

Court File No. A- 229-24

FEDERAL COURT OF APPEAL

BETWEEN:

101

FEDERAL COURT OF APPEAL		D É P O S É
COUR D'APPEL FÉDÉRALE		
F I L E D	JUL 03 2024	
	KIMI CHEONG	
TORONTO, ON		

APPLE CANADA INC.

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

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 the Federal Court of Appeal at 180 Queen Street West, Suite 200, 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 where 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.

**BRITTNEY CHANNER
REGISTRY OFFICER
AGENT DU GREFFE**

Date: July 3, 2024

Issued by: _____

(Registry Office)

Address of local office:
180 Queen Street West, Suite
200
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TO: The Chief Administrator
Federal Court of Appeal
180 Queen Street West, Suite 200
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120 Adelaide Street West, Suite 400
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Solicitors for the Respondent,
Attorney General of Canada

APPLICATION

THIS IS AN APPLICATION FOR leave to appeal, pursuant to subsection 31(2) of the *Broadcasting Act*, S.C. 1991, c. 11, and Rule 300(b) of the *Federal Courts Rules*, SOR/98-106, to this Honourable Court from the Broadcasting Regulatory Policy CRTC 2024-121 – “*The Path Forward – Supporting Canadian and Indigenous content through base contributions*” issued by the Canadian Radio-television and Telecommunications Commission (the “CRTC”) on June 4, 2024 (the “**Decision**”) and for judicial review of the Decision pursuant to paragraph 28(1)(c) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 300(a) of the *Federal Courts Rules*.

THE APPLICANT MAKES APPLICATION FOR:

1. An order granting the applicant leave to appeal to this Court from the Decision.
2. In the event that leave to appeal is granted, an order directing that the appeal be joined to be heard together with the judicial review of the Decision.
3. An order setting aside the Decision in whole or in part and remanding the determinations contained therein to be re-determined by the CRTC.
4. An order, if necessary, extending the time for making the application for leave to appeal and for judicial review.
5. An order designating certain material to be filed with the Court as confidential, with access to such material being restricted to the Court and the parties to the within proceeding.
6. An order for directions regarding the within proceeding and similar proceedings which may be brought by other parties in respect of the Decision.
7. Costs of the within proceeding.

8. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

A. Introduction

9. Apple Canada Inc. (“**Apple**”) brings this application seeking to challenge the Decision made by the CRTC.

10. In the Decision, the CRTC determined that online undertakings, such as the ones provided by Apple, who are not affiliated with Canadian broadcast licensees, would have to make “base contributions” – broadly speaking, payments – to certain funds with the goal of developing, financing, producing, or promoting Canadian and Indigenous programming.

11. Apple has played a significant role in promoting and making Canadian music and video content available and discoverable to Canadians and to broader international audiences. Apple has served Canadian customers with video and music services over the course of many years and is a company established in Canada, with local offices in Toronto and Montréal.

12. Apple has always been committed to making a variety of content, including Canadian and Indigenous content, discoverable and accessible to Canadian consumers.

13. From the time that it first introduced its video services in Canada, Apple has helped make Canadian movies and TV shows accessible to Canadians. The extensive catalogue of Canadian films available on the Apple TV app provides access to these works to Canadian consumers and provides Apple’s Canadian distribution partners an additional outlet for their productions.

14. Since its launch of its original content service Apple TV+ in November 2019, Apple has made major investments in Canadian development, production, and post-

production, including in the shows “See,” “Schmigadoon!” “Home Before Dark,” “Me,” “Fraggle Rock,” “Changeling,” multiple Peanuts specials, and a live capture of the Tony award-winning musical set in Newfoundland, “Come from Away”. These initiatives reflect Apple’s efforts to engage local writers, directors, composers, actors, animators, crews, and production and post-production companies.

15. With respect to music, Apple has long supported the Canadian industry by featuring and promoting Canadian artists, in both English and French, as well as by working closely with Canadian record labels, distributors, management companies, and directly with artists.

16. Given its established and long-standing Canadian presence and support as outlined above, Apple has been and remains committed to contributing to, and supporting, Canadian programming.

17. As such, Apple was and remains generally aligned with the CRTC’s stated regulatory approach that was to guide the regulatory consultation process which ultimately gave rise to the Decision, as reflected in the following “**Statement of Intended Regulatory Approach**”:

A new and modernized framework should recognize the new perspectives and opportunities that online undertakings bring to the broadcasting system, and *ensure flexibility and adaptability* in the future. For these reasons, the Commission intends to apply an approach that recognizes that *each broadcasting undertaking or group of undertakings is unique*, and that focuses on desired performance standards and measures of success. At the same time, it is essential for the approach to ensure that *the principles of regulatory fairness and equitability* are upheld across all contributors. Further, by considering the possibility of a group-based approach to contributions (where applicable) the *Commission aims to provide greater flexibility and a reduced administrative burden*.
[emphasis added]

18. However, in rendering the Decision the CRTC did not did not abide by its Statement of Intended Regulatory Approach. Instead, it acted prematurely in imposing a system of base contributions without a proper foundation and without properly considering and/or effecting the following critical aspects of its legislated mandate, as specifically directed by the Governor-in-Council:

- (a) the review of the definition of Canadian and Indigenous content (to which any support, including funding, would be directed);
- (b) the identification and constitution of the funds that could optimally receive and distribute any direct financial support;
- (c) the consideration of what would be equitable to require of non-Canadian online undertakings, including the ability of those undertakings (or their affiliates) to access those funds; and
- (d) the consideration of the unique characteristics of the various online undertakings in question, as well as their respective and relative capacities to reasonably contribute to funds established to support Canadian and Indigenous content.

19. As further detailed herein, Apple respectfully submits that, in rendering the Decision, the CRTC erred in law and in jurisdiction, and acted unreasonably.

B. The Applicant

20. Apple is a corporation incorporated pursuant to the laws of Canada.

21. Apple provides online video and audio services in the Canadian market (collectively, “**Apple Media Services**”), including the following.

22. With respect to video (often referred to as “audiovisual”) services, Apple offers the Apple TV app.¹ The Apple TV app provides customers the ability to:

- (a) purchase and rent movies and television shows delivered from multiple studios and distributors;
- (b) subscribe to Apple TV Channels (i.e., video on demand channels that are operated by third parties); and
- (c) subscribe to Apple TV+, a streaming service focused on delivering Apple Original films, series, and specials to a global audience.

23. With respect to audio services, Apple offers:

- (a) Apple Music – a music streaming service with over 100 million songs, which customers access by means of a subscription; and
- (b) iTunes Store – which offers customers the ability to purchase music, music albums, and music videos.

C. *Online Streaming Act Effects Changes to the Broadcasting Act*

24. On April 27, 2023, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, S.C. 2023, c 8, formerly known as Bill C-11, and also cited as the *Online Streaming Act*, came into force.

25. Pursuant to the *Online Streaming Act*, Parliament made a number of changes to the *Broadcasting Act* including, most significantly for present purposes, changes that:

¹ Among its online services that could be subject to the *Broadcasting Act*, Apple also offers Apple Fitness+ which is a subscription service that is available across Apple’s audiovisual products (i.e., iPhone, iPad, Apple TV, Apple Watch), MLS Season Pass as well as Apple Podcasts and Audiobooks.

- (a) added online undertakings (i.e., undertakings for the transmission of programs over the internet) as a distinct class of broadcasting undertakings (s. 2);
- (b) updated the broadcasting policy for Canada set out in section 3 of the *Broadcasting Act* (s. 3);
- (c) updated the statutory provisions describing the manner in which the CRTC was to regulate and supervise the Canadian broadcasting system (ss. 5 and 6); and
- (d) articulated the CRTC's power to require that persons carrying on broadcasting undertakings make expenditures to support the Canadian broadcasting system (s. 13).

26. Included in the updated broadcasting policy set out in the *Broadcasting Act* are the following provisions:

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;

(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*;

[...]

(e) each element of the Canadian broadcasting system shall contribute *in an appropriate manner* to the creation and presentation of Canadian programming;

[...]

(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;

[emphasis added]

D. CRTC's Regulatory Plan

27. On May 8, 2023, the CRTC published its regulatory plan to implement the *Online Streaming Act*.
28. On May 12, 2023, the CRTC announced three public consultations to be held regarding:
- (a) base contributions to support Canadian and Indigenous content ("**Base Contribution Consultation**");
 - (b) registration of online streaming services; and
 - (c) exemption orders and basic conditions of service.
29. In connection with the Base Contribution Consultation, the CRTC, on May 12, 2023, issued the Broadcasting Notice of Consultation CRTC 2023-138 – "*The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*" ("**Notice of Consultation 2023-138**").
30. Notice of Consultation 2023-138 included the Statement of Intended Regulatory Approach, cited above.
31. In parallel with the Base Contribution Consultation, the CRTC invited submissions in respect of the registration of, and conditions of service applicable to,

online undertakings. On September 29, 2023, the CRTC published decisions on registration and conditions of service. In addition, during the late summer of 2023, the CRTC invited submissions in respect of broadcasting licence fees to be paid by online undertakings. On March 21, 2024, the CRTC published its decision in respect thereof. Apple participated in each of these consultations.

E. Government Intervention

32. On November 9, 2023, the Government of Canada – i.e., the Governor-in-Council – issued a direction to the CRTC (SOR/2023-239) on how to design and implement the new regulatory framework (the “**Direction**”).

33. The Direction included the following mandatory directives:

4 The Commission is directed to impose requirements on broadcasting undertakings that ensure that the Canadian broadcasting system - which is to be effectively owned and controlled by Canadians and includes foreign broadcasting undertakings that provide programming to Canadians - strongly supports a wide range of Canadian programming and Canadian creators. The requirements, both financial and non-financial, must be *equitable* given the size and nature of the undertaking and *equitable* as between foreign online undertakings and Canadian broadcasting undertakings.

...

19 The Commission is directed to make any changes to its regulatory framework that are necessary for the purposes of the implementation of this Order *within two years* after the day on which it comes into force. In doing so, the Commission is directed to *prioritize* the implementation of *sections 13 to 16* and to ensure that any changes to its regulatory framework are made as soon as feasible and on a continual basis during that two-year period.
[emphasis added]

34. The sections of the Direction referenced in section 19 above – i.e., “sections 13 to 16” – that the CRTC was directed by the Governor-in-Council to prioritize were measures regarding a re-determination of what constitutes Canadian programming, as well as measures regarding the engagement of Indigenous peoples, equity-seeking and ethnocultural groups, and official language minority communities.

35. In rendering the Decision, the CRTC did not prioritize these measures as directed.

F. Base Contribution Consultation – Submissions and Hearing

36. As part of the Base Contribution Consultation, the CRTC invited submissions (referred to as “interventions”) and reply submissions to the Base Contribution Consultation, which were due during the month of July 2023. Claiming that the matter was urgent, the Commission did not wait for the Governor-in-Council to finalize its anticipated policy direction to the CRTC (which Direction was ultimately issued on November 9, 2023, as noted above).

37. The Commission also convened a three-week public hearing, held from November 20 to December 8, 2023. Both before and after the public hearings, the CRTC received some 360 written submissions from interested stakeholders, including Apple.

38. Apple’s written and oral submissions included the following:

- (a) general agreement with the CRTC’s Statement of Intended Regulatory Approach, with the emphases indicated in paragraph 17, above;
- (b) a caution that the CRTC not approach the proceedings with a predetermined purpose of extending the regulatory obligations of traditional broadcasting undertakings to online undertakings (like Apple) but, rather, should more holistically ask what a new and

modernized framework would look like in order to recognize the new perspectives and opportunities that online undertakings bring to the broadcasting system, and to ensure flexibility and adaptability in the future;

- (c) urging that flexibility be a crucial feature of any contribution framework that may be imposed on online undertakings. There are various business models available and, given that this is an industry driven by innovation, technology, and creativity, all such models should be fully considered when determining the appropriate form of contributions;
- (d) a recommendation that the contribution framework should:
 - (i) foster competition, innovation, and creativity;
 - (ii) recognize the distinctions between online undertakings and traditional broadcasters in a manner that does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians;
 - (iii) recognize the unique attributes of individual undertakings by imposing contributions that are appropriate to their business models and programming;
 - (iv) recognize both tangible and intangible contributions made by undertakings to the production, promotion, and discoverability of Canadian and Indigenous programming. As to the tangible contributions, Apple pays considerable royalties to rights holders and Apple has also been making significant expenditures in production activities in Canada. As examples of the intangible contributions Apple makes to Canadian and

Indigenous content, the Apple TV app promotes content from Canada's Indigenous creators throughout the year, highlighting new releases, catalogue content and developing creator-focused features that shine a light on the incredible work of actors and filmmakers. The Apple TV app provides amplified editorial support to Canadian content, not only upon new release, but on an ongoing basis. Canadian movies and TV shows are promoted in multiple collections and shelves alongside US and international content on the main page of the app (Home tab), as well as on Store tab, using both large scale and standard sized artwork;

- (v) where expenditures are required, ownership groups should be given the flexibility to determine the most appropriate method and breakdown of such contributions (e.g., payment into funds to support Canadian and Indigenous programming, direct investments in Canadian and Indigenous productions, rights payments, and/or marketing expenditures, or a combination thereof);
- (vi) reflect the need for the ownership groups of non-Canadian online undertakings to benefit from payments into funds as do traditional broadcasters; and
- (vii) acknowledge the necessity of enacting a new definition of Canadian programming that meets the Broadcasting Policy - prior to determining new base contributions - while reflecting the reality of the participation of non-Canadians in the broadcasting system.

39. More specifically, in its submissions, Apple expressed reservations about the CRTC's apparently predetermined intentions to establish "initial base requirements for online undertakings" and "the possible recipients of those contributions", as set out in paragraphs 3 and 4 of the Notice of Consultation 2023-138.

40. Apple pointed out that this approach raised two interrelated procedural concerns. First, determining a base contribution requirement that will form part of the larger framework could have the effect of prejudging the shape of the overall contribution framework, including by limiting online undertakings' flexibility to effect their contribution to the broadcasting system through direct investments in Canadian and Indigenous programming.

41. Second, Apple urged against setting contribution requirements without first revisiting the definition of Canadian programming, noting that, until the CRTC had redefined Canadian content, online undertakings would not be able to understand (and would not be able to explain to the CRTC) the potential business impacts flowing from any new contribution requirements.

42. Apple also expressed the view that, at a minimum, the fund rules needed to be reconsidered so as to ensure equitable access to those funds by both Canadian and non-Canadian broadcasting undertakings (including their ownership groups). Otherwise, non-Canadian online undertakings would effectively be required to subsidize the production of content by Canadian broadcasting undertakings – such a result being contrary to the Direction's explicit and mandatory directive (set out above) that, "*The requirements, both financial and non-financial, must be equitable given the size and nature of the undertaking and equitable as between foreign online undertakings and Canadian broadcasting undertakings.*" [emphasis added]

43. In addition, given that the CRTC had postponed its review of the definition of Canadian programming to a later date, Apple pointed out that affected parties would not know until after the consultation was completed what type of programming will

ultimately be supported by the contribution requirements being considered. Also, given that direct investments can count as contributions, undertakings would not know which investments qualify at the time the contribution requirement goes into effect. Apple argued that this was inconsistent with the procedural requirement for parties to know the case they have to meet.

44. In its submissions, Apple also highlighted the significant contribution it already makes towards making Canadian music and video content available and discoverable to Canadians and broader international audiences.

G. Apple's Evidence

45. As part of its participation in the Consultation, Apple provided specific evidence relevant to the appropriateness and quantum of any base contributions that might be imposed.

46. On December 4, 2023, Apple representatives appeared before the CRTC at the public hearing and provided evidence on the various matters for determination posed by the CRTC. Among other things, this evidence included information about how its music and transactional video services should be distinguished from traditional broadcasting services.

47. In the context of this appearance, Apple also answered questions posed by the CRTC.

48. Following the public hearing, on December 21, 2023, the CRTC sent out a letter to some of the stakeholders who had participated in the proceedings (including Apple), requesting different types of information from various participants (the “**request for information**” or “**RFI**”).

49. The RFI asked Apple to provide various information, including the following:

- (a) information regarding the appropriate thresholds at the broadcasting ownership group level for the application of base contributions (request #12);
- (b) appropriate levels of initial base contributions by Apple (request #15);
- (c) financial information related to total annual gross revenues generated by Apple for its transactional services for the past 3 broadcast years – broken down between music transactional services and audiovisual transactional services; and the expenses related to the above-noted revenues (request #16);
- (d) financial information related to (request #17):
 - (i) the portion of the total annual Canadian gross revenues generated by the audio undertaking(s) for each of the past 3 broadcast years;
 - (ii) the portion of the total annual Canadian gross revenues generated by podcast services for each of the past 3 broadcast years;
 - (iii) total expenses incurred in Canada by the audio undertaking(s) over the same period; and
 - (iv) expenses related to music services over the same period, including royalty payments to Canadian and foreign music rights holders and total expenditures in support of the development and promotion of Canadian and Indigenous music;
- (e) financial information related to (request #20):

- (i) the portion of the total annual Canadian gross revenues generated by the audiovisual undertakings for each of the past 3 broadcast years;
 - (ii) total expenses related to the audiovisual undertakings in Canada over the same period; and
 - (iii) expenses related to the audiovisual undertakings over the same period in relation to the licensing of preexisting Canadian content and original Canadian content (for productions licensed solely by Apple and for which the rights are exclusive to Apple), and the funding of Canadian content (as it is currently defined by CAVO, the CRTC, and under the various coproduction treaties administered by Telefilm);
- (f) information relating to the activities of non-Canadian online undertakings with respect to original Canadian French-language programming and the acquisition of the rights of preexisting Canadian French-language programming, including the following additional information of programming expenditures of the past 3 broadcast years (request #21):
- (i) the portion of the Canadian content (as it is currently defined by CAVCO, the CRTC, and under the various coproduction treaties administered by Telefilm) in relation to pre-existing Canadian French-language content; and
 - (ii) the portion of the Canadian content (as it is currently defined by CAVCO, the CRTC, and under the various co-production treaties administered by Telefilm) spent on original Canadian French-language and commissioned from (i) Quebec creators

and (ii) official language minority communities outside Quebec; and

- (g) information regarding the portion of Canadian content (as it is currently defined by CAVCO, the CRTC, and under the various co-production treaties administered by Telefilm) for English-language content commissioned from producers from the official language minority community in Montreal, Quebec (request #22).

50. With respect, in particular, to items (c), (d) and (e) above, the RFI explicitly indicated that the requested information could be provided “confidentially, if desired”.

51. Section 25.3 of the *Broadcasting Act* contains the following provisions:

25.3 (1) A person who submits any of the following information to the Commission may designate it as confidential:

- (a) information that is a trade secret;
- (b) financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or
- (c) information the disclosure of which could reasonably be expected
 - (i) to result in material financial loss or gain to any person,
 - (ii) to prejudice the competitive position of any person, or
 - (iii) to affect contractual or other negotiations of any person.

(2) Subject to subsections (4), (5) and (7), if a person designates information as confidential and the designation

is not withdrawn by that person, no person described in subsection (3) shall knowingly disclose the information, or knowingly allow it to be disclosed, to any other person in any manner that is intended or likely to make it available for the use of any person who may benefit from the information or use it to the detriment of any person to whose business or affairs the information relates.

52. Apple responded to the RFI in two tranches.

53. First, on January 26, 2024, Apple filed a confidential letter to the Secretary General of the CRTC (the “**January 26 Response**”). In this letter, Apple provided detailed information in response to all of the item numbers applicable to it in the RFI subject only to certain information that was incomplete.

54. Second, on February 9, 2024, Apple filed a confidential letter to the Secretary General of the CRTC (the “**February 9 Response**”). In this letter, Apple provided the balance of the information that had been sought by CRTC in the RFI. (The January 26 Response and the February 9 Response are referred to collectively as the “**Confidential RFI Responses**”.)

55. In each of the Confidential RFI Responses, in reliance upon the CRTC’s invitation and in reliance upon subsections 25.3(1) and (2) of the *Broadcasting Act*, Apple provided confidential and competitively sensitive financial information. Apple also provided evidence that the conditions set out in subparagraphs 25.3(ii) and (iii) of the *Broadcasting Act* were satisfied.

56. In addition to the Confidential RFI Responses, in accordance with CRTC practice, Apple filed “abridged” versions of the January 26 Response and the February 9 Response in which the confidential information and competitively sensitive information was redacted so that the abridged versions could form part of the public record.

57. The nature and specificity of the information contained in the Confidential RFI Responses is exemplified by the following extract from the abridged version of the February 9 Response:

- Expenses related to Apple’s music transactional services ##

Expense Category	FY 2022	FY 2023
Standard Cost - i.e., Royalties (Labels and Publishers, and other content providers)	##%	##%
Other Cost of Goods Sold - i.e., Other content related costs (e.g. Live events, Lyrics royalties, Radio, Quality Assurance, Localization, Design, etc.)	##%	##%
Operating Expenses – i.e., Engineering and other headcount related costs, transaction costs, marketing and advertising	##%	##%
Operating Margin – i.e., Estimated margin remaining to cover other corporate G&A expenses	##%	##%

- Expenses related to Apple’s audiovisual transactional services

Expense Category	FY 2022	FY 2023
Standard Cost - i.e., Royalties (Labels, Publishers, and other content providers)	##%	##%

Other Cost of Goods Sold - i.e., Other content related costs (e.g. Quality Assurance, Localization, Design, etc.)	##%	##%
Operating Expenses – i.e., Engineering and other headcount related costs, transaction costs, marketing and advertising	##%	##%
Operating Margin – i.e., Estimated margin remaining to cover other corporate G&A expenses	##%	##%

H. Apple’s Final Submissions

58. On February 15, 2024, Apple filed its final written submissions to the CRTC. By way of summary, in these submissions, Apple advanced the following positions:

- (a) at this early stage of the CRTC’s implementation of the *Online Streaming Act*, there are simply too many unknowns to reliably and fairly establish a “base contribution” payable by online services;
- (b) while Apple acknowledges that a modernized framework will include contributions from online services, such contributions should:
 - (i) take into consideration particularities and different models of each online undertaking; and
 - (ii) only be required once the overall framework for contributions has been determined, including such important elements as an updated definition of “Canadian content”, and the eligibility of

non-Canadian services to access funds to enhance the availability of Canadian programming on their own services;

- (c) prematurely establishing base contributions, including their level and recipients, could undercut the CRTC's stated goals for a new and modernized framework,
- (d) imposing a base contribution on online undertakings in isolation from foundational issues would also risk unfairness, by requiring online undertakings to make contributions forming part of an as-yet-unknown framework and which they themselves are unable to access in support of the production of Canadian and Indigenous content made available on their own services;
- (e) as pointed out by various participants, imposing a base contribution would risk increased costs to consumers or even curtailment of investments and services available to Canadians in light of the tight margins of certain services; and
- (f) there is no urgency to impose a one-size-fits-all base contribution on Apple given its already significant contributions to and support of Canadian and Indigenous content.

59. As part of its submissions above, Apple pointed to the evidence that had been put before the CRTC, from both Apple and other participants, regarding the financial impact that the imposition of a base contribution would have on the various online services. Apple cautioned the CRTC against a one-size-fits-all contribution payment scheme that does not take into account how the resulting cost would affect the overall financial structure of the services in question.

I. CRTC's Decision

60. On June 4, 2024, the CRTC released the Decision.
61. The Decision is comprised of :
- (a) a first portion which contains the CRTC's analysis of the issues for determination, summaries of the various participants' submissions on the issues and the CRTC's determinations on each of the issues; (the "**Reasons**"); and
 - (b) an appendix which contains a proposed order imposing conditions of service and expenditure requirements for carrying on certain online undertakings (the "**Draft Order**") in respect of which participants, including parties to be affected by the Draft Order, could file comments in respect of same.
62. In the Decision, which was stated to be "based on the public record", the CRTC concluded that base contribution requirements should be imposed on both audio and audiovisual online undertakings not affiliated with Canadian licensees. Specifically, the CRTC held that online undertakings whose corporate groups generate \$25 million or more in combined annual revenues of both audio and audiovisual streaming services and that are not affiliated with a Canadian broadcaster should contribute 5% of those revenues to certain funds. The only such revenues of Apple that are exempt from this requirement are those generated by smaller services such as podcasts and audiobooks. Even Apple Fitness+, which is very different from any video streaming service or traditional broadcaster is subject to the contribution.
63. The CRTC further indicated that:
- (a) it expects this requirement to take effect in the 2024-2025 broadcast year, which begins on September 1, 2024;

- (b) the requirement will provide an estimated \$200 million per year in funding for the support of Canadian and Indigenous programming;
- (c) contributions will be directed to areas of immediate need, such as local news on radio and television, French-language content, Indigenous content, and content created by and for equity-deserving groups, official language minority communities and Canadians of diverse backgrounds;
- (d) more specifically, the contributions were to be directed as follows:
 - (i) contributions from audio-visual online streaming services will go to:
 - A. the Canada Media Fund and/or direct expenditures toward certified Canadian content (2%);²
 - B. the Independent Local News Fund (1.5%);
 - C. the Black Screen Office Fund, the Canadian Independent Screen Fund for BPOC creators, and/or the Broadcasting Accessibility Fund (0.5%);
 - D. the Certified Independent Production Funds supporting OLMC producers and producers from diverse communities (0.5%); and
 - E. the Indigenous Screen Office Fund (0.5%); and
 - (ii) contributions from audio online undertakings will go to:

² Of this 2%, the operator may deduct certified Canadian content expenditures (i.e., expenditures for the acquisition or production of Canadian programming) of up to 1.5% for this initiative.

- A. FACTOR and Musicaction (2%);
- B. a new temporary fund supporting local news production by commercial radio stations outside of the designated markets (1.5%);
- C. the Canadian Starmaker Fund and Fonds RadioStar (0.5%);
- D. the Community Radio Fund of Canada (0.5%);
- E. direct expenditures targeting the development of Canadian and Indigenous content and/or a variety of selected funds (0.35%); and
- F. the Indigenous Music Office and a new fund to support Indigenous music (0.15%).

64. The CRTC further indicated, “This base contribution decision sets the foundation for meaningful participation by online streaming services in the Canadian broadcasting system. The contributions made by traditional broadcasters and online streaming services will be fine-tuned as the Commission moves forward with the implementation of the amended *Broadcasting Act*.”

J. Apple’s Comments on the Draft Order

65. Apple submitted comments on the CRTC’s proposed order on June 14, 2024 and July 2, 2024.

66. In its comments, Apple reserved its rights to challenge the Decision and the imposition of expenditure requirements. As instructed by the CRTC, Apple limited its comments to:

- (a) aspects of the order requiring clarification or that require revision to conform to the reasons given in the Decision;
- (b) measures to clarify how the base contribution of 5% of online undertakings' annual revenue ("Contribution Requirements") are to be calculated;
- (c) measures necessary to protect the confidentiality of sensitive financial information that Apple will be required to share with certain third parties, as a result of the Decision; and
- (d) the language of, and implementation issues regarding, the order itself.

67. Apple also contested the CRTC's ability to impose the obligations in the Decision by way of order, specifically.

68. In its reply comments submitted July 2, 2024, Apple responded to comments from other parties as to the timing of payments as well as the ability of online undertakings to make direct expenditures in relation to certified Canadian content under the Decision and Order.

K. Jurisdiction of the Federal Court of Appeal

69. This Honourable Court has jurisdiction to hear the request for leave to appeal because:

- (a) subsection 31(2) of the *Broadcasting Act* provides:

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. [emphasis added]

- (b) Rules 300 and 301 of the *Federal Courts Rules* provide, in part:

300. This Part applies to:

(a) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, unless the Court directs under subsection 18.4(2) of the Act that the application be treated and proceeded with as an action;

(b) *proceedings required or permitted by or under an Act of Parliament to be brought by application*, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the *Marine Liability Act*;

[...]

301. An application *shall be commenced by a notice of application* in Form 301, setting out:...

[emphasis added]

70. This Honourable Court has jurisdiction to hear the judicial review as a result of the following:

- (a) the *Federal Courts Act* provides, in part:

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

[...]

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*; and

- (b) Rule 300(a) of the *Federal Courts Rules*, *supra*.

L. Grounds for Leave to Appeal

71. Under subsection 31(2) of the *Broadcasting Act*, an appeal lies from a decision or order of the CRTC to this Court on a question of law or jurisdiction, with leave of the Court.

72. Leave should be granted where the applicant can establish some arguable ground upon which the proposed appeal might succeed. For the reasons set out below, Apple meets (and, indeed, exceeds) this threshold.

73. The CRTC committed errors of law in the Decision. More particularly, the CRTC erred in law:

- (a) by exceeding any jurisdiction under the *Broadcasting Act* to render the Decision by virtue of the following:
 - (i) the order to make base contributions was purportedly made by the CRTC “pursuant to subsections 9.1(1) and 11.1(2) of the *Broadcasting Act*”;
 - (ii) subsection 9.1(1) of the *Broadcasting Act* does not provide the CRTC with authority to make orders requiring undertakings to make expenditures, including base contributions;
 - (iii) the order to make base contributions applies to a class of undertakings (i.e., online undertakings that have annual contributions in excess of \$25 million); and
 - (iv) subsection 11.1(2) of the *Broadcasting Act* provides the CRTC with authority to make an order for, inter alia, “developing, financing, producing or promoting Canadian audio or audio-visual programs, including independent productions, for broadcasting undertakings”. However, such authority:

- A. is only available when regulations passed under subsection 11.1(1) have first been passed; and/or
- B. is limited to the making of an order in respect of a single person carrying on a broadcasting undertaking and not an entire class of persons such as the class of persons which the Decision purports to bind.

In effect, under the guise of a subsection 11.1(2) order, the CRTC has attempted to effect a subsection 11.1(1) regulation, without fulfilling the statutory conditions for doing same;

- (b) by determining that online undertakings should pay a base contribution (and by determining the quantum of that base contribution) without first determining what constitutes Canadian programming, contrary to section 19 of the Direction;
- (c) by failing to consider whether the result was “appropriate”, in light of the *Broadcasting Act* and the Direction requiring that contributions be “appropriate” to the nature of the service;
- (d) by specifically failing to consider whether it was “appropriate” (within the meaning of section 3(e) of the *Broadcasting Act*) to require online undertakings to pay a base contribution:
 - (i) without regard to the services’ profitability, and/or
 - (ii) without regard to contributions already being made to support Canadian and Indigenous content;
- (e) by failing to consider whether it was “equitable” (within the meaning of section 3(f.1) of the *Broadcasting Act*) to require online audiovisual undertakings to pay a base contribution when online undertakings do

not enjoy the same access to funds as is enjoyed by other undertakings or their affiliates that create programming;

