



# Communications (Media and Telecommunications)

Doing Business in Canada

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The Canadian courts have determined that enterprises engaged in telecommunications and broadcasting undertakings clearly fall within the scope of federal jurisdiction as “interprovincial undertakings.” These judicial determinations have been the basis for establishing federal regulation in the communications sector, which is overseen by the Canadian Radio-Television and Telecommunications Commission (“**CRTC**”), an administrative tribunal that operates at arm’s length from the federal government.

## The Telecommunications Sector

Under the *Telecommunications Act*, the CRTC has jurisdiction over all telecommunications service providers (“**TSPs**”), including wireline and wireless telecommunications common carriers<sup>1</sup> and internet service providers (“**ISPs**”). Among the Act’s stated objectives is to ensure that Canadians in all regions of Canada have access to reliable, affordable and high-quality telecommunication services. While the CRTC operates independently, the Minister of Innovation, Science and Economic Development (“**ISED**”) exercises ministerial oversight over policy development of the telecommunications sector. Further, the ISED policy framework extends to the allocation and use of wireless spectrum under the *Radiocommunication Act*.

## The Broadcasting Sector

The CRTC has jurisdiction over broadcasting undertakings (including more recently “online undertakings,” see below) operating in whole or in part in Canada, under the policy framework of the Minister of Canadian Heritage, who is responsible for Canadian broadcasting policy.

## The Last Decade Has Seen Significant Legislative and Regulatory Evolution in the Telecommunications and Broadcasting Sectors

The pace of change in the legal and regulatory regimes governing telecommunications and broadcasting noticeably picked up following the federal government announcement in 2019 to undertake the *Broadcasting and Telecommunications Legislative Review* (“**BTLR**”), an initiative announced by the Ministers of ISED and Canadian Heritage. The Ministers jointly appointed a “Panel of Experts” to review the legislative and regulatory framework governing the broadcasting and telecommunications sectors. The stated purpose of the review was to “examine the existing legislative framework and tools in the context of

the digital age and what changes may be needed” to support both telecommunications objectives (promoting competition and affordability for internet and mobile wireless, and net neutrality) and media/broadcasting policy objectives (content creation in the digital environment, cultural diversity and strengthening Canadian media undertakings).

The BTLR Panel issued its Report in January 2020 along with 85 recommendations spanning the telecommunications and media sectors. The Panel’s Report presented a broad, sweeping set of proposals to re-work the legislative “plumbing” in the communications sector with a view, as it describes, to “better prepare the country for an era of constant and rapid technological change.”

## New Policy Direction in the Telecommunications Sector

The issuance of the BTLR Report should be viewed in the context of the ongoing structural changes in the competitive landscape of the telecommunications sector. These developments prompted the government to issue a reformulated Policy Direction to the CRTC in 2023 (the “**Telecom Policy Direction**”).<sup>2</sup> Section 8 of the *Telecommunications Act* permits the government to issue directions to the CRTC “of general application on broad policy matters” with respect to the statutory Canadian telecommunications policy objectives. The Telecom Policy Direction supplanted previous policy directions made in 2006 and 2019.

Among the multiple policy objectives in the Telecom Policy Direction are those requiring the CRTC to “promote competition, affordability, consumer interests and innovation.”<sup>3</sup> The CRTC is also required to pursue “principles of effective regulation.” When making decisions of an “economic nature,” it must balance objectives, such as fostering competition, promoting investment in high-quality networks, improving consumer choice, supporting the provision of innovative services and encouraging the provision of services at reasonable prices for consumers.<sup>4</sup>

<sup>2</sup> *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, SOR/2023-23 (<https://laws.justice.gc.ca/eng/regulations/SOR-2023-23/page-1.html>).

<sup>3</sup> The Telecom Policy Direction also directs the CRTC to: ensure that affordable access to high-quality telecommunications services in all regions of Canada; enhance and protect consumer rights; reduce barriers to entry into the market for telecommunications services; enable new technologies and differentiated service offerings; and stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services.

<sup>4</sup> Moreover, the principles of effective regulation will also require the CRTC to ensure that its proceedings and rulings are transparent, predictable and coherent; based on sound and recent evidence and that its proceedings and decisions are conducted in a timely manner.

