

Court File No. A-225-24
~~F-1642-24~~

FEDERAL COURT OF APPEAL

BETWEEN:

MOTION PICTURE ASSOCIATION-CANADA,
CRUNCHYROLL, LLC, NETFLIX SERVICES CANADA ULC,
PARAMOUNT ENTERTAINMENT CANADA ULC AND PLUTO INC.

- and -

CANADIAN ASSOCIATION OF BROADCASTERS

Applicants		101
FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE		
F I L E D	JUL 02 2024 KIMI CHEONG	D É P O S É
TORONTO, ON. Respondent		

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENDED by the Applicants. The relief claimed by the Applicants appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal*

Courts Rules and serve it on the Applicant's solicitor, or if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date JUL 02 2024 Issued by _____
(Registry Officer)

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: **The Registrar**
Federal Court of Canada
Application Division
180 Queen Street West
Suite 200
Toronto, Ontario M5V 3L6

AND TO: **Department of Justice**
c/o The Administrator
Federal Court of Appeal
180 Queen Street West
Suite 200
Toronto, Ontario M5V 3L6

Solicitors for the Respondent,
Attorney General of Canada

(service to be effected by filing duplicate copies in the Registry pursuant to Rule 133 and Section 48 of the Federal Courts Act)

AND TO: **Canadian Radio-television and Telecommunications Commission**
Ottawa, ON K1A 0N2

AND TO: **Canadian Association of Broadcasters (Independent Local News Fund)**
770 - 45 O'Connor Street
Ottawa, Ontario K1P 1A4

Email: kdesjardins@cab-acr.ca
Attention: Kevin Desjardins, President

THE APPLICATION IS FOR:

THIS IS AN APPLICATION for judicial review in respect of the decision of the Broadcasting Regulatory Policy CRTC 2024-121 issued by the Canadian Radio-television and Telecommunications Commission (“CRTC”) and dated June 4, 2023 (the “Decision”).

THE APPLICANTS hereby request, pursuant to Rule 317 of the *Federal Courts Rules*, all material that is relevant to this application that is in the possession of the CRTC in any way related to or in connection with the Decision and Broadcasting Notice of Consultation CRTC 2023-138, other than the material posted on the CRTC’s public website at <https://crtc.gc.ca/> for process numbers 2023-138, 2023-138-1 and 2023-138-2.

THE APPLICANTS MAKE APPLICATION FOR:

1. An Order, with respect to the Decision and any order of the CRTC implementing the Decision (including the draft order at the appendix to the Decision),
 - (a) setting aside and quashing the requirement that foreign online undertakings pay a percentage of their revenues to the Independent Local News Fund;
 - (b) setting aside and referring back to the CRTC for determination the requirements that foreign online undertakings devote, contribute or make the payments set out in the Decision, with a direction that the CRTC establish a mechanism that ensures any such payments do not, directly or indirectly, disclose information designated as confidential under s. s. 25.3 of the *Broadcasting Act*.
2. Costs of this application; and
3. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

1. The Decision imposes new obligations on the Applicant companies, non-Canadian businesses that stream broadcasting content over the internet to Canadians.

The Applicants

5. Motion Picture Association-Canada (“MPA-Canada”) is the voice and advocate of major international producers and distributors of film, television and streaming content for global audiences. It is the Canadian affiliate of the Motion Picture Association. The global studios MPA-Canada represents are members of the Motion Picture Association and include Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. (collectively, “MPA Studios”).

6. One or more affiliates of each of the MPA Studios operate an “online undertaking”, within the meaning of the *Broadcasting Act*, that is available in Canada (the “Services”), including the Applicants Crunchyroll, LLC, the Canadian operator of the Crunchyroll Japanese anime subscription streaming service; Netflix Services Canada ULC, the Canadian operator of the Netflix subscription streaming service; Paramount Streaming Canada, a division of Paramount Entertainment Canada ULC, the Canadian operator of the Paramount+ subscription streaming service; and Pluto Inc., the Canadian operator of the Pluto TV free advertising-supported television or “FAST” streaming service.

7. As described below, the MPA Studios and the Services are massive supporters of Canada's creative ecosystem, as part of their global entertainment efforts. None of the Services produce local news, let alone Canadian local news.

The Decision

8. The Decision requires online undertakings to make a "base contribution" of 5% of their annual Canadian gross broadcasting revenues less excluded revenues to certain funds. This requirement applies to online undertakings registered with the CRTC, except (i) online undertakings whose operator or operator's ownership group has annual contributions revenues of \$25 million or less, and (ii) online undertakings whose operator is a licensee, is affiliated with a licensee, or is a person operating, or affiliated with a person operating, an exempt broadcasting undertaking.

9. In particular, the Decision requires online undertakings to pay a 1.5% base contribution to the Independent Local News Fund ("ILNF") to support Canadian local news production.

10. The ILNF distributes funds to traditional private television stations that offer local news and information and are unaffiliated with a vertically integrated group.

