



15 February 2024

Filed online

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Secretary General,

Re: *The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content, Broadcasting Notice of Consultation 2023-138 (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 1991 *Broadcasting Act*. FRPC intervened and participated in the CRTC's public hearing in this matter.

The Forum's final reply in the above-noted proceeding is attached.

We look forward to the Commission's determinations in this matter.

Monica Auer, M.A., LL.M.
Executive Director
Forum for Research and Policy in Communications (FRPC)
Ottawa, Ontario

execdir@frpc.net



Broadcasting Notice of Consultation CRTC 2023-138

Designing a “Path Forward” Requires a clear starting point

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

Monica Auer, LL.B., LL.M.

Executive Director

execdir@frpc.net

15 February 2024



Contents

| | | |
|------------|--|----------|
| I. | Introduction | 1 |
| II. | CRTC's objectives for the 2023-138 proceeding | 1 |
| A | Lack of information limited informed contributions | 2 |
| B | Hidden knowledge obscures trajectory of CRTC's regulatory approach | 2 |
| C | 'Primarily hosts user-generated content' | 3 |
| D | Applicability thresholds | 4 |
| E | Discrimination between Canadian and non-Canadian online broadcasters | 4 |

I. Introduction

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established a decade ago to undertake research and policy analysis about communications, including broadcasting.
- 2 The Forum submitted written interventions and procedural requests regarding Notice of Public Hearing 2023-138 (NPH 2023-138) and participated in the CRTC's public hearing held in November and December 2023.
- 3 FRPC's final reply in the proceeding is set out below. It focusses primarily on the problem at the heart of the public component of the 2023-138 proceeding: lack of empirical evidence on which to base a new regulatory framework for Canadian programming expenditures and other forms of support.¹ Unless specifically stated otherwise, therefore, FRPC's submissions in the written intervention, in its reply to interventions and at the CRTC's public hearing stand as presented.
- 4 That said, FRPC notes as a preliminary matter that it was unable, in the 11 working days available to undertake this reply, to locate Apple's answers to English-language question 12 (French-language question 3) along with English-language questions 15, 17(b) regarding transactional service expenses, 21 and 22. FRPC also notes that while some parties directed the CRTC to look to answers the parties had filed in other proceedings such as the ADMS, it would have been preferable for the parties to reproduce that information in the answers it submitted in this proceeding (even if redacted). Last, FRPC regrets the timing of the CRTC's RFIs – being issued on 21 December 2023 and also again on 4 January 2024: it remains unclear why the Commission did not seek and publish this information from the relevant parties well before its hearing in November, when all interested parties appearing at the hearing could have then had the opportunity to engage in more informed discussion with the CRTC's hearing panel.

II. CRTC's objectives for the 2023-138 proceeding

- 5 On 12 May 2023 the CRTC described the 2023-138 proceeding as

Step 1 of a three-step process to establish a modernized regulatory framework regarding contributions to support Canadian and Indigenous content. This framework, once implemented, will set out the contributions (which may include both expenditures and other types of supports) that broadcasting undertakings, including online

undertakings (i.e., online audio and video services), will be required to make to support Canadian and Indigenous audio and video content.²

- 6 The CRTC later added that the general objectives for this regulatory framework included
- “clearly defined, measurable regulatory objectives”
 - “appropriate measures of success”, along with
 - “a plan for monitoring performance ... to ensure transparency and accountability to the Commission and to Canadians.”³
- 7 FRPC supports the CRTC’s objectives of clarity, measurability, transparency and accountability. Regulatory objectives that are not clearly defined, that cannot readily be measured and that are not transparent will raise serious questions about fairness once the Commission begins to implement the framework. Moreover, the 6 February 2023 Ministerial letters to Chairperson Eatrides upon her appointment expressed confidence in the CRTC’s “modernization to being more open, transparent, efficient, and effective” given the Ministers’ sense “that public confidence and trust in the CRTC has waned in recent years.”
- A** *Lack of information limited informed contributions*
- 8 Apple said, “there are too many unknowns regarding the overall contribution framework for the CRTC to establish an initial base contribution or indeed, for Apple to recommend an appropriate level of such contribution” (response b) to CRTC question 15).
- 9 FRPC agrees with Apple’s comment.
- B** *Hidden knowledge obscures trajectory of CRTC’s regulatory approach*
- 10 The results of the CRTC’s RFI process are somewhat unclear. Google’s RFI response of 26 January 2024 (page 2) notes that it previously provided revenue and expense information to the Commission in the annual Digital Media Survey (ADMS), and that the CRTC “justified a low threshold for the registration regulations based on the need to build a complete picture of the online Canadian broadcasting landscape” (page 3).
- 11 As the CRTC decided to not publish even aggregated data from the ADMS, the CRTC should take the opportunity of its decision in this proceeding to publish on an

