakings Registration Regulations* is therefore obscure. If it is a ‘gateway’ regulation – a regulation that enables the CRTC to enact additional sets of regulations that actually will identify what online undertaking operators operate online undertakings in whole or in part in Canada and how much revenue they draw from Canada, so that the CRTC can then in turn devise yet more regulations – 2023-139 should have said so, as any future requirements already envisaged may affect parties’ position on the proposed *Online Undertakings Registration Regulations*, as well as any appellate remedies they may pursue.

40 Or, are the proposed *Online Undertakings Registration Regulations* intended to enable the CRTC to identify persons that must but not yet have completed its Digital Media Survey (see paragraph 9, above)? The CRTC will inspire more confidence in its work if it clearly identifies the purposes of its regulatory activities.

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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):

... our sense is that public confidence and trust in the CRTC has waned in recent years. Over the course of our mandates, we have spoken and engaged with Canadians, parliamentarians, stakeholders, academics, and civil society on their experiences with, and perceptions of, the CRTC. While there is broad and strong support for an independent and effective CRTC, we consistently heard that the organization falls short in three areas:

1. Timeliness of decision making
2. Accessibility of CRTC processes to the public, non-corporate interest groups, and civil society
3. Openness and transparency

...

In the years ahead, the CRTC's decisions will shape the digital economy in Canada. As noted above, the CRTC has a long history of evidence-based decision making. Through legislation before Parliament, the Government proposes to further enhance the CRTC's information-gathering and data-sharing powers. We trust that interested parties, civil society, and the public can continue to count on the CRTC to help them understand the reasoning, evidence, and data underpinning its decisions. Active market monitoring and international benchmarking can help Canadians understand the context for regulation and so better equip them to participate in its formation

- 41 The remainder of this intervention sets out FRPC's general comments about the regulations and exemption order being proposed in 2023-139. Appendix and Appendix set out FRPC's specific questions and concerns about the *Online Undertakings Registration Regulations* and proposed Exemption Order.

II. FRPC comments on 2023-139

A. *Implications of 'deregistration' are unclear*

- 42 2023-139 states both that "[f]ailure to register an online streaming service" – presumably one that operates in whole or in part in Canada – "would constitute a violation under the *Broadcasting Act*"²⁶ and that the CRTC "may deregister online streaming services" if the registration information is not up to date and the Commission is unable to verify that such services are operating.

- 43 If deregistration constitutes an informal penalty,²⁷ what does the CRTC believe to be the negative consequences of this action? Will deregistration, for instance, affect online streaming services' ability to access funding from Canadian program funds? Potential negative consequences of deregistration should be explained in the CRTC's determination in this matter.

B. *Failures to explain exclusions in sufficient detail*

- 44 The CRTC says in 2023-139 (paragraph 4) that two exclusions are relevant to the 2023-139 proceeding:

²⁶ 2023-139, paragraph 10.

²⁷ Similar to the CRTC's informal penalties of short-term licence renewals for repeated non-compliance with its regulations or a broadcaster's conditions of licence.

Exclusion — carrying on broadcasting undertaking: (2.1) A person who **uses a social media service to upload programs** for transmission over the Internet and reception by other users of the service — and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them — does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act.

Exclusion — certain transmissions over the Internet: (2.3) A person does not carry on an online undertaking for the purposes of this Act in respect of a transmission of programs over the Internet

- a. that is **ancillary to a business not primarily engaged in** the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business;
- b. that is part of the operations of a primary or secondary school, a college, university or other institution of higher learning, a public library or a museum; or
- c. that is part of the operations of a theatre, concert hall or other venue for the presentation of live performing art

45 Unfortunately, the CRTC has not provided any examples of the services that it believes are or are not encompassed by these exclusions from subsections 2(2.1) and 2(2.2).

46 Such examples are necessary because the *Act's* structure is complex. The exclusion in subsection 2(2.1), for example, must be read in connection with subsection 4.1(2): the latter says that the *Act* does not apply to a program that is uploaded by a user to an online undertaking's social-media service unless the CRTC establishes regulations to such programs under subsection 4.2(1). While the CRTC states in paragraph 5 of 2023-139 that such users "would" not be subject to any registration requirements as proposed in 2023-139, it continues to be unclear whether such users would be indirectly affected by other CRTC regulations.

