

July 4, 2024

Issued by

(Registry Officer)

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APPLICATION

This is an application for judicial review of Broadcasting Regulatory Policy CRTC 2024-121, a decision of the Canadian Radio-television and Telecommunications Commission (the “CRTC”), dated 4 June 2024 (the “Decision”).

THE APPLICANT MAKES APPLICATION FOR:

1. The following orders and relief:
 - (a) An order of *certiorari* setting aside the Decision;
 - (b) Further and in the alternative, an order for declaratory relief that the Decision is of no force and effect;
 - (c) Further and in the alternative, an order remitting the matter to the CRTC to be redetermined in accordance with the reasons of this Court in allowing the judicial review, in addition to any directives set out by this Court in its judgment;
 - (d) An interim and permanent order to the effect of staying the enforcement or implementation of any orders made or purportedly made by the CRTC arising from the Decision to which the applicant may be subject;
 - (e) Directions pursuant to Rule 54 of the *Federal Courts Rules*;
 - (f) Costs of this application; and
 - (g) Such further and other relief as counsel may advise and this Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

Context

1. The applicant (“**Spotify**”) is a music streaming service provider. Spotify entered the Canadian market in 2014, and today has a team in Canada of over 100 people whose work, among other things, enables the growth of audiences for Canadian and Indigenous music and audio talent.

2. The CRTC is a quasi-judicial tribunal with a statutory remit to regulate Canadian broadcasting in the public interest, pursuant to the *Broadcasting Act* S.C. 1991, c. 11, among other legislation.
3. The *Online Streaming Act* S.C. 2023, c. 8 received Royal Assent on 27 April 2023. The *Online Streaming Act* amended the *Broadcasting Act* by, *inter alia*, making “online undertakings” a defined class of broadcasting undertakings, with the effect that the CRTC gained the express and general jurisdictional authority to ensure that online undertakings, such as Spotify, are contributing to the creation and dissemination of Canadian and Indigenous cultural content.
4. The *Online Streaming Act* grants the CRTC the authority to make new regulations respecting financial contributions to various existing and potential funding mechanisms which serve, or purport to support the development, production, and promotion of Canadian cultural content.
5. The *Broadcasting Act*, at section 3, sets out the Broadcasting Policy for Canada (the “**Broadcasting Policy**”). The Broadcasting Policy is a series of overarching public policy objectives which constitute the expression of Parliament’s overall legislative intention, and which form an interpretative touchstone for the reading and construction of the *Broadcasting Act* and related legislation and administrative measures.
6. The Broadcasting Policy provides, *inter alia*, that each broadcasting undertaking shall contribute to the implementation of the policy objectives “in a manner that is appropriate in consideration of the nature of the services provided by the undertaking” (s. 3(1)(a.1)). The Broadcasting Policy objectives include displaying Canadian talent in entertainment programming (s. 3(1)(d)(ii)); promoting Canadian programming (s. 3(1)(r)); providing opportunities to Indigenous persons, Black, and other racialized persons (s. 3(1)(d)(iii.1) – (iii.3)); supporting the production and broadcast of a range of programming in English, French and Indigenous languages (s. 3(1)(k)); and promoting innovation (s. 3(d)(iv)).
7. Section 5(1) of the *Broadcasting Act* provides that the CRTC shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the

Broadcasting Policy and in so doing, shall have regard to the regulatory policy set out at s. 5(2) (the “**Regulatory Policy**”).

8. Several of the salient amendments of the *Broadcasting Act* contained in the *Online Streaming Act* were amendments to the Broadcasting Policy and/or the Regulatory Policy.

9. In summary, the Regulatory Policy requires the CRTC to, *inter alia*, take into account the nature and diversity of the services provided by a broadcasting undertaking, in addition to their size and impact on Canadian content creation (s. 5(2)(a.1)); be sensitive to the administrative burden that regulation and supervision may impose on broadcasting undertakings (s. 5(2)(g)); and avoid imposing obligations on any class of broadcasting undertaking if any such imposition would not materially contribute to the implementation of the Broadcasting Policy (s. 5(2)(h)).

10. Prior to the amendments introduced by the *Online Streaming Act*, the CRTC had exempted online services from most broadcasting regulatory measures applicable to traditional media through the promulgation of successive “Digital Media Exemption Orders.”

11. On 9 November 2023, the Governor General in Council on the recommendation of the Minister of Canadian Heritage issued *An Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239, pursuant to s. 7(1) of the *Broadcasting Act* (the “**Cabinet Direction**”). The Cabinet Direction, in summary, requires the CRTC, in its implementation of its revised regulatory framework and discretions pursuant to the *Online Streaming Act* and in the exercise of its statutory remit generally, to, *inter alia*, ensure that the broadcasting system supports a wide range of Canadian programming and Canadian creators (s. 4); ensure that the regulatory framework is flexible (s. 8); ensure that any expenditure requirements by broadcasting undertakings are proportional to clear objectives (s. 12(a)); determine what constitutes Canadian content (s. 13); and give priority to that determination (s. 19). The Cabinet Direction sets out considerations for the CRTC that align generally with the policy valence of the Broadcasting Policy and the Regulatory Policy.