<sup>1</sup> However, unlike the Federal Communications Commission in the United States, the CRTC does not award spectrum licences to wireless telecommunications carriers; that function is exercised by the Minister of Innovation, Science and Economic Development under the *Radiocommunication Act*.

The Telecom Policy Direction has already had significant influence on the CRTC's regulatory framework. Below, we summarize recent developments in the communications sector following the issuance of the Telecom Policy Direction.

### Fixed Internet Competition

The CRTC has continued to adapt its regulatory framework to enable independent ISPs to provide competitively priced services to both business and residential customers in competition with facilities-based incumbent telephone companies and cable carriers. The CRTC's "wholesale framework" mandates that the access facilities operated by the large incumbent telephone companies and cable carriers must provide wholesale access services to non-facilities-based competitors at regulated rates.

The wholesale framework is a notable exception to several decades in which the CRTC has exercised its "forbearance" power under the *Telecommunications Act* to effectively liberalize (deregulate) most services or classes of services provided by telecom carriers at the retail level. The statutory forbearance power may be exercised if the CRTC finds that there is sufficient competition for those services to protect the interests of users.

The wholesale regime must strike a balance (see *principles of effective regulation* above) in a market in which facilities-based providers are both suppliers to and competitors with their wholesale customers. In November 2023, as part of its ongoing review of the wholesale high-speed access framework, the CRTC directed large incumbent telephone companies to provide temporary wholesale access to their fibre-to-the-premises networks in Ontario and Quebec within six months following the date of the decision. The CRTC also established interim rates that wholesale-based competitors will pay those incumbent companies for access. However, this decision has proved highly controversial: shortly after the decision was released, Bell Canada, the largest incumbent telephone company in Canada, sought leave to appeal the CRTC's decision to the Federal Court of Appeal (as well as an interim stay of the decision pending the Court's determination on the appeal request). Bell has also petitioned the federal government to rescind or vary the decision.

### Mobile Wireless Competition

The Telecom Policy Direction expressly directs the CRTC to improve upon its hybrid mobile virtual network operator (MVNO) model which it established in 2021 to encourage broader service-based competition. This leaves open the potential

for the CRTC to adopt a full MVNO model, if needed, to support competition in the sector. The CRTC is also required to revise its rules "if the effectiveness of the approach in fostering mobile wireless competition is lessened due to changes in the mobile wireless market structure or circumstances of competition."

### Measures to Enhance and Protect the Rights of Consumers in Telecommunications Markets

The CRTC has increased its focus on protecting consumers from unacceptable sales practices, promoting clarity and transparency of pricing information and service plan characteristics in marketing materials and ensuring that consumers can easily cancel, downgrade, transfer or change their telecom services.

CRTC oversight of TSPs under the *Telecommunications Act* extends to regulating unsolicited telecommunications under section 41 of the Act: the CRTC may order, prohibit or regulate the use by any person of the telecommunications facilities of a telecommunications service provider for the provision of unsolicited telecommunications to the extent that the CRTC considers it necessary to prevent undue inconvenience or nuisance (giving due regard to freedom of expression). The CRTC has been relatively proactive in the area of unsolicited telecommunications, including establishing detailed Unsolicited Telecommunications Rules and overseeing a rigorous "Do Not Call List" regime that governs unsolicited telecommunications.

More recently, the CRTC has extended its unsolicited telecommunications regime to rules with respect to authentication and verification of caller ID information for Internet Protocol voice calls (known as the STIR/SHAKEN framework).<sup>5</sup>

The CRTC has the power to impose monetary penalties on individuals and corporations that contravene the unsolicited telecommunications rules, with the power to levy fines of up to C\$50,000 and C\$15 million, respectively, for violations of the rules.

### Measures Supporting Deployment and Universal Access

The CRTC is required to adopt measures to support the objective of universal access to high-quality fixed Internet and mobile wireless services, including funding mechanisms and mandating

<sup>5</sup> STIR [Secure Telephony Identity Revisited] / SHAKEN [Signature-based Handling of Asserted information using toKENs] framework to authenticate and verify caller identification (ID) information for Internet Protocol (IP)-based voice calls.

improved access to support structures, such as telephone poles and conduits, as well as identifying and addressing other barriers to timely deployment of telecommunications networks.

