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January 24, 2025

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AND TO: 371 CONSULTATION PARTICIPANTS

By email, as set out in Schedule “A” to the Order of Walker J.A. dated November 12, 2024 in *inter alia* Court File No. 24-A-38

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the decision of the Canadian Radio-television and Telecommunications Commission (CRTC) on August 29, 2024 to issue *Broadcasting Regulatory Policy CRTC 2024-121-1* and the appended *Broadcasting Order CRTC 2024-194*, including the version of this order delivered to the Appellant (collectively, the **Implementing Decision**), pursuant to this Court's order in Court File No. 24-A-38 of December 16, 2024, granting leave to appeal from the Implementing Decision under section 31 of the *Broadcasting Act*, S.C. 1991, c. 11.

THE APPELLANT ASKS that this Court:

- (a) allow the appeal;
- (b) declare that:
 - (i) the Implementing Decision is *ultra vires* for failure to comply with the statutory conditions precedent to the exercise of the CRTC's powers under sections 9.1 and 11.1 of the *Broadcasting Act*; and
 - (ii) the Implementing Decision is *ultra vires* section 4 of the *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, S.O.R./2023-239 (the **Cabinet Order**);
- (c) grant the Appellant its costs of this appeal; and
- (d) grant such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The CRTC has acted unlawfully by ordering certain foreign online undertakings to make "base contribution payments."

2. The CRTC’s decision to impose these payments by way of order is *ultra vires* the *Broadcasting Act*. The statute only permits the CRTC to issue such a requirement by way of regulation following prescribed statutory preconditions, which the CRTC has not followed. The CRTC has therefore acted beyond its authority. Its decision to do so has also caused procedural unfairness.

3. The CRTC’s decision is also *ultra vires* the binding Cabinet Order. Cabinet prohibited the CRTC from imposing financial contribution requirements on broadcasting undertakings unless the requirements are “equitable given the size and nature of the undertaking and equitable as between foreign online undertakings and Canadian broadcasting undertakings.” The new base contribution requirement fails on both counts—it is inequitable because it applies only to foreign online undertakings and only to such undertakings with more than \$25 million in annual Canadian broadcasting revenues.

4. The Court has granted Amazon.com.ca ULC (**Amazon Canada**) leave to appeal these errors of law and jurisdiction.

I. BACKGROUND

A. Amazon Canada

5. Amazon Canada is a corporation incorporated pursuant to the laws of British Columbia, with an office in Toronto, Ontario.

6. 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, audiobooks, and podcasts. Amazon Music showcases Canadian content, including music content, 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. The Online Streaming Act

7. In 2023, Parliament passed the *Online Streaming Act*, S.C. 2023, c. 8.

8. The *Online Streaming Act* amended the *Broadcasting Act* to regulate broadcasting undertakings that transmit programs over the internet, such as video and audio streaming services.

9. Some of these new provisions grant the CRTC the authority to require broadcasting undertakings to take steps to support Canadian programming. For example, new section 11.1 authorises the CRTC to adopt regulations requiring broadcasting undertakings to make expenditures for the purposes of developing, financing, producing, and promoting Canadian and Indigenous programs.

10. Section 11.1 specifically provides that, where the CRTC imposes expenditures on a class of undertakings, it must do so by way of a regulation—and only after following certain specified procedures intended to ensure the legality of the regulation and a fulsome comment and review process.

C. The Cabinet Order

11. On November 9, 2023, the Governor in Council issued the Cabinet Order. Pursuant to subsection 7(3) of the *Broadcasting Act*, the Cabinet Order is binding on the CRTC.

12. The Cabinet Order imposes two further requirements on the CRTC when the CRTC imposes financial requirements on broadcasting undertakings. Any CRTC-imposed requirement must be both:

- (a) “equitable given the size and nature of the undertaking;” and
- (b) “equitable as between foreign online undertakings and Canadian broadcasting undertakings.”

D. The Base Contribution Policy

13. On June 4, 2024, the CRTC issued *Broadcasting Regulatory Policy 2024-121* (the **Base Contribution Policy**).

14. The Base Contribution Policy consists of: (a) a “Broadcasting Regulatory Policy” and (b) an appendix setting out “proposed orders imposing conditions of service and expenditure requirements for carrying on certain online undertakings.”

15. In the Base Contribution Policy, the CRTC stated that it had decided to impose an annual requirement on certain online undertakings to make payments to support Canadian programming. The annual payments would be equivalent to 5% of these undertakings’ annual revenues. The CRTC described these payments as “base contributions.” The new base contribution requirement would apply only to online undertakings that (a) are not affiliated with a Canadian broadcaster and (b) make \$25 million or more in specified annual revenues.