12. On 8 May 2023, the CRTC published a regulatory plan (the “**Regulatory Plan**”), complemented on 12 May 2023 by the publication of Broadcasting Information Bulletin CRTC

2023-137, which together set out, *inter alia*, the process by which the CRTC proposed to engage in consultations on its design and implementation of a new broadcasting regulatory framework in light of the additional powers conferred by the *Online Streaming Act*.

13. As part of the consultation process set out in the Regulatory Plan, the CRTC published Broadcasting Notice of Consultation CRTC 2023-138 (“**Notice 2023-138**”), by which means the CRTC sought comment on aspects of the implementation of the Regulatory Plan.

14. Contemplated in Notice 2023-138 was the prospect of a new and equitable contribution framework for broadcasting undertakings, including online undertakings, to support Canadian and Indigenous audiovisual and audio content. Such contributions included the possibility (but not the requirement) of expenditures, among other potential forms of support. Specifically, Notice 2023-138 invited comment on the Commission’s proposal that all broadcasting undertakings, including online undertakings, be required to support the Canadian broadcasting system (both audiovisual and audio elements) through a standardized contribution framework to be allocated among three broad categories of contributions.

- (a) The first such category constitutes a base requirement that broadcasting undertakings, including online undertakings, make a financial contribution to specified funds that support, or purport to support, Canadian artists and programming.
- (b) The second such category could require broadcasting undertakings, including online undertakings, to make a “flexible” financial requirement by which the undertakings determine how to direct their financial contributions among a list of options, such options to be specified following further consultation.
- (c) The third such category constitutes intangible, less quantifiable commitments, without greater specificity given as to the nature or degree of such commitments.

15. Certain online audiovisual and audio services were envisaged as being exempted from the requirement to make any such contemplated contributions, as proposed by Broadcasting Notice of Consultation 2023-139 (“**Notice 2023-139**”). Spotify’s music business was not and

is not within the contemplation of the exempted online audiovisual and audio services to which Notice 2023-139 is germane.

16. On 12 May 2023, the CRTC published Broadcasting Notice 2023-140 (“**Notice 2023-140**”, together with Notice 2023-138 and Notice 2023-139, the “**Notices**”). Notice 2023-140 sought comment on the means by which the CRTC maintains oversight over online undertakings, the need to replace or repeal certain of the Digital Media Exemption Orders referenced *supra*, and the scope of the exemption of certain broadcasting undertakings from the contribution framework proposed in Notice 2023-138.

17. Spotify participated fully in the consultation process occasioned by the Notices. In the consultations arising from Notice 2023-138, Spotify made initial comments filed in writing on 11 July 2023; reply comments filed in writing on 26 July 2023; and final comments filed in writing on 15 February 2024. In response to specific requests for information by letter from the CRTC dated 22 December 2023 and 4 January 2024, Spotify provided further written responses, including information of a sensitive commercial and financial nature on 26 January 2024. Spotify also contributed comments orally at a public hearing convened by the CRTC on 29 November 2023. In the consultations arising from Notice 2023-139 and Notice 2023-140, Spotify made initial comments filed in writing on 12 June 2023; reply comments filed in writing on 27 June 2023; and final comments filed in writing on 12 July 2023 (all together, the “**Comments**”).

The Decision

18. On 4 June 2024, the CRTC published Broadcasting Regulatory Policy CRTC 2024-121, entitled “*The Path Forward – Supporting Canadian and Indigenous content through base contributions*” (the “**Decision**” as defined above). The Decision is a decision within the definition and intended meaning of that term as defined in s. 2 of the *Broadcasting Act*.

19. By means of the Decision, the CRTC imposed requirements on certain online undertakings, being those which are not licensees or affiliates of licensees within the meaning of the *Broadcasting Act*; nor are operating under the benefit of an existing licensing exemption; and which have (at the level of the broadcasting ownership group) annual Canadian gross

broadcasting revenues exceeding a threshold of CAD 25,000,000, to contribute 5 percent of defined annual contributions revenues to certain specified funds (such as FACTOR, Musicaction, and funds benefiting the domestic commercial radio and news production sectors). The application of the requirements excludes online undertakings affiliated with Canadian broadcasting undertakings (such as Bell Media's Crave online undertaking). This contribution requirement commences in the 2024-2025 broadcast year but may be retrospective (with the first contribution calculated based on gross revenues retroactive to the broadcasting year from 1 September 2023 to 31 August 2024).

20. Spotify will be subject to the contribution requirement set out in the Decision.

21. The Decision purports to be given effect by means of an order or series of orders in a form set out in its appendix and pursuant to s. 9.1(1) and s. 11.1(2) of the *Broadcasting Act*. The Commission proposes using its list of registrants to determine which group of entities may be subject to the contribution requirement set out in the Decision; the Decision does not contemplate the identification of specified online undertakings as being subject to any such order.

22. The Decision invited comment on the form of orders referenced *supra* pursuant to s. 9.1(4) and 11.1(7) of the *Broadcasting Act*. Spotify has also participated in this consultation process.