## OWNERSHIP AND CONTROL OF TELECOMMUNICATIONS CARRIERS

Amendments to the *Telecommunications Act* in 2012 removed the ownership limitations for smaller facilities-based telecommunications carriers, specifically those with annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues for the sector. This effectively eliminated the foreign ownership restrictions for all but the large “incumbent” Canadian telecommunications carriers. Non-Canadian ownership in the latter class of carriers is limited to up to a direct or indirect one-third voting interest of a holding company which has a wholly-owned subsidiary operating company operating as a telecommunications carrier.

## PROMOTION OF SECURITY INTERESTS IN THE TELECOMMUNICATIONS SECTOR

The proposed amendments to the *Telecommunications Act* through Bill C-26, currently before the Senate, add the promotion of security as an objective of Canadian telecommunications policy. These amendments are expected to grant the Governor in Council and the Minister of Industry broad new powers to secure Canadian telecommunications systems, including the authority to direct telecommunications service providers to refrain from providing or using any products or services determined to be a security risk.

## BROADCASTING REGULATORY FRAMEWORK

### Current Regulatory Landscape

The CRTC supervises and regulates all aspects of the Canadian broadcasting system pursuant to the *Broadcasting Act* through its licensing and exemption powers over Canadian-owned and controlled broadcasting undertakings. Under the legacy provisions of the *Broadcasting Act*, conventional “free-to-air” television stations and terrestrial radio stations are subject to requirements providing for minimum levels of Canadian content on their services. These requirements were extended to discretionary television programming services and newer technologies such as satellite radio services, along with expenditure requirements pursuant to which specified percentage of revenues

from broadcasting operations must be allocated toward expenditures for Canadian programs.

Further, broadcasting distributors (known as “broadcasting distribution undertakings” or “BDU”s) are required to give priority to the carriage of Canadian services and to contribute a certain percentage of their revenues from customers (subscribers) to the production of Canadian programming (primarily through allocating a percentage of revenue to recognized Canadian production funds).

## RECENT AMENDMENTS TO CANADIAN BROADCASTING LEGISLATION

In February 2022, following the issuance of the BTLR Report, the Minister of Canadian Heritage introduced an *Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* (“**Bill C-11**”). Bill C-11, which came into force in April of 2023, provided for significant amendments to the *Broadcasting Act*. The amended Act confers on the CRTC the express authority to directly regulate “online undertakings,” a new category of “broadcasting undertaking,” whether carried on in whole or in part within Canada, that transmit programs over the Internet, including on an on-demand basis.<sup>6</sup> This expanded statutory authority is in addition to the CRTC’s existing authority over licensed (and exempt) Canadian-owned and controlled broadcasting undertakings under the Act.

An expanded broadcasting policy provides that the broadcasting system in Canada must serve the needs and interests of all Canadians “including Canadians from Black or other racialized communities and Canadians of diverse ethnocultural backgrounds,” while also providing opportunities for Indigenous persons and programming “that reflects Indigenous cultures” and “that is in Indigenous languages” as well as “programming that is accessible without barriers to persons with disabilities.”<sup>7</sup>

The “Regulatory Policy” in section 5 of the Act requires the CRTC to ensure that each broadcasting undertaking contributes to the implementation of the objectives of the Canadian broadcasting policy in a flexible manner that is appropriate in consideration of the nature of the services provided by the undertaking. Canadian-owned and controlled broadcasting undertakings must employ and make “maximum use, and in no case less than predominant use,” of Canadian creative

<sup>6</sup> Government Briefing Deck issued with Bill C-10 (Predecessor to Bill C-11) November 3, 2020.

<sup>7</sup> *Broadcasting Act*, section 3(1).

and other human resources in the creation, production and presentation of programming. In contrast, foreign online undertakings are required to make “the greatest practicable use” of Canadian creative and other human resources and 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.