² *The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*, [BNoC 2023-138](#) (Ottawa, 12 May 2023), unnumbered paragraph beginning with “The Commission is ...”

³ *Ibid.*, paragraph 58.

aggregated basis for all audiovisual and for all audio undertakings (assuming confidentiality granted by the CRTC for individuals' responses is justified by Canadian law) the data it currently has to hand from the ADMS. (As to the Commission's argument that the ADMS data are not flawless, the annual *Statistical and Financial Summaries* for conventional broadcasters have for years warned that a single year's data might change from one report to the next because some respondents filed their annual returns late.)

- 12 Without a data-based starting point it will be impossible for the public and Parliament to understand whether the 2023 *Broadcasting Act's* goals are being met by the CRTC's 2023-138 Path Forward.

C 'Primarily hosts user-generated content'

- 13 The CRTC asked some participants how it should measure and track whether an online platform "primarily hosts user-generated content" (CRTC English-language 18). As a matter of law, of course, the CRTC will have to determine the answer to this question given the absence of a simple and straightforward definition in the 2023 *Broadcasting Act*. FRPC's focus in this reply, however, concerns some parties' emphasis on the CRTC's exercise of discretion and a case-by-case approach.
- 14 TikTok Canada argued that the CRTC "should use its discretion", "establish a non-exhaustive list of indicators to guide it" and to make decisions case by case (page 2).⁴ Apple said the CRTC's "contribution framework should ... recognize the unique attributes of individual undertakings by imposing contributions that are appropriate to their business models and programming" and the "intangible contributions ... to production, promotion and discoverability" of Canadian programming (answers to question 15, subsections c and d). Apple added that ownership groups should have "the flexibility to determine the most appropriate method and breakdown of such contributions" (*Ibid.*, subsection e).
- 15 For the reasons noted above in paragraphs 2 to 4, FRPC does not support proposals under which the CRTC would exercise its discretion and impose requirements based on unidentified and possibly unidentifiable indicia or intangible elements. Suppose the Commission adopted this approach and that such decisions emerged after months of private meetings between a few private broadcasters and senior government or other officials: would the public accept the CRTC's decisions as transparent and open, based on a public record?

⁴ TikTok added that it "would be pleased to engage with the Commission to provide further assistance and context to support the creation of a definition" – engagement that FRPC supports provided it takes place within a formal CRTC public process rather than in private meetings with the CRTC's Commissioners and senior staff.

16 As to Apple’s suggestion that broadcasters determine the most appropriate method and breakdown of expenditure and other requirements for Canada’s broadcasting system, FRPC submits that this is what Canadian and non-Canadian broadcasters have already been doing. This in turn led Parliament to enact Canada’s new 2023 *Broadcasting Act* so as to move from an unregulated to a regulated legislative approach (to put it another way, to change from a non-ordered and non-orderly approach, to an ordered approach).

17 FRPC’s position is that any indicia established by the Commission as part of its decision in this proceeding must be clearly defined, hence clearly measurable and must apply to all parties. A case-by-case approach that shoehorns each major broadcaster into a unique group creates unfairness, unpredictability and opacity rather than fair, predictable and transparent regulation.

D Applicability thresholds

18 When asked about the “appropriate threshold” among the three proposed by the CRTC in question 12, Google answered that “the ultimate determination of the appropriate threshold among the three applicability thresholds set out in the RFI should be deferred until such time as the Commission has established the respective contribution frameworks governing various types of online undertakings in Step 2 of the proceeding.”

19 FRPC agrees with Google. Asking broadcasters to make recommendations without understanding their context is unreasonable. This is why the Commission’s decision to ask its RFIs after the 2023-138 hearing process ended rather than before it began has been so unfortunate.