Grounds for Judicial Review

23. The Decision is unreasonable, and is therefore amenable to review, on the following grounds:

- (a) The Decision was made without the CRTC having determined, as a matter of priority, what constitutes Canadian programming for the purposes of implementing the Broadcasting Policy, the Regulatory Policy, and the Cabinet Direction. This failure is a breach of sections 13 and 19 of the Cabinet Direction. The absence of a firm determination as to what constitutes Canadian programming (i) required online undertakings to make comments and provide data in the consultation process on their contributions, including financial

contributions, in support of Canadian content in a vacuum and without knowing what expenditure would or would not count as Canadian content; and (ii) renders any reasonable comparison as to the support, especially monetary support, for Canadian content by broadcasting undertakings, including online undertakings, impossible. In the absence of the ability to compare reliably evidence submitted by the broadcasting undertakings, the Decision results from an unreasonable process.

- (b) The Decision is nevertheless predicated on a misapprehension by the CRTC that Spotify, as an online undertaking, does not in any manner contribute to the creation and success of Canadian content. The CRTC failed to give sufficient and reasonable consideration, or in the alternative any consideration, to the contributions Spotify has made, and currently makes, to the support of Canadian creators and cultural content. Spotify's support of Canadian musical and cultural endeavour, directly and indirectly, and as set out in the Comments, represents an appropriate contribution to the creation of Canadian content.
- (c) The Decision is predicated on the CRTC's determination that online streaming services do not contribute to the production and distribution of Canadian cultural content "in an appropriate manner" or "equitably" with traditional broadcasters. This predication is an erroneous and unreasonable assumption unsupported by the evidence presented to the CRTC in the consultation process described herein. Having erred in its failure to determine what constitutes Canadian content as per sections 13 and 19 of the Cabinet Direction, the CRTC cannot properly make any determination as to the equitable nature of contributions of broadcasting undertakings, including online undertakings, to Canadian content.
- (d) The Decision unreasonably discounts entirely the significance of Spotify's royalty arrangements with rightsholders. In the Decision, the CRTC notes that, in its view, royalty payments are an inherent cost of making musical content legally available to users and, therefore, should not offset contribution obligations, making a comparison to the royalty obligations of traditional radio

broadcasters. The Decision fails to take account of the relevant consideration of the significant difference between the royalty arrangements governing Spotify's dissemination of musical content and the regulated royalty tariffs applicable to traditional radio broadcasters.

- (e) The Decision applies a significant and uniform gross revenue contribution requirement to all online undertakings, without differentiation between online audio online undertakings and online audio-visual undertakings. The business model of audio online undertakings differs considerably from online audiovisual undertakings, including material differences in the approaches to content acquisition, possibility of vertical integration of production and distribution, profit margins, royalty arrangements, and access to other sources of funding. The CRTC failed to take into account the relevant consideration of the financial and business model of online audio undertakings.
- (f) The Decision states that the CRTC "is not convinced that foreign online undertakings are entirely unable to access funds", *funds* being a reference to sources of funding for the production and distribution of content (at paragraph 149 of the Decision). The CRTC erred in its failure to differentiate between audio and audio-visual online undertakings in (i) its determination that access to such funds may be available to foreign online undertakings, (ii) its failure to recognize that such funds serve primarily to finance content production, and (iii) that there are significant differences between the audio and audio-visual sectors with respect to the extent of or potential for vertical integration of production and distribution. Such funds are not available to Spotify, which, with few exceptions, does not produce its own music. The CRTC's failure to consider the availability of such funds to audio only foreign online undertakings is unreasonable.

24. Spotify relies on the following statutory provisions in support of its application:

- (a) Sections 18, 18.1, 18.2, 18.5, and 28 of the *Federal Courts Act*;

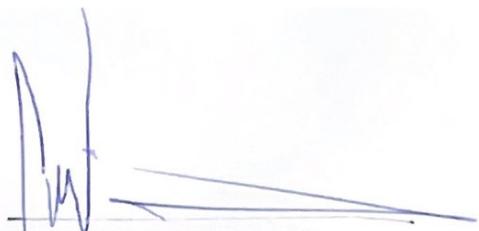
- (b) Rules 3, 4, 300(a), and 317 of the *Federal Courts Rules*;
- (c) The *Broadcasting Act*, S.C. 1991, c. 11;
- (d) The *Online Streaming Act*, S.C. 2023, c. 8; and
- (e) Such other statutory provisions as may be advised and this Court may accept.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- 25. Affidavits to be affirmed and filed in accordance with the *Federal Courts Rules*.
- 26. The applicant requests pursuant to Rule 317(2) of the *Federal Courts Rules* that the CRTC send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the CRTC and the Registry:
 - (a) All materials considered in coming to the Decision, including but not limited to all records containing information related directly or indirectly to the Decision; notice of any information considered in coming to the Decision that was not reduced to writing; and any other materials that are factually or legally germane to the Decision; to the extent such materials may be disclosed in accordance with applicable law.

Date: July 4, 2024

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