### Prescriptive Approach to Defining Canadian Content

The amended Act expressly provides that the CRTC can make regulations prescribing what constitutes a “Canadian program” (commonly referred to as “Canadian content”). The CRTC’s discretion to determine the scope of eligible content is limited to specified criteria which the CRTC must consider including whether Canadians own copyright in relation to a program to control and benefit in a “significant and equitable manner” from its exploitation. The Act also prescribes other criteria as to what constitutes a Canadian program, such as key creative positions “primarily held” by Canadians, furthering Canadian artistic and cultural expression, and collaborating with Canadians operating in the broadcasting sector, including independent producers.<sup>8</sup>

### Policy Direction Provides Guidance on New Regulatory Framework

In late 2023, the Government of Canada published its *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)* (the “**Policy Direction**”).<sup>9</sup> The Policy Direction gives binding, high-level direction to the CRTC as it engages Canadians and all interested parties to design and implement the new regulatory framework for the broadcasting system. Key elements of the Policy Direction include redefining Canadian programs and increased support for equity-seeking groups, Indigenous persons, Canadian creators, independent broadcasters, and community-run media outlets.

The Policy Direction also clarifies and arguably narrows the scope of the CRTC’s regulatory focus over content made available on the platforms of social media services.

The Policy Direction directs the CRTC generally to develop a flexible and adaptable regulatory framework with minimal regulatory burden on the

broadcasting system and to foster collaboration between Canadian and foreign broadcasting undertakings.

### IMPLEMENTATION OF THE NEW BROADCASTING REGULATORY FRAMEWORK

Following passage of Bill C-11 as the amended Act, the CRTC commenced public proceedings to establish a regulatory framework to address the wider scope of regulation contemplated in the amended Act.<sup>10</sup> To date, the CRTC made the *Online Undertakings Registration Regulations* (the “**Registration Regulations**”)<sup>11</sup> and established a number of conditions of service for certain online undertakings.<sup>12</sup> These apply to most online undertakings (other than services which fall under a specified exemption threshold based on annual turnover). Upon coming into effect, these conditions of service replaced many of the provisions previously set out in the (now repealed) *Digital Media Exemption Order* (“**DMEO**”) which had effectively exempted all online streaming services from any element of CRTC regulation. Following the repeal of the DMEO, online undertakings are no longer exempt from CRTC regulation.

### Broadcasting Fees Regulations

In *Broadcasting Regulatory Policy CRTC 2024-65*, the CRTC established the *Broadcasting Fees Regulations*, which will require traditional broadcasters and online streaming services to remit “broadcasting fees” to the CRTC on an annual basis. An exemption threshold level of C\$25 million for “broadcasting ownership groups” has been established along with an exemption for each service earning up to C\$2 million in annual broadcasting revenues in Canada. A broadcasting ownership group’s fee revenue is calculated by aggregating the total annual broadcasting revenues in Canada of each individual broadcasting undertaking with an annual revenue of more than C\$2 million within the ownership group. Broadcasting fees are not payable on the first C\$25 million in revenue earned by a broadcasting ownership group.

<sup>10</sup> *The Path Forward - Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous Content*, Broadcasting Notice of Consultation CRTC 2023-138, May 15, 2023.

<sup>11</sup> Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330.

<sup>12</sup> Broadcasting Regulatory Policy CRTC 2023-331 and Broadcasting Order CRTC 2023-332.

<sup>8</sup> *Broadcasting Act*, section 10(1.1).

<sup>9</sup> *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239 (“Policy Direction”), section 11.



## Base Contribution Decision

In June 2024, the CRTC issued its “base contribution” decision, marking Step 1 in establishing the overall contribution framework governing online undertakings. Under this decision, most non-Canadian online streaming services are subject to a newly implemented requirement to contribute 5% of their annual turnover from broadcasting operations towards expenditures on the acquisition or production of Canadian content, as well as to a range of specified Canadian production and content funds.

Step 2 will involve further examination of policy elements based on information gathered in Step 1. Step 3 aims to finalize tailored contribution requirements for each applicable undertaking or ownership group. This public process on contributions forms part of the CRTC’s broader regulatory plan to modernize Canada’s broadcasting framework.