47 Moreover, the exclusion in subsection 2(2.3) for programs transmitted which are "ancillary to a business" is unclear. The current *Act* does not define either "ancillary" or the "business", and 2023-139 does not explain how the CRTC may then measure whether transmitting a program is "ancillary to a business not primarily engaged" in such program transmissions. FRPC submits that it would be inequitable for the CRTC to exempt a company – similar, for example, to Amazon Canada's Prime video service or to Apple TV's on-demand programming service – from the application of Part II of the *Act* because it considers the programming to be "ancillary" to the company's business overall, or because it is "not primarily" engaged in such activity.

48 The effect of this is to raise concerns about non-exclusionary exclusions: what is really 'in' and what is really 'out' when it comes to CRTC regulations? The CRTC could and should have provided aggregated information from its 2020-21 and 2021-22 digital media surveys to describe what it already knows. It could and should have set out concrete examples in 2023-139 to explain what problems it has encountered to date with those surveys. And it could and should have provided concrete examples in 2023-139 showing which online broadcasting undertakings now operating in whole or in part in Canada would be exempted from its requirements. That notice – unlike the current 2023-139 notice – would have given interveners an informed basis on which to comment.

C. Drafting problems in the regulations proposed by 2023-139

1 Definitional issues

- 49 The current *Broadcasting Act* does not mention “online streaming”, referring instead in section 2 to “online undertaking”:

online undertaking means an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus; (entreprise en ligne)FRPC proposes “online .

entreprise en ligne Entreprise de transmission ou de retransmission d’émissions par Internet destinées à être reçues par le public à l’aide d’un récepteur. (online undertaking)

- 50 2023-139, on the other hand, refers to “online streaming services” 16 times without explaining what this term means to the CRTC and whether the term actually means “online undertakings operating in Canada”.

- 51 Rather than creating additional confusion about the reach of the CRTC’s *Online Undertakings Registration Regulations* the CRTC should use the terms and definitions set out by Parliament in the current *Act* – online undertakings that operate in whole or in part in Canada.

- 52 The CRTC’s draft *Online Undertakings Registration Regulations* then define “operator”:

Interpretation

Definition of operator

1 In these Regulations, **operator** means a person who carries on an online undertaking to which the *Broadcasting Act* applies.

...

- 53 The CRTC’s existing *Broadcasting Distribution Regulations* define ‘operator’ differently, and also include references to other ‘operators’ over which it has no jurisdiction:

1 ...

operator means

(a) in relation to a licensed programming undertaking, the person that is licensed to carry on the programming undertaking; or

(b) in relation to an exempt programming undertaking, the person that carries on the exempt programming undertaking. (**exploitant**)

...

subscriber means

(a) a household of one or more persons, whether occupying a single-unit dwelling or a unit in a multiple-unit dwelling, to which service is provided directly or indirectly by a licensee; or

(b) the owner or operator of a hotel, hospital, nursing home or other commercial or institutional premises to which service is provided by a licensee. (abonné)

...

54 To minimize the risk of costly misunderstandings²⁸ the CRTC should use unique terms consistently. Its *Online Undertakings Registration Regulations* should apply to “online undertaking operators”, and set out the requirements that apply solely to this group of broadcasters.

55 It is unclear from the proposed *Online Undertakings Registration Regulations* whether the CRTC believes that knowing the place where an online undertaking is incorporated suffices to establish whether the undertaking is “effectively owned and controlled by Canadians” or whether it is a foreign undertaking.²⁹

2 Clear description in the proposed Regulations of those who must register.

56 According to 2023-139, the CRTC’s proposed *Online Undertakings Registration Regulations* would serve two purposes, by enabling it

to (1) keep track of online undertakings operating in Canada, and (2) collect the most basic information from these undertakings
(paragraph 7)

57 A third purpose that 2023-139 does not address is that regulations – being subordinate legislation to implement the *Broadcasting Act* – must clearly state who is subject to the regulations and what they must do to comply with them. The proposed *Online Undertakings Registration Regulations* should therefore clearly define the difference between operating ‘in whole’ in Canada, or operating ‘in part’ in Canada.