16. The CRTC gave affected parties 10 days to file comments on the proposed order in the Base Contribution Policy. Amazon Canada requested an extension. The CRTC denied this request. Amazon Canada therefore made submissions within the timeframe set by the CRTC.

E. The Implementing Decision

17. On August 29, 2024, the CRTC issued the Implementing Decision.

18. Like the Base Contribution Policy, the Implementing Decision is divided into two parts: (a) a “Broadcasting Regulatory Policy” numbered CRTC 2024-121-1 and (b) an appendix containing *Broadcasting Order CRTC 2024-194* (the **Final Order**).

19. The “Application” section of the Final Order provides that only online undertakings that are not affiliated with a Canadian broadcaster and who have revenues of more than \$25 million are required to make base contribution payments. Online undertakings that have some affiliation with a Canadian broadcaster, or less than \$25 million in revenues, do not have to make base contribution payments.

20. Sections 1 and 2 of the Final Order set out the details of the base contribution payments. Operators of affected online undertakings must pay not not less than 5% of

their “annual contributions revenues” derived from audio or audio-visual broadcasting activities in a given broadcast year to certain funds. The Final Order provides that for broadcast year 2024–2025, operators were required to start making payments by December 31, 2024, with the balance of payments due by August 31, 2025. Thereafter, operators must make payments annually by August 31st.

21. Section 3 of the Final Order requires the operators of affected online undertakings to deliver certain financial information to the CRTC.

22. The CRTC issued identical copies of the Final Order to multiple operators of online undertakings, including to Amazon Canada (the **Amazon Order**).

23. On December 23, 2024, this Court stayed paragraphs 1 and 2 of the Final Order and of the Amazon Order pending the disposition of this and other similar litigation. As a result, the requirement that Amazon Canada make base contribution payments has been suspended until the litigation has been decided.

F. Proceedings challenging the Implementing Decision

24. This appeal concerns errors of law and jurisdiction in the Implementing Decision that must be addressed by means of an appeal with leave pursuant to section 31 of the *Broadcasting Act*. The Court granted Amazon Canada leave on December 16, 2024, in Court File No. 24-A-38.

25. Pursuant to the Supreme Court of Canada’s decision in *Yatar v. TD Insurance Meloche Monnex*, Amazon Canada is also pursuing judicial review of the Implementing Decision in Court File No. A-304-24 to address errors of fact and mixed fact and law.

II. THE CRTC MADE ERRORS OF LAW AND JURISDICTION

26. In making the Implementing Decision, the CRTC exceeded its jurisdiction and denied procedural fairness to affected online undertakings like Amazon Canada.

A. The Implementing Decision cannot be made by way of order

27. The Final Order is *ultra vires* the CRTC’s authority under the *Broadcasting Act*.

28. The CRTC has failed to identify the specific source of authority on which it relied in promulgating sections 1, 2 and 3 of the Final Order. Instead, the CRTC claims to have adopted all of the Final Order “pursuant to subsections 9.1(1) and 11.1(2) of the *Act*.”

29. The CRTC has exceeded its jurisdiction under both provisions.

(1) Section 9.1 does not authorise expenditure requirements

30. The CRTC does not have authority under section 9.1 of the *Broadcasting Act* (titled “Conditions”) to impose expenditure requirements.

31. Section 9.1 empowers the CRTC to impose conditions relating to the proportion of Canadian programming to be broadcast by an undertaking, the continued ownership of Canadian broadcasting undertakings by Canadians, and the provision of financial information to the CRTC.

32. None of the enumerated conditions in section 9.1 relate to the imposition of expenditure requirements. Instead, section 11.1 (titled “Regulations – expenditures”) is the provision of the *Broadcasting Act* that authorizes the CRTC to impose expenditure requirements.

33. Thus, section 3 of the Final Order—which imposes financial reporting requirements—may be validly made pursuant to section 9.1 of the *Broadcasting Act*. However, sections 1 and 2 of the Final Order—which impose expenditure requirements—are not.

34. None of the CRTC’s reasons contain any acknowledgement or discussion of the differences between the CRTC’s authority under sections 9.1 and 11.1 of the *Broadcasting Act*.

(2) Section 11.1 requires general expenditure requirements to be made by way of regulation

35. Sections 9.1 and 11.1 of the *Broadcasting Act* not only cover different subject matter, but also set out different rule-making processes.

