

REGULATORY IMPACT ANALYSIS STATEMENT
RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(This statement is not part of the Regulation.)
(Ce résumé ne fait pas partie du règlement.)

Department or Agency:

Department of Industry

Ministère ou organisme :

Ministère de l'Industrie

Title of Proposal:

Radiocommunication Act (Paragraph 9(1)(c)) Exemption Order for the Purposes of National Defence and Security

Titre du projet :

Décret d'exemption de l'application de la Loi sur la radiocommunication (alinéa 9(1)c)) aux fins de la défense nationale et de la sécurité

Statutory Authority:

Radiocommunication Act,
subsection 3(2)

Fondement législatif :

Loi sur la radiocommunication,
par. 3(2)

Submitted for consideration for:

Exemption from prepublication and final approval because of **urgent security requirements to support the Government's anti-terrorism plan**, legal sensitivities and the costs of prepublication of the order outweigh the benefits.

Soumise en vue de :

Concéder une exemption de publication préalable du règlement et une approbation finale en raison du **besoin urgent de supporter le plan antiterroriste du gouvernement**, des questions juridiques et des coûts qui dépasseraient les avantages.

Minister of Industry/Ministre de l'Industrie

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Description

This Order exempts, under certain conditions, Her Majesty in right of Canada, as represented by federal entities engaged in national defence and security from the operation of paragraph 9(1)(c) of the *Radiocommunication Act* with respect to encrypted programming signals or encrypted network feeds. The exemption applies only if the signals or feed are not available from a lawful distributor.

The exemption order provides a way to address an unanticipated and problematic application of paragraph 9(1)(c) of the *Radiocommunication Act*.

In 1991, the *Radiocommunication Act* was amended to harmonize it with the *Broadcasting Act*'s provisions concerning subscription programming — specifically, encrypted satellite television signals — and to support Canadian broadcast policy.

Paragraph 9(1)(c) of the *Radiocommunication Act* prohibits decoding encrypted subscription programming signals unless in accordance with an authorization from the lawful distributor of the signal. The lawful distributor is defined under the *Radiocommunication Act* as a person who has the lawful right in Canada to transmit and authorize the decoding of an encrypted programming signal or encrypted network feed. The Federal Court of Appeal has held that this prohibition is an absolute one which applies to signals emanating from lawful distributors as well as signals emanating from other distributors whether inside or outside Canada. That ruling has some support from the Alberta Court of Appeal.

More recently, the British Columbia Court of Appeal and Ontario Court of Appeal have ruled that the prohibition only applies to signals emanating from lawful distributors. The Supreme Court of Canada has granted leave to appeal the decision of the British Columbia Court of Appeal. The *ExpressVu v. Rex* case is to be heard by the Supreme Court of Canada in December. Under the absolute prohibition interpretation, any decoding of an encrypted subscription programming signal done in Canada, without authorization from a lawful distributor is illegal under paragraph 9(1)(c).

Federal entities such as the Communications Security Establishment (CSE) and the Canadian Security Intelligence Service (CSIS) which have mandates in the areas of national defence and security would make use of the order. For example, in meeting its mandated commitments, CSIS provides advance warning to government departments and agencies about activities which may reasonably be suspected of constituting threats to the country's security.

The requirements of the CSE illustrate an appropriate use of the exemption order. The Communications Security Establishment is mandated to: acquire and provide foreign signals intelligence; provide advice, guidance and services to help ensure the protection of Government of Canada electronic information and information infrastructures; and provide technical and operational assistance to federal law enforcement and security agencies.

Encrypted programming, for example, of foreign-based regional news and current events provides real-time information and insights that are critical in supporting efforts to produce foreign intelligence in accordance with the intelligence priorities of the Government of Canada. Access to this native language programming is critical to the identification and understanding of regional events and intelligence targets as well as the capabilities, plans and actions of those targets.

Not all encrypted programming containing information that would serve to support foreign intelligence is provided by an authorized distributor in Canada. Distributors in other jurisdictions, who have a lawful right to transmit the signal in their country, but who do not have a lawful right in Canada to transmit the signal, may have access to programming containing information that would support foreign intelligence gathering for the Government of Canada. Because these distributors are not “lawful distributors” within the meaning of the *Radiocommunication Act*, the Government of Canada cannot have access to that information.

Moreover, Canada’s allies have lawful distributors in their countries who can provide access to encrypted programming, which supports their foreign intelligence activities, that Canada cannot access. The use of the Order-in-Council exemption power of subsection 3 (2) provides a means to address Canada’s lack of access to this foreign programming, which will support Canada’s foreign intelligence activities, where there is no “lawful distributor” in Canada. The exemption power would not apply in the event a lawful distributor in Canada can provide the same service. In such an event, the Communications Security Establishment would purchase the encrypted programming from the lawful distributor.

The exemption applies when CSE decodes an encrypted subscription programming signal transmitted by a person other than a person who is a lawful distributor in Canada of the programming signal, where the signal is decoded to fulfil the mandate of CSE in respect to the acquisition and use of information for the purpose of providing foreign intelligence in accordance with the intelligence priorities of the Government of Canada.

The use of the Order-in-Council exemption power of subsection 3(2) of the *Radiocommunication Act* provides a means to meet CSE’s requirements. Under this power the Governor in Council may exempt Her Majesty in right of Canada as represented by a person or persons, from any or all of the provisions of the Act.

This exemption order comes into force on the day on which it is registered.

Alternatives

Three alternatives were considered: keeping the status quo, amending the *Radiocommunication Act*, and making use of the Order-in-Council exemption power of section 3(2) of the *Radiocommunication Act*.

Continuing with the existing practice unduly restricts CSE from accessing information in support of foreign intelligence activities that can be used by the government for strategic warning, policy formulation, decision-making and day-to-day assessment of foreign capabilities and intentions.

Amending the *Radiocommunication Act* to address this situation was viewed as a long-term solution that may occur while addