

e-document-6		A-231-24-ID 1	
F	FEDERAL COURT	D	
I	OF APPEAL	É	
L	COUR D'APPEL	P	
E	FÉDÉRALE	O	
D		S	
July 03, 2024		03 juillet 2024	
Yoginder Gulia			
TOR		1	

Court File No. 24-A-

# FEDERAL COURT OF APPEAL

B E T W E E N :

AMAZON.COM.CA ULC

Applicant

— and —

THE ATTORNEY GENERAL OF CANADA

Respondent

## NOTICE OF APPLICATION

(Application for Judicial Review under  
Section 28 of the *Federal Courts Act* and  
Rule 300 of the *Federal Courts Rules*)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant 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 file 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.

July 3, 2024

Issued by:

---

*(Registry Officer)*

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

**TO: The Attorney General of Canada**

Department of Justice  
Ontario Regional Office  
120 Adelaide Street West  
Suite 4000  
Toronto, Ontario M5H 1T1

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

**AND TO: Canadian Radio-television and Telecommunications Commission**

Les Terrasses de le Chaudiere Central Building  
1 du Portage Dr.  
Gatineau, QC J8X 4B1

## APPLICATION

THIS IS AN APPLICATION for judicial review of the decision made by the Canadian Radio-television and Telecommunications Commission (**CRTC**) on June 4, 2024 to issue Broadcasting Regulatory Policy CRTC 2024-121 and the accompanying *Proposed orders imposing conditions of service and expenditure requirements for carrying on certain online undertakings* (**Decision**).

### THE APPLICANT MAKES APPLICATION FOR:

- (a) a declaration that the Decision is unreasonable, in whole or in part;
- (b) an order quashing and setting aside the Decision, in whole or in part;
- (c) the costs of the within Application; and
- (d) such further and other relief as counsel may advise and this Honourable Court may deem appropriate.

### THE GROUNDS FOR THE APPLICATION ARE:

#### A. The Applicant

1. Amazon.com.ca ULC (**Amazon Canada**) is a corporation incorporated pursuant to the laws of British Columbia, with an office in Toronto, Ontario. Amazon Canada is an indirect subsidiary of Amazon.com, Inc., a Delaware company traded on the NASDAQ.
2. Amazon Canada operates the Amazon.ca store, as well as:
  - (a) **Prime Video.** Prime Video is a video streaming service offering a range of audio-visual content to Canadians in English and French, among other languages. This includes series and films produced by and showcasing Canadian talent, as well as programming that Prime Video licenses from Canadian broadcasters.
  - (b) **Amazon Music.** Amazon Music is an audio streaming service offering a range of content to Canadians in English and French (as well as many

other languages), including music and podcasts. Amazon Music showcases Canadian music to its customers both in Canada and globally, and pays licensing fees that flow to Canadian recording artists, songwriters, producers, record companies, music publishers, and distributors.

**B. Background: the *Online Streaming Act* amends the *Broadcasting Act***

**(1) The *Online Streaming Act***

3. In 2023, the *Broadcasting Act*, S.C. 1991, c. 11, was amended by the *Online Streaming Act*, S.C. 2023, c. 8.

4. The *Online Streaming Act* introduced a new framework for regulating online undertakings as broadcasting undertakings within the scheme of the *Broadcasting Act*. It also provided the CRTC with the power to require broadcasting undertakings to make expenditures to support the Canadian broadcasting system.

5. To implement these expenditure requirements, the *Online Streaming Act* introduced the following new provisions to the *Broadcasting Act*:

- (a) Section 9.1, which authorises the CRTC to make orders requiring broadcasting undertakings to provide it with financial or commercial information.
- (b) Section 11.1, which authorises the CRTC to make rules respecting the expenditures to be made by broadcasting undertakings for the purposes of developing, financing, producing, and promoting Canadian and Indigenous programs. Section 11.1 specifically provides that expenditure rules applicable to a class of broadcasting undertakings must be made by way of regulation, and that such regulations must be made following specified procedures.

**(2) The Consultation**

6. On May 12, 2023, the CRTC launched a consultation on a new framework for the contributions that broadcasting undertakings would be required to make to support

Canadian and Indigenous content (**Consultation**). The Consultation was announced in Broadcasting Notice of Consultation CRTC 2023-138.

7. Prime Video and Amazon Music participated and made submissions in the Consultation, including at the public hearing.

### **(3) The Cabinet Order**

8. Section 7 of the *Broadcasting Act* provides that the Governor in Council may make orders that are binding on the CRTC.

9. On November 9, 2023, the Governor in Council made the *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239 (**Cabinet Order**) pursuant to subsection 7(1) of the *Broadcasting Act*.

10. The Cabinet Order requires that any financial contribution imposed by the CRTC on broadcasting undertakings to support Canadian programming “must be equitable given the size and nature of the undertaking and equitable as between foreign online undertakings and Canadian broadcasting undertakings.” The CRTC’s exercise of its new powers under sections 9.1 and 11.1 is subject to this requirement.

### **C. The Decision**

11. On June 4, 2024, the CRTC issued the Decision.

12. The Decision is divided into two parts: (a) a “Broadcasting Regulatory Policy” followed by (b) an appendix setting out “proposed orders imposing conditions of service and expenditure requirements for carrying on certain online undertakings.”

13. In the Decision, the CRTC states that:

(a) It “is imposing requirements on online streaming services. Specifically, the Commission will require online streaming services that make \$25 million or more in annual contributions revenues and that are not affiliated with a Canadian broadcaster to contribute 5% of those revenues to certain funds.”

(b) These contributions “will go to” a specified list of funds.

- (c) Audio online undertakings must direct 0.05% to a specified fund “by 31 December 2024.”

14. The CRTC purports to impose the new requirement by way of order, stating that it “will impose base contribution requirements by way of orders issued pursuant to sections 9.1 and 11.1 of the *Broadcasting Act*.”

15. The order in the Decision reflects the CRTC’s determinations:

- (a) The “Application” section reflects the CRTC’s decision to impose the new contribution requirement on a class of online undertakings (*i.e.*, “online streaming services that make \$25 million or more in annual contributions revenues and that are not affiliated with a Canadian broadcaster”).
- (b) Sections 1 and 2 reflect:
  - (i) The CRTC’s decision to impose a 5% contribution requirement on qualifying online undertakings.
  - (ii) The CRTC’s decision about the particular Canadian funds to which these contributions must be directed. Unlike Canadian broadcasters, foreign streamers cannot benefit from the support payments made to these funds.
  - (iii) The CRTC’s decision to require the first contribution payment for audio online undertakings “by 31 December 2024.”

**D. The Decision applies to Amazon Canada**

16. Amazon Canada is directly affected by the Decision, which requires it to make base contributions for Prime Video and Amazon Music.

**E. The Decision is final**

17. The Decision is binding and affects Amazon Canada’s legal rights, as evidenced by its mandatory and declarative language.

18. The CRTC gave affected parties 10 days to file comments on the order. Amazon Canada requested an extension. The CRTC denied this request on the basis that the determinations in the Decision are final and conclusive:

These orders seek to implement the Commission's determinations, which were made following extensive public consultation and, under the *Broadcasting Act*, are final and conclusive.

**F. The Decision is unreasonable**

19. The Decision is unreasonable because it is not internally coherent or justified in light of the legal and factual constraints that bear on the CRTC. The Decision also contains errors of law and jurisdiction.

20. Pursuant to the Supreme Court of Canada's decision in *Yatar v. TD Insurance Meloche Monnex*, Amazon Canada brings this judicial review to address the CRTC's errors of fact and mixed fact and law.

21. Amazon Canada is concurrently seeking leave to appeal to this Court pursuant to section 31 of the *Broadcasting Act* with respect to the CRTC's errors of law and jurisdiction.

**(1) The Decision should have been made by way of regulation**

22. The CRTC's imposition of the base contribution requirement on foreign streamers by way of order, as opposed to regulation, is contrary to section 11.1 of the *Broadcasting Act* and denied affected parties important procedural protections.

23. Subsection 11.1(1) authorizes the CRTC to make regulations respecting expenditures that apply to "all persons carrying on broadcasting undertakings or to all persons carrying on broadcasting undertakings of any class established by the Commission in the regulation."

24. Subsection 11.1(2) authorizes the CRTC to make orders respecting expenditures "to be made by a particular person."

25. The Decision is inconsistent with this legal constraint. It is not directed to any particular person. Rather, it purports to impose the base contribution requirement on a class of undertakings defined using criteria of general application (*i.e.*, "online

streaming services that make \$25 million or more in annual contributions revenues and that are not affiliated with a Canadian broadcaster”).

26. The CRTC’s determination to impose the base contribution requirement on a class of undertakings by way of order instead of regulation has denied affected undertakings a range of procedural protections.

27. Unlike orders, a regulation made under section 11.1 is subject to specific requirements to ensure that the regulation is lawful and adequately explained:

- (a) The proposed regulation must be published in the *Canada Gazette* and must meet the requirements of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.
- (b) Among other things, the *Statutory Instruments Act* requires the Deputy Minister of Justice and the Clerk of the Privy Council to study the proposed regulation and determine whether it is authorized by its parent statute. The proposed regulation may not be registered if this determination is not made.
- (c) The *Cabinet Directive on Regulation* provides that:
  - (i) a draft of the regulation must be published together with a Regulatory Impact Analysis Statement on specified terms and with a cost-benefit analysis that specifically identifies “how impacts are distributed across various parties;” and
  - (ii) affected parties must be given a minimum comment period of 30 days.

28. The CRTC did not follow any of these procedures. Instead, it (a) issued the Decision, (b) included the text of the order in the Decision, and (c) gave affected undertakings 10 days to make comments solely on whether the order “accurately reflect[s] the determinations made by the Commission” in the Decision.

29. The CRTC may impose individualized and tailored contribution requirements on a particular undertaking by way of order. The Decision provides no reasoning or



justification for the imposition of the new 5% base contribution requirement on a class of undertakings by way of order, as opposed to regulation, and is unreasonable as a result.

**(2) The Decision is inequitable and arbitrary**

30. Section 4 of the Cabinet Order provides that any financial requirement imposed by the CRTC (a) “must be equitable...as between foreign online undertakings and Canadian broadcasting undertakings” and (b) “must be equitable given the size and nature of the undertaking.”

31. The Decision imposes inequitable and arbitrary contribution requirements without justification:

- (a) The CRTC has not identified any Canadian online undertakings to which the new base contribution applies.
- (b) The Decision discriminates between foreign and domestic streamers by imposing base contribution requirements on the former only. The CRTC’s limited reasoning for this inequitable treatment is that domestic streamers are affiliated with traditional broadcasting undertakings, which have historically made contributions to Canadian programming. However, the Decision fails to address critical factual and legal constraints, including the following:
  - (i) as the Cabinet Order makes clear, the CRTC lacks the authority to discriminate between online undertakings based on their corporate affiliation with Canadian broadcasting undertakings;
  - (ii) while foreign streamers have historically contributed to Canadian programming, they have not made regulated contributions because neither they nor Canadian streamers were required to do so;
  - (iii) the CRTC does not have—and does not identify—any authority to close any historical “gap” in contributions between classes of

undertakings by imposing new contribution requirements on only some undertakings; and

- (iv) the CRTC's limited justification that "[w]hile traditional Canadian broadcasters have long contributed to the system through various requirements (financial and other), foreign and Canadian online undertakings have not been required to make financial contributions to the broadcasting system" is neither rational nor logical. The CRTC does not address the contributions that online undertakings have made to the broadcasting system, nor how those contributions compare to the contributions of traditional Canadian broadcasters, nor how these respective contributions justify applying the new 5% base contribution requirement on unaffiliated online undertakings only. In fact, the record before the CRTC shows that unaffiliated online undertakings have made significant contributions to the Canadian broadcasting system, and that traditional Canadian broadcasting ownership groups have historically contributed only 2.7% of their total revenues.
- (c) The Decision is arbitrary because it imposes the same 5% base contribution requirement on both audio-visual and audio streamers even though the record before the CRTC shows that these are distinct undertakings. At the same time, the Decision permits audio-visual streamers to deduct a far higher share of Canadian content expenditures than audio streamers.
- (d) The Decision ignores the nature of Prime Video's business. For example, Prime Video passes on much of the revenue it collects in Canada to the streaming services of traditional broadcasting groups, which the CRTC has exempted from having to make base contributions. Prime Video also makes rights contributions to Canadian programming including through royalty payments to SOCAN and to Canadian authors and music rightsholders.

- (e) The Decision ignores the nature of Amazon Music's business. For example, the Decision does not address that streamers like Amazon Music pay higher music royalties to rightsholders, including Canadian rightsholders, than traditional audio undertakings such as commercial and satellite radio stations. At the same time, the Decision imposes contribution requirements on audio streamers that are significantly higher than those imposed by the CRTC on traditional audio undertakings. For example, Amazon Music's base contribution requirement of 5% is ten times higher than the contribution requirement of 0.5% imposed on certain radio services. The CRTC does not explain this discrepancy.
- (f) The Decision exempts undertakings with less than \$25 million in revenues from making any contributions without making any comparable exemption from the contribution calculation for the first \$25 million in revenue earned by unaffiliated online undertakings. As a result, the Decision requires an operator of an undertaking with \$25.1 million in annual contributions revenues to make a base contribution of more than \$1.2 million, whereas an operator with \$24.9 million in annual contribution revenues does not have to make any base contribution at all.

32. The Decision does not adequately justify this inequitable treatment and is unreasonable as a result. For many of these examples of inequitable treatment, the Decision provides no reasoning at all.

#### **G. Rule 317 Request**

33. Pursuant to Rule 317, Amazon Canada requests any document or other material in the possession of the CRTC and not in the possession of Amazon Canada, that was before the CRTC in connection with making the Decision,<sup>1</sup> including relating to:

- (a) the Cabinet Order;

---

<sup>1</sup> For clarity, Amazon Canada does not seek production of information designated confidential by any party to the Consultation.

- (b) the CRTC's jurisdiction under the *Broadcasting Act*;
- (c) implementing the Decision by way of order;
- (d) imposing the base contribution requirement on "online streaming services that make \$25 million or more in annual contributions revenues and that are not affiliated with a Canadian broadcaster;"
- (e) the definition of "certified Canadian content expenditures;"
- (f) permitting deductions for "certified Canadian content expenditures" in respect of audio-visual services but not audio services;
- (g) the domestic online undertakings that will be required to make contributions pursuant to the Decision;
- (h) the contributions to the Canadian broadcasting system (in dollars and as a percentage of annual contributions revenues) made:
  - (i) by traditional Canadian broadcasters, prior to the Decision;
  - (ii) by Canadian online undertakings, prior to the Decision; and
  - (iii) by online undertakings that are and are not required to make contributions pursuant to the Decision; and
- (i) the capacity of online undertakings subject to the Decision to:
  - (i) deduct their investments in Canadian programming from their expenditure requirements under the Decision; or
  - (ii) benefit from the funds identified in the Decision.

**H. Statutes and regulations relied on**

34. *Broadcasting Act*, S.C. 1991, c. 11.

35. *Federal Courts Act*, R.S.C. 1985, c. F-7, including section 18.1 and paragraph 28(1)(c).

36. *Federal Courts Rules*, SOR 98/106, including Rules 3, 300, 317, and 318.
37. *Online Streaming Act*, S.C. 2023, c. 8.
38. *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239.
39. *Statutory Instruments Act*, R.S.C. 1985, c. S-22.
40. Such further and other grounds as the solicitors may advise.

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

- (a) The affidavits of one or more individual(s).
- (b) The Certified Tribunal Record produced by the CRTC pursuant to Rule 318.
- (c) Such further and other material as the solicitors may advise and this Honourable Court may permit.

July 3, 2024



---

**Norton Rose Fulbright Canada LLP**  
222 Bay Street, Suite 3000, P.O. Box 53  
Toronto, Ontario M5K 1E7 Canada  
Tel: +1 416.216.4000  
Fax: +1 416.216.3930

**Fahad Siddiqui**  
([Fahad.Siddiqui@nortonrosefulbright.com](mailto:Fahad.Siddiqui@nortonrosefulbright.com))

**Christine Muir**  
([Christine.Muir@nortonrosefulbright.com](mailto:Christine.Muir@nortonrosefulbright.com))

**Christopher A. Guerreiro**  
([Christopher.Guerreiro@nortonrosefulbright.com](mailto:Christopher.Guerreiro@nortonrosefulbright.com))

**Sarah Pennington**  
([Sarah.Pennington@nortonrosefulbright.com](mailto:Sarah.Pennington@nortonrosefulbright.com))

**Solicitors for the Applicant**

**TO:**           **The Chief Administrator**  
Federal Court of Appeal  
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 of the *Federal Courts Rules* and Section 48 of  
the *Federal Courts Act*)

**AND TO:**   **Canadian Radio-television and Telecommunications Commission**  
Les Terrasses de le Chaudiere Central Building  
1 du Portage Dr.  
Gatineau, QC J8X 4B1