3 Application of the Online Undertakings Registration Regulations

58 It is unclear from the proposed *Regulations* whether the CRTC wants online undertaking operators to submit a single form for each undertaking they operate, or whether it intends to require online undertaking operators to file a single form for all their “broadcasting services”.

59 Rather than requiring online operators to navigate through the CRTC’s (many) broadcasting forms, the Commission could design a form with two parts: a part in which single-undertaking online undertaking operators provide information about the sole online undertaking they operate in whole or in part in Canada, and a part in which multi-undertaking online undertaking operators provide information about each of their undertakings.

4 Updates

60 Section 4 of the proposed *Online Undertakings Registration Regulations* requires operators to notify the CRTC when “notify the Commission of any change to information previously submitted by submitting the updated information with [sic] 30 days after the day on which the change occurs”.

²⁸ See e.g. *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 SCR 810, <<https://canlii.ca/t/g1z1v>>, retrieved on 2023-06-11; and *Aventis Pharma Inc. v. Pharmascience Inc. (F.C.A.)*, 2006 FCA 229 (CanLII), [2007] 2 FCR 103, <<https://canlii.ca/t/1nq67>>, retrieved on 2023-06-11;

²⁹ Act, s. 3(1)(a) and (a.1).

- 61 It is unclear whether this phrasing will ensure that online undertaking operators report changes in their ownership. Would the purchase by Party A of all assets of online undertaking operator B (including the operator's legal name and offices) require Party A to notify the Commission?

III. CRTC's proposed exemption orders

- 62 Neither 2023-139 nor 2023-140 provides any evidence to support a conclusion by the CRTC that regulating these services would not contribute materially to the implementation of Parliament's broadcasting policy for Canada – the test set out in subsection 9(4).

Exemptions

[9](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).**

In addition, the Commission intends to rely on this condition of service as its authority to continue administering its Annual Digital Media Survey. (The Commission currently relies on paragraph 4 of the DMEQ as its authority to collect this data.) As such, the determinations that the Commission made in Broadcasting Regulatory Policy 2022-47 remain in effect. In the future, the Commission may expand or modify the requirement to participate in the Annual Digital Media Survey, or the content of that survey.

- 63 The remainder of this section addresses the 2023-139 basis for setting out proposed exemptions to its regulatory requirements, recommends that the CRTC make it easier for the public to identify not only the CRTC's exemption orders, but the service subject to those orders and the evidence forming the basis of the CRTC's exemption determinations. FRPC's comments conclude with an analysis of drafting issues.

A. *Basis for exempting three classes of online undertaking from regulation is unclear*

- 64 The general discussion in 2023-139 appears to suggest that the CRTC is keenly focussed on high-income online broadcasters. Throughout, however, 2023-139 also refers to "undertakings", proposing at the outset to define "operator" as one who is carrying on "an online undertaking". The *Broadcasting Act* does not define "undertaking", and it is unclear how the CRTC understands the application of this term. In denying a procedural request to extend the deadlines in this proceeding, though, the CRTC stated specifically that "BNC 2023-139 is industry focused"
- 65 With this in mind, FRPC recommends that this proceeding be used to clarify that the CRTC's regulations regarding online broadcasting are focussed on 'industry'. Specifically, the CRTC should define undertakings in terms of their status as unincorporated or incorporated undertakings: where unincorporated undertakings are owned and operated as 'sole proprietorships' and would have no material impact on Parliament's broadcasting policy for Canada, incorporated undertakings would have established themselves to protect the interests

of their shareholders, thereby assuring current and prospective investors of their *bona fides*. The CRTC should then specify in its regulations that these exclude unincorporated undertakings from their ambit: it could, for example, create a class of unincorporated undertakings so that, if a miniscule number of such undertakings turns out to have the power to materially contribute to the implementation of Parliament's broadcasting policy for Canada, the CRTC would be able in the future to establish regulatory requirements for this small group.

- 66 Moving on to the classes proposed by 2023-139, these are based on business model (activity), business structure (affiliation with other unknown broadcasters) and financial ability or inability to "contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)".³⁰

Status	Activity	Revenues <u>excluding revenue from video-gaming or unique transaction</u>
Exempted	Online video game broadcaster	Undertaking or its ownership group earned below \$10 M in previous year
	Unique transaction broadcaster	
Not exempted	All other online broadcasters	Undertaking or its ownership group earned above \$10 M in previous year

- 67 What is not explained is why the CRTC believes it should exempt video-game online undertakings, unique-transaction online broadcasters and those making less than \$10 million from helping to implement Parliament's broadcasting policy for Canada. After all, as noted above (paragraph 19) the CRTC requires commercial radio broadcasters whose revenues exceed 12.5% of that amount (in other words, \$1.25 million) to allocate \$1,000 + 0.5% of its revenues above \$1.25 million to Canadian content development. As Table 2 shows below, two broadcasters in the same broadcasting system with the same ability to contribute to the implementation of Parliament's broadcasting policy for Canada face quite different requirements: one must allocate 0.45% of its revenues to Canadian content development, and the other nothing.

Table 2 Comparison of CRTC's proposed financial requirements for video games with current requirements for commercial radio broadcasters

Type of broadcaster	Commercial radio	Video games
Revenue	\$9,999,999.99	\$9,999,999.99
Canadian development financial requirement		
Base amount	\$1,000.99	\$0.00
Revenue above \$1,250,000	\$8,749,999.99	\$8,749,999.99
0.5% above \$1,250,000	\$43,750	\$0.00
Total Canadian development financial requirement	\$44,750	\$0.00
As percentage of revenue	0.45%	0.0%

- 68 Apart from the absence of even prima facie evidence to explain why an online broadcaster that provides one or more video gaming services should be exempted from all requirements to

support Canada's broadcasting system, exemptions such as these at the outset of the CRTC's process to implement the current Act will obviously lead offline broadcasters either to demand reductions in or cancellations of their existing financial support for Canadian programming – or may lead them to transform themselves into online broadcasters only. After all, previous CRTC exemption decisions, such as the one to exempt BDUs below a specified number of subscribers from regulation led large BDUs to restructure their legal structure so as to limit their exposure to regulations.

- 69 The absence of any information showing why the three exempted classes of online undertaking cannot contribute to the implementation of Canada's broadcasting policy risks creating the impression of arbitrary decision-making that is not based on actual provisions of the *Broadcasting Act*.

B. Updated information about exempted classes of offline and online broadcasters

- 70 The CRTC has in the past set out classes of undertakings by way of a public notice: the 1991 *New Broadcasting Act – Amendments to Classes of Licence*, for example.³¹ As Table 1 showed, the CRTC says that it currently exempts 13 types of broadcasting service.

- 71 The CRTC should facilitate ready access to the classes of undertakings that are now in effect, by publishing an updated annual list of such classes,³² with clear descriptions of the reasons for which the services have been exempted under subsection 9(4), along with the evidence that (at the time of exemption) supported the CRTC's decision.

C. Drafting issues

1 Definitional issues

- 72 Next, the proposed exemption order's wording requires clarifications. Insofar as "interpretation" is concerned, the CRTC has not defined but should provide clear definitions of the following terms: "attributable", "associates", "Canadian broadcasting system", "all services", "in part", "electronic game" and user "interaction". As a corollary, the exemption order should not use different terms for (possibly) the same concept: it refers to "revenues ... collected from the Canadian broadcasting system across all services" when it defines "annual revenues", yet then refers to "annual Canadian gross revenues from broadcasting activities" in paragraph iii: are these the same or different concepts?

- 73 It is unclear from the proposed exemption order who is to be responsible for identifying the attribution of revenues. The proposed exemption order refers to the 'allocation' of "... revenues collected from the Canadian broadcasting system across all services" but does not clarify the specific types of 'revenues' that may be involved: would in-kind payments qualify as revenues, for instance?

³¹ [Public Notice CRTC 1991-63](#) (Ottawa, 19 June 1991).

³² Section 9(4) does not prevent the CRTC from publishing such lists on its own initiative.