- (f) by failing to consider whether it was “equitable” (within the meaning of section 3(f.1) of the *Broadcasting Act*) to require online audio undertakings to pay a base contribution that is in excess of the contribution required of any other class of audio undertakings (i.e., pursuant to the Decision, non-Canadian-affiliated streaming services such as Apple would have to pay 5%; by contrast, Canadian-owned radio services have and would continue to pay 0.5% and the one satellite radio licensee would pay 4%); and
- (g) by entering into considerations about whether online undertakings should be subject to pay a base contribution in the absence of a determination of the definition of Canadian content, thereby requiring the online undertakings to make informed submissions in relation to matters about which critical information was missing (contrary to the requirements of the Direction).

M. Grounds for Judicial Review

74. The CRTC acted unreasonably in rendering the Decision as follows:

- (a) in rendering the Decision, it acted without legislative authority, in that:
 - (i) the order to make base contributions was purportedly made by the CRTC “pursuant to subsections 9.1(1) and 11.1(2) of the *Broadcasting Act*”;
 - (ii) subsection 9.1(1) of the *Broadcasting Act* does not provide the CRTC with authority to make orders requiring undertakings to make expenditures, including base contributions;

- (iii) the order to make base contributions applies to a class of undertakings (i.e., online undertakings that have annual contributions in excess of \$25 million);
- (iv) subsection 11.1(2) of the *Broadcasting Act* provides the CRTC with authority to make an order for, among other things, “developing, financing, producing or promoting Canadian audio or audiovisual programs, including independent productions, for broadcasting undertakings”. However, such authority:
 - A. is only available when regulations passed under subsection 11.1(1) have first been passed; and/or
 - B. is limited to the making of an order in respect of a single person carrying on a broadcasting undertaking and not an entire class of persons such as the class of persons which the Decision purports to bind.

In effect, under the guise of a subsection 11.1(2) order, the CRTC has attempted to effect a subsection 11.1(1) regulation, without fulfilling the statutory conditions for doing same;

- (b) by determining that online undertakings should pay a base contribution (and by determining the quantum of that base contribution) without first determining what constitutes Canadian programming, it acted contrary to section 19 of the Direction issued by the Governor-in-Council;
- (c) it failed to consider whether the result was “appropriate”, in light of the *Broadcasting Act* and the Direction requiring contributions “appropriate” to the nature of the service;

- (d) it failed to provide any explanation as to how it was “appropriate” to require online undertakings to pay a base contribution without regard to the services’ profitability and contributions already being made to support Canadian and Indigenous content;
- (e) it failed to provide any explanation as to how it was “equitable” to require online audiovisual undertakings to pay a base contribution when online undertakings do not enjoy the same access to funds as is enjoyed by other undertakings or their affiliates that create programming;
- (f) it failed to provide any explanation as to how it was “equitable” to require online audio undertakings to pay a base contribution that is in excess of the contribution required of any other class of audio undertakings (i.e., pursuant to the Decision, non-Canadian-affiliated streaming services such as Apple would have to pay 5% whereas Canadian-owned radio services have and would continue to pay 0.5%); and
- (g) it entered into considerations about whether online undertakings should be subject to pay a base contribution in the absence of a determination of the definition of Canadian content, thereby requiring the online undertakings to make informed submissions in relation to matters about which critical information was missing (contrary to the requirements of the Direction).

N. Legislative Grounds

75. Sections 3, 25.3 and 31 of the *Broadcasting Act*, S.C. 1991, c. 11.

76. Section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

77. Rules 151, 300, 301, 352, 353, and 369 of the *Federal Courts Rules*, SOR/98-106.

78. *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239.

79. Such further and other grounds as this Court deems appropriate.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

80. Affidavits to be sworn.

81. Those portions of the record filed by Apple before the CRTC.

82. The transcripts from the CRTC hearing.

83. Such further and other evidence as Apple may advise and as this Honourable Court agrees to consider.

July 3, 2024

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Court File No. A-

FEDERAL COURT OF APPEAL

BETWEEN:

APPLE CANADA INC.

Applicant

- and -

ATTORNEY GENERAL OF

CANADA

Respondent

NOTICE OF APPLICATION

(dated July 3, 2024)

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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 03 2024 A.D. 20 _____

Dated this _____ day of _____ JUL 03 2024 20 _____

_____ *ice* _____