Additional elements of the new framework, such as definitions of Canadian content, Indigenous broadcasting policy and barrier-free programming, are expected to be implemented no earlier than mid-2025. The CRTC has initiated a three-step proceeding to address contributions to the Canadian broadcasting system from online undertakings, including non-Canadian video streaming platforms.<sup>13</sup>

## Treatment of Social Media Services Under the *Broadcasting Act*

The *Broadcasting Act* and the Policy Direction expressly provides that social media creators and individual users who upload content remain exempt from the Act.<sup>14</sup> However, among the most controversial elements of the amended Act are the provisions with respect to CRTC regulatory oversight over social media services. Pursuant to section 4.2 of the Act, the CRTC may “prescribe” regulatory obligations in respect of certain types of “programs” uploaded by users (i.e., programs that either (directly or indirectly) generate revenue or that have been broadcast “in whole or in significant part, by a broadcasting undertaking” (i.e., licensed television services or subscription video on demand streaming services).

The ostensible objective of delineating certain “programs” on social media services as being potentially subject to Canadian content contribution requirements is based on equitable treatment of programs consumed on different

platforms, regardless of how they are transmitted. Therefore, to the extent that commercial, revenue-driven traditional entertainment content (but not “user generated content”) is made available on social media platforms, the social media service providing the platform may be subject to regulatory obligations that are similar or akin to those imposed on streaming entertainment services.

At this time, the CRTC has not made a decision on whether requirements related to discoverability and showcasing of Canadian content, are applicable to social media services under the Act.

## FOREIGN OWNERSHIP RULES IN THE BROADCASTING SECTOR

In what appears to be an increasingly less frequent area of focus (in view of the CRTC’s statutory oversight over foreign online undertakings under the amended *Broadcasting Act*), the CRTC continues to exercise oversight with respect to Canadian ownership and control of licensed (and most exempt) broadcasting undertakings. Pursuant to the Direction from the Canadian government to the CRTC made under the *Broadcasting Act*, non-Canadians are permitted to own and control, directly or indirectly, up to 33 1/3% of the voting shares and 33 1/3% of the votes of a holding company which has a wholly-owned subsidiary operating company licensed under the *Broadcasting Act*. Furthermore, the Direction specifies that the Chief Executive Officer and at least 80% of the board of directors of a licensee that is a corporation must be resident Canadian citizens. Additionally, a non-Canadian may not exercise “control in fact” over a licensed broadcasting undertaking. Factors such as the level of ownership of equity through non-voting shares and total equity are relevant to the analysis of control in fact.

## OTHER DEVELOPMENTS IN DIGITAL MEDIA - REGULATORY FRAMEWORK FOR NEWS ORGANIZATIONS

On June 22, 2023, the [Online News Act](#) received Royal Assent, officially becoming the first-ever legislation in Canada that regulates online communications platforms that make news content available to Canadians. The purpose of the *Online News Act* is to enhance fairness in the Canadian digital news marketplace and contribute to the sustainability of news businesses, in both the non-profit and for-profit sectors, including independent local ones.

The CRTC is responsible for overseeing the *Online News Act*, including the exemption criteria, the eligibility of news businesses, the Code of

<sup>13</sup> Broadcasting Notice of Consultation CRTC 2023-138.

<sup>14</sup> Broadcasting Regulatory Policy CRTC, 2024-65, para 155.

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Conduct, prohibitions on discrimination and undue preference, and administering the bargaining framework under the Act. The CRTC is also responsible for making regulations about how groups of news businesses are structured and how they carry out their obligations under the Act.

The *Online News Act Application and Exemption Regulations* sets out which news organizations are exempt from the formal bargaining process under the Act. The CRTC has initiated public consultations related to the bargaining, mediation and arbitration process<sup>15</sup> in addition to the proposed *Cost Recovery Regulations*.<sup>16</sup> Once complete, the public process will inform how the CRTC will implement the new regulatory framework for news businesses.

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<sup>15</sup> Online News Notice of Consultation CRTC 2024-55.

<sup>16</sup> Online News Notice of Consultation CRTC 2024-111.

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