11. The Decision does not reveal any basis for the CRTC's conclusion that it is appropriate to require foreign online undertakings to contribute to news production. The CRTC summarily concludes, without evidence, that "there is a need to increase support for news production", followed by a bald statement that such a contribution will "reflect the

importance of independent broadcasting undertakings and the provision of news coverage” under the policy objectives in ss. 3(1)(d)(iii.5) and 3(1)(i)(ii.1) of the *Broadcasting Act*.

12. The determination to impose a local news funding obligation on foreign online undertakings ignores the *Broadcasting Act* requirements that foreign online undertakings “contribute in an equitable manner” and “in a manner that is appropriate in consideration of the nature of the services provided by the undertaking”.

13. The CRTC did not impose base contributions on Canadian online undertakings associated with traditional Canadian broadcasters or exempt broadcasting undertakings, such as Canada’s largest streaming service, Crave. The CRTC attempted to justify the inequity of foreign online undertakings being required to contribute to a local news fund that has nothing to do with the nature of their services (such as Crunchyroll only providing Japanese anime programming) by pointing to broadcasting distribution undertakings (“BDUs”) contributing to the ILNF without receiving funding from the ILNF. This is unsound reasoning. Unlike foreign online undertakings, BDUs have a nexus to local news and local reflection programming because they provide mandatory distribution of local television channels that produce local news.

14. The Decision offers no reasoning or support for the conclusion that foreign online undertakings that do not produce local news programming should be compelled to contribute to the production of news or be treated inequitably as compared to Canadian online undertakings.

15. Imposing on foreign online undertakings a requirement to fund news production is not “appropriate” in light of the “nature” of the services that foreign online undertakings provide. Rather, it is a requirement to subsidize the news programming of other broadcasting undertakings that, unlike foreign online undertakings, have been licensed by the CRTC to provide such programming as a fundamental component of their licence to serve local communities. Just as Canadian services are not required to fund local news, neither can foreign streaming services with no rational connection to the production of local news be forced to pay into a local news fund.

16. Section 25.3 of the *Broadcasting Act* provides a mechanism by which the Services can designate commercially sensitive financial information as confidential, and they would undoubtedly do so. Nevertheless, the Decision requires online undertakings to contribute directly to the designated fund administrators, such as the Canadian Association of Broadcasters (“CAB”) that administers the ILNF, in a manner that will reveal their commercially sensitive financial information. These fund administrators may through a basic mathematical calculation determine, and potentially disclose to others, the annual Canadian broadcasting revenues of each of the Services. The provision of such sensitive financial information to the CAB is particularly concerning and prejudicial since the CAB acts as a representative voice for private television broadcasters, which are both competitors to the Services’ streaming services, and content licensees of the Services or their affiliates.

17. As of the making of this motion, the CRTC has called for comments on its draft order to implement the Decision, but not yet issued the order.

The Grounds for Judicial Review

18. Leave should be granted because the CRTC made two errors of mixed law and fact, and failed to satisfy its duty of procedural fairness. Specifically:

- (a) the CRTC acted unreasonably in compelling foreign online undertakings to contribute monies to support news production and requiring that they make financial contributions to the ILNF;
- (b) the CRTC acted unreasonably in knowingly allowing confidential information to be disclosed to others by indirectly requiring foreign online undertakings to disclose to several organizations each of their confidential relevant annual Canadian gross broadcasting revenues; and
- (c) the CRTC provided inadequate reasons with respect to the subject of (a) and (b).

19. To be clear, the Applicant companies' streaming services contribute to the policy goals for online undertakings established in the *Online Streaming Act* and support the creation, production, and presentation of Canadian programming that is consistent with the nature of their services.

20. However, the Applicant companies' streaming services do not produce local news. Requiring them to fund the production of Canadian news programming was unreasonable under the *Broadcasting Act*, as recently amended by the *Online Streaming Act*. The requirement is neither appropriate in consideration of the nature of the services they provide, nor equitable.

21. The funding mechanism chosen by the CRTC unreasonably violated the statutory confidentiality requirement imposed by Parliament. This matter should be remedied by the CRTC appropriately using its power in a manner that respects the confidentiality of foreign online undertakings' financial information.

22. The Applicants rely on the following statutes, order and rules:

- (a) *Online Streaming Act*, S.C. 2023, c. 8;
- (b) *Broadcasting Act*, S.C. 1991, c. 11;
- (c) *Online News Act*, S.C. 2023, c. 23;
- (d) *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1 and s. 28;
- (e) Order issuing directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), SOR/2023-239; and
- (f) Rules 300 to 319 of the *Federal Courts Rules*, SOR 98/106;

23. Such further and other grounds as the solicitors may advise.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (a) The affidavit of Lisa Ebdon sworn July 2, 2024;
- (b) The records provided by the CRTC under Rule 318; and

- (c) Such further and other evidence as the solicitors may advise and this Honourable Court may permit.

July 2, 2024

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Court File No.

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Applicants


- and -

CANADIAN ASSOCIATION OF
BROADCASTERS

Respondent

NOTICE OF APPLICATION

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____
day of JUL 02 2024 A.D. 20____

Dated this _____ day of JUL 02 2024 20____
KC 

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