2 Measurement issues

- 74 It is also unclear how the CRTC will distinguish between online undertakings on the basis of unique transactions. Suppose that an online undertaking's revenues derives 99% of its income from unique transactions – and that it (somehow) earns other revenue from the Canadian broadcasting system: will the CRTC deem that undertaking to be a unique-transaction undertaking?

3 Operational issues

- 75 It is unclear how the proposed *Online Undertakings Registration Regulations* will operate in conjunction with the proposed exemption order: will CRTC 'know' about the scale of services in the broadcasting system that it does not regulate, if they are exempted from reporting requirements?

Appendices

Appendix 1	Proposed Online Undertakings Registration Regulations – line-by-line analysis	24
Appendix 2	Proposed exemption order respecting classes of online undertakings in relation to the proposed Online Undertakings Registration Regulations – line-by-line analysis	30

Appendix 1 Proposed Online Undertakings Registration Regulations – line-by-line analysis

Appendix 1 to Broadcasting Notice of Consultation CRTC 2023-139

<i>Proposed Online Undertakings Registration Regulations</i>	FRPC comments on the CRTC's proposed regulations
Online Undertakings Registration Regulations	
Interpretation	
Definition of operator	
1 In these Regulations, operator means a person who carries on an online undertaking to which the Broadcasting Act applies.	<p>The current <i>Act</i> does not define “operator”. As set out below, given the frequency with which the CRTC uses ‘operator’ in other contexts, FRPC recommends that the CRTC refer to “online undertaking operator” in its <i>Online Undertakings Registration Regulations</i>, rather than simply to ‘operator’.</p> <p>Proposed section 1 does not state whether it applies to all online undertakings to which the <i>Act</i> applies, or to all online undertakings to which the <i>Act</i> applies and which have not been exempted under section 9(4) of the <i>Act</i>: even if the CRTC believes it is clear – either that the operators of all online undertakings must register, or that only those not exempted from regulatory requirements must register – the CRTC should enable potential registrants to understand readily whether they are or are not subject to the <i>Online Undertakings Registration Regulations</i>.</p> <p>FRPC notes that the CRTC refers to “operator” 31 times in its <i>Broadcasting Distribution Regulations</i>, in relation to 13 different types of operations. A number of these references refer to the “operator of a hotel, hospital, nursing home or other commercial or institutional premises”. They also refer</p> <ul style="list-style-type: none"> in ss. 1 to the “operator” of an undertaking exempted from any or all requirements of Part II of the <i>Act</i>, in section 7(d) to the operator of a programming service or network service in 7(g) and 41(2) to the operator of a Canadian programming service in 9.1 and 44 and 46(6) to the operator of a programming undertaking in 12(1) to the operator of a licensed programming undertaking in 15.01(1) to the operator of an exempt programming undertaking in 15.3 to the operators of programming services affected by channel realignment in 17(4) to the operators of [television] stations in 18(2) to the operators of Category A services in 19(1) to the operator of a distribution undertaking or of an exempt distribution undertaking in 20(b) to the operator of any on-demand service in 21 and 49 to the operator of a distant television station <p>Proposed rewording:</p>