36. Subsection 9.1(2) provides that the CRTC may make orders under section 9.1 applicable to a class of broadcasting undertakings.

37. Contrastingly, section 11.1 provides that the CRTC may only impose expenditures on a class of undertakings by way of regulation. Section 11.1 also sets out the conditions precedent that the CRTC must satisfy before it makes such a regulation.

38. Among other things, a section 11.1 regulation must follow the processes in the *Statutory Instruments Act*, R.S.C., 1985, c. S-22, and the *Cabinet Directive on Regulation*. Among other requirements, the CRTC must:

- (a) submit the proposed regulation to the Clerk of the Privy Council and the Deputy Minister of Justice for a determination as to its legality;
- (b) publish the proposed regulation in the *Canada Gazette* together with a regulatory impact analysis statement and detailed cost-benefit analysis; and
- (c) provide affected undertakings with a minimum comment period of 30 days.

39. The CRTC failed to comply with any of these requirements.

40. By purporting to impose the base contribution requirement on a class of undertakings by way of order, rather than by regulation, the CRTC acted beyond its authority under the *Broadcasting Act*.

41. By skipping all of the statutory preconditions to a section 11.1 regulation, the CRTC also denied affected undertakings procedural fairness.

B. The Implementing Decision is *ultra vires* the Cabinet Order

42. In addition, the base contribution requirement is *ultra vires* because it contravenes the binding Cabinet Order.

43. 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.”

44. The CRTC has imposed the base contribution requirement only on foreign online undertakings. This is inequitable:

- (a) The CRTC previously treated foreign and Canadian online undertakings in the same way. As the Base Contribution Policy states, “foreign and Canadian online undertakings have not been required to make financial contributions to the broadcasting system.”
- (b) The CRTC has decided to impose a base contribution requirement only on one class of undertaking (*i.e.*, online undertakings “that are not affiliated with a Canadian broadcaster”). Online undertakings that are “affiliated with Canadian traditional broadcasters” do not have to make base contributions. This is a distinction based on whether the online undertakings are foreign or Canadian.

45. The CRTC’s decision to distinguish between foreign and domestic online undertakings in this way is inequitable.

46. The Implementing Decision is also contrary to the Cabinet Order because it is inequitable as between undertakings of different sizes. In particular:

- (a) operators of online undertakings with revenues of less than \$25 million are exempt from any base contribution obligations; while,
- (b) online undertakings with revenues of more than \$25 million are required to make base contributions based on all of their revenues, including the first \$25 million in revenues.

47. The CRTC’s decision to exempt the first \$25 million in revenues for only some online undertakings is inequitable.

III. CONCLUSION

48. Amazon Canada relies upon:

- (a) The Appeal Book.
- (b) *Broadcasting Act*, S.C. 1991, c. 11, including sections 9.1, 11.1, and 31.

- (c) *Federal Courts Rules*, S.O.R./98-106, including Rules 3, 4, 317, 338, 339, 350, and 352–356.
- (d) *Online Streaming Act*, S.C. 2023, c. 8.
- (e) *Online Undertakings Registration Regulations*, S.O.R./2023-203.
- (f) *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, S.O.R./2023-239.
- (g) *Statutory Instruments Act*, R.S.C., 1985, c. S-22.
- (h) *Cabinet Directive on Regulation*.
- (i) *Canadian Cost-Benefit Analysis Guide: Regulatory Proposals*.
- (j) Such further and other grounds as the solicitors may advise.

49. For greater certainty, Amazon Canada intends to rely upon the CRTC’s record of decision in support of this appeal. In the motion for leave to appeal in Court File No. 24-A-38, Amazon Canada included a request for certain of these materials pursuant to Rule 317. In response, the CRTC refused to file a certified tribunal record on the basis that:

- (a) the documents filed on the public record of the Commission proceeding that led to the Base Contribution Policy and the Implementing Decision are available on the CRTC’s website;
- (b) certain information was filed with the CRTC confidentially pursuant to section 25.3 of the *Broadcasting Act*. Amazon Canada does not seek production of these documents; and
- (c) the CRTC objects to the production of documents created by CRTC staff to assist the CRTC Commissioners (the **Staff Briefing Documents**).

50. Amazon Canada has challenged the CRTC’s objection with respect to the Staff Briefing Documents. This issue is now pending this Court’s determination. To the

extent that this Court orders production of any of the Staff Briefing Documents, Amazon Canada reserves the right to rely upon them in support of this appeal.

January 24, 2025



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