E Discrimination between Canadian and non-Canadian online broadcasters

20 BCE argues that the CRTC should “exempt online undertakings affiliated with Canadian broadcasters from the initial contribution regime at this time” because “Canadian broadcasters are already under extreme financial pressure” (page 4). Corus argues that it would be unfair to regulate Canadian broadcasters based on their combined online and offline businesses, if non-Canadian broadcasters are only regulated on the basis of their online business. Rogers opposes “regulatory asymmetry ... which would disproportionately impact Canadian ownership groups” (paragraph 5).

21 Parliament effectively welcomed non-Canadian broadcasters into Canada’s broadcasting system in 2023 through subsection 3(1)(a):

3 (1) It is hereby declared as the broadcasting policy for Canada that
(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians, and it is recognized that it includes foreign broadcasting undertakings that provide programming to Canadians;

....

- 22 The reason that the CRTC might wind up regulating Canadian offline and online services and non-Canadian online services has less to do with unfair discrimination against Canadian broadcasters with offline and online broadcasting interests than with the fact that Cabinet has chosen not to rescind the [Direction to the CRTC \(Ineligibility of Non-Canadians\)](#), (SOR//97-192). It prevents the CRTC from issuing broadcasting licences to non-Canadians. The CRTC is required to adhere to the *Direction*.
- 23 Regardless of the *Direction's* existence, too little information about Canadian broadcasters' online services is available on the public record which might support Corus' argument. Suppose – for example – that large Canadian vertically integrated broadcasters' online programming undertakings broadcast programming acquired or produced by their conventional programming services and then also sold sufficient advertising time and/or subscriptions to generate profits before interest and taxes. The broadcasters' conventional services, meanwhile, declared losses before interest and taxes and laid off staff because their conventional services paid for all costs associated with the programming shared with its profitable online colleague. In this hypothetical scenario it would be unreasonable to exempt conventional online services from implementing the *Broadcasting Policy for Canada* (subsection 3(1) of the 2023 *Broadcasting Act*) because in the end, the conventional and online companies are both being operated to serve the interests of their parent company.
- 24 The CRTC has already faced the problem that a broadcaster might effectively subsidize some of its non-conventional services on the metaphorical back of its existing, conventional services. In 1987, for example, it licensed the service now known as CBC News Network (formerly CBC Newsworld) and imposed conditions of licence (now service) to ensure that the CBC's discretionary programming service compensated the CBC's television services properly for carrying their programming (see [Decision CRTC 87-904](#), conditions of licence 9 through 11). The CRTC could, hypothetically, consider the same scenario for broadcasters with both online and offline programming services except that it would be difficult to reconcile with concerns about administrative burden.
- 25 Moreover, to the extent that it is relevant to BCE's argument, although the CRTC has in the past accepted the infant-industry argument to exempt 'young' broadcasting services from regulation, this is simply no longer the case for online services. The online services of many long-established broadcasters have effectively been able to benefit from exemption from implementing the *Broadcasting Policy for Canada* for [25 years](#). FRPC does not support an infant-industry argument to exempt Canadian online services from regulation.

- 26 Finally, Rogers argues that the CRTC should continue to exempt all Canadian online broadcasting services that are affiliated with conventional broadcasters from requirements to provide financial support to Canada’s broadcasting system. It says that such support should only be required “when the Commission carries out its full review of traditional broadcasting undertakings’ contribution obligations” (paragraph 10).
- 27 FRPC agrees that the timing of the various stages of the CRTC’s *Regulatory Plan* has led to serious problems in terms of achieving Parliament’s objectives for the *Online Streaming Act*. That said, Rogers goes on to argue that if the CRTC imposes financial requirements on conventional broadcasters’ affiliated online broadcast services, such requirements should only ‘enter into force’ when conventional broadcasters’ financial support to implement the *Broadcasting Policy for Canada* has been reduced (paragraph 10). FRPC disagrees with this proposal, as its main effect will be to maintain (or weaken) the *status quo ante*: the entire rationale of the *Online Streaming Act* was to increase support for Canada’s *Broadcasting Policy* – not to maintain or reduce that support. If Canada’s broadcasting system is no better off in, say, five years – what was the point of the last several years of intense work by the House of Commons, the Senate and so many other interested parties?

* * * End of document * * *