<i>Proposed Online Undertakings Registration Regulations</i>	FRPC comments on the CRTC's proposed regulations
	In these Regulations, online undertaking operator means a person who carries on an online undertaking to which the Broadcasting Act applies.
Registration	
Registration return	
<p>2 An operator must register their online undertaking by submitting to the Commission, within 30 days after the day on which they begin to carry on the undertaking, a registration return that contains the following information:</p>	<p>Proposed section 2 does not clearly establish that the CRTC's <i>Online Undertakings Registration Regulations</i> apply to those operating <u>in whole or in part in Canada, and to online undertaking operators that are Canadian or non-Canadian</u>.</p> <p>Moreover, the phrasing of proposed section 2 may inadvertently mislead some online undertaking operators operating more than one online undertaking in whole or in part in Canada, to assume that they need only make a single registration.</p> <p>The 30-day requirement it creates the risk that new (as opposed to existing) online operators that are unaware of Canada's <i>Broadcasting Act</i>, Bill C-11 and 2023-139 will inadvertently and unintentionally place themselves at risk of an administrative monetary penalty.</p> <p>FRPC considers that the CRTC should grant online operators at least six months to register, and that the CRTC should itself undertake a marketing campaign to inform online broadcasters of its new regulatory regime.</p> <p>Proposed rewording:</p> <p>2 An <u>online undertaking</u> operator <u>operating in whole or in part in Canada</u> must register their each online undertaking by submitting to the Commission, within 90 days after the day on which they begin to carry on the undertaking, a registration return that contains the following information:</p>
<ul style="list-style-type: none"> the online undertaking's name; 	<p>The CRTC's <i>Online Undertakings Registration Regulations</i> should define what 'name' online undertakings should provide:</p> <p>their legal name if incorporated</p> <p>the name by which they are commonly known</p> <p>the name that appears on screen, or</p> <p>all three names</p> <p>Proposed rewording:</p> <p>the online undertaking's legal name and</p> <p>the name by which it is commonly known or the name that identifies the online undertaking on-screen</p>
<ul style="list-style-type: none"> the operator's name, mailing address, phone number and email address; 	<p>The CRTC's <i>Online Undertakings Registration Regulations</i> should specify that online undertakings' operators are to provide their legal name (whether a business or an individual), their municipal as well as their mailing addresses, landline and mobile telephone numbers, website and e-mail address.</p> <p>Proposed rewording:</p> <p>the online undertaking operator's</p> <p>a) legal name</p> <p>b) mailing address</p>

Proposed Online Undertakings Registration Regulations	FRPC comments on the CRTC's proposed regulations
	c) municipal address d) landline telephone number (if available) e) mobile telephone number f) e-mail address
<ul style="list-style-type: none"> if different than the contact information filed under paragraph (b), contact information for a contact person for the operator, such as their name, title, mailing address, phone number and email address; 	<p>The CRTC's <i>Online Undertakings Registration Regulations</i> should specify that online undertakings' operators are to provide their legal name (whether a business or an individual), their municipal as well as their mailing addresses, landline and mobile telephone numbers, website and e-mail address.</p> <p>Proposed rewording</p> <p>if different than the contact information filed under paragraph (b), contact information for a representative of the online undertaking operator:</p> <ul style="list-style-type: none"> a) legal name b) mailing address c) municipal address d) landline telephone number (if available) e) mobile telephone number f) e-mail address
<ul style="list-style-type: none"> the place where the online undertaking is incorporated or otherwise formed, if any, and the location of its head office; and le lieu où l'entreprise en ligne est constituée ou formée, le cas échéant, et le lieu où se trouve son siège social; 	<p>It is unclear what information the use of "if any" in "the place where the online undertaking is incorporated or otherwise formed, if any" is intended to elicit</p> <p>Using "if any" to refer to the "place where ... incorporated or otherwise formed" suggests that the online undertaking was not incorporated or otherwise formed in any place</p> <p>The French-language version suggests that the CRTC's intention is to refer to "as the case may be" or "as appropriate"</p> <p>Proposed rewording:</p> <p>"the place where the online undertaking is incorporated or otherwise formed, as the case may be, and the location of its head office; and"</p>
<ul style="list-style-type: none"> the broadcasting services offered by the online undertaking. 	<p>Proposed section 2 refers above to "their online undertaking", "the undertaking", "the undertaking's name" and to "the place where the undertaking" – but now refers to "broadcasting services". If a goal of these <i>Online Undertakings Registration Regulations</i> is to limit regulatory burden, why require online undertaking operators to state and then restate the names of each broadcasting service they offer? It may be simpler and less burdensome to set out two parts in the regulations: one for online undertaking operators that operate only one broadcasting undertaking in whole or in part in Canada, and one for online undertaking operators that operate more than one undertaking (and providing in this part a table where the undertakings may be listed)</p> <p>To limit confusion on the part of online operators unfamiliar with Canadian broadcast law, the CRTC should clarify whether "broadcasting service" refers to services being provided in whole or in part in Canada, or</p>

Proposed Online Undertakings Registration Regulations	FRPC comments on the CRTC's proposed regulations
	<p>in other jurisdictions.</p> <p>The CRTC should provide an easy-to-understand checklist, with textual clarifications that include a brief summary of the definition of 'broadcasting service'.</p> <p>In paragraph 12 of 2023-139, for instance, the CRTC describes "the most essential features of the broadcasting services offered by the online streaming service, for example, whether it offers audio or video services." How does the CRTC define 'audio' and 'video' services? Does it contemplate that online streaming services will provide 'audio-visual' services?</p> <p>The CRTC should also ascertain a brief description of the online service(s) so as to enable the Commission to determine whether Canada's broadcasting system is meeting section 3(1)(d)(v) – requiring the Canadian broadcasting system to provide programming that 'reflects and is responsive to the preferences and interests of various audiences'</p> <p>The CRTC should as well ascertain the language(s) in which the online undertaking(s) is provided, to respect the requirements of subsections 5.1 and 5.2 of the Act</p> <p>Proposed rewording:</p> <ul style="list-style-type: none"> the broadcasting services offered by the online undertaking, and for each service, <ul style="list-style-type: none"> i) the language in which programming is primarily presented ii) a brief description of the type of programming provided (general interest, news, sports, comedy/drama etc.)
	<p>Given that Parliament added the definition of 'affiliate' in the current Act, it clearly intended the CRTC to take relationships between undertakings into account</p> <p>The CRTC's light registration requirements should enable the CRTC to provide Parliament with information about the relationships between broadcasting undertakings and the <i>Online Undertakings Registration Regulations</i> should therefore require online undertaking operators to set out the names of broadcasting services with which they are, at the time of registration, affiliated:</p> <p>Proposed addition:</p> <ul style="list-style-type: none"> the broadcasting services operating in whole or in part in Canada with which the online undertaking is affiliated
Request for additional information	
3 (1) If it appears to the Commission that a registration return is incorrect or incomplete, the Commission may request that the operator submit any information that is necessary to correct or complete the registration return.	<p>Proposed rewording:</p> <p>3(1) If it appears to the Commission that a registration return is incorrect or incomplete, the Commission may request that the operator submit any</p> <p>a) the information needed to correct or complete the registration return or</p> <p>b) an explanation of why the information provided in the registration return is accurate or complete</p>

<i>Proposed Online Undertakings Registration Regulations</i>	FRPC comments on the CRTC's proposed regulations
Submission of additional information	
(2) The operator must submit the requested information to the Commission as soon as feasible.	<p>"as soon as feasible" is an undefined term that lacks objective meaning. The CRTC should set a defined period of time, such as (but not necessarily) "within 30 days" (as in section 4 of the <i>Online Undertakings Registration Regulations</i>)</p> <p>Proposed rewording:</p> <p>(2) The <u>online undertaking</u> operator must submit the requested information to the Commission within 30 days of the Commission's request.</p>
Updates to registration return	
4 An operator must notify the Commission of any change to information previously submitted by submitting the updated information with 30 days after the day on which the change occurs.	<p>The phrase, "with 30 days" appears to be a typographical error (as the French-language version states "dans les trente jours suivant")</p> <p>Proposed rewording:</p> <p>4 An <u>online undertaking</u> operator must notify the Commission of any change to information previously submitted by submitting the updated information <u>within</u> 30 days after the day on which the change occurs.</p>
Request for deregistration	
5 (1) An operator must submit a request to deregister their online undertaking within 30 days after the day on which they cease to carry on the undertaking.	<p>Proposed rewording:</p> <p>5(1) An <u>online undertaking</u> operator must submit a request to deregister their online undertaking within 30 days after the day on which they cease to carry on the undertaking..</p>
Deregistration	
(2) An online undertaking must be deregistered if, after an attempt to contact the operator using the information on file, the Commission is unable to verify that the operator continues to carry on the undertaking.	<p>Proposed rewording:</p> <p>(2) The CRTC will deregister an online undertaking if, after two attempts to contact the <u>online undertaking</u> operator using the information on file, the Commission is unable to verify that the operator continues to carry on the undertaking.</p>
Electronic submission	
6 All information that is submitted under these Regulations must be submitted electronically in the format specified by the Commission.	<p>The proposed regulation does not identify who is to make the submission, or where the submission is to be made.</p> <p>Proposed rewording:</p> <p>The proposed regulation does not state who is to make the submission. FRPC proposes rewording the text as follows:</p> <p>6 All information that is submitted under these Regulations must be submitted electronically at [CRTC website page] by the online undertaking operator or that person's representative in the format specified by the Commission.</p>
Transitional Provision	
Registration deadline – existing undertaking	
7 If an operator began carrying on an online undertaking before the day on which these Regulations come into	<p>Proposed rewording:</p> <p>7 An <u>online undertaking</u> operator carrying on an online undertaking before the day on which these Regulations come into force must register</p>

<i>Proposed Online Undertakings Registration Regulations</i>	FRPC comments on the CRTC's proposed regulations
force, the operator must register the undertaking by submitting to the Commission, within 60 days after that day, a registration return that contains the information referred to in section 2.	the undertaking by submitting electronically to the Commission, within 60 days after that day, a registration return that contains the information referred to in section 2.
Coming into Force	
Registration	
8 These Regulations come into force on the day on which they are registered.	

Appendix 2 Proposed exemption order respecting classes of online undertakings in relation to the proposed Online Undertakings Registration Regulations – line-by-line analysis

Appendix 2 to Broadcasting Notice of Consultation CRTC 2023-139

Proposed exemption order respecting classes of online undertakings in relation to the proposed *Online Undertakings Registration Regulations*

Exemption order respecting classes of online undertakings in relation to the <i>Online Undertakings Registration Regulations</i>	FRPC comments on proposed exemption order
Interpretation	
The following definitions apply in this exemption 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>"attributable" is undefined</p> <p>The party responsible for making the attribution – the CRTC? – is not identified</p> <p>"associates" is undefined</p> <p>What is the difference between "revenues ... collected from the Canadian broadcasting system across all services" and "annual Canadian gross revenues from broadcasting activities" below at iii?</p> <p>Could two or more online undertakings jointly own a subsidiary and if so, how will these annual revenues be allocated?</p> <p>"all services" is undefined</p> <p>What is the "revenue calculation", who calculates it, when is that information filed and through what process is it filed?</p> <p>How does the CRTC define "in part"?</p> <p>Is the CRTC fettering its jurisdiction by committing to accommodate all requests for alternative reporting periods?</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 <i>Broadcasting Act</i> applies and includes all persons that carry on those broadcasting undertakings.	<p>"affiliated broadcasting undertakings" is not defined</p> <p>Does "these broadcasting undertakings" include or exclude undertakings exempted under other exemption orders?</p>
Excluded revenue means revenue that originates from providing video games services or unique transactions.	"providing" is undefined

Exemption order respecting classes of online undertakings in relation to the <i>Online Undertakings Registration Regulations</i>	FRPC comments on proposed exemption order
Unique transaction means a one-time rental or purchase of an individual program transmitted or retransmitted over the Internet.	
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.	
Video games service means the transmission or retransmission of video games over the Internet to enable users to select and play video games.	Is there a cut-off point at which a 'video games service' is no longer a video games service but is a programming service?
Description	
The Commission, pursuant to subsection 9(4) of the <i>Broadcasting Act</i> , by this order, exempts from all the requirements of the <i>Online Undertakings Registration Regulations</i> , as amended from time to time, persons carrying on, in whole or in part in Canada, broadcasting undertakings defined by any of the following four classes:	"in whole" and "in part" are undefined terms
i. online undertakings whose single activity and purpose consists of providing video game services;	Exemption based on nature of service
ii. online undertakings whose single activity and purpose consists of providing unique transactions;	Exemption based on business model
iii. online undertakings affiliated with a broadcasting ownership group that has, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than \$10 million; or	Exemption based on ownership structure and 'annual Canadian gross revenues from broadcasting' Does iii refer to non-Canadian broadcasting ownership groups? Proposed rewording: "annual gross revenues from Canadian broadcasting activities of less than \$10 million"
iv. online undertakings that have no affiliation whatsoever with a broadcasting ownership group, if they have, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than \$10 million.	Exemption based on ownership structure and "annual Canadian gross revenues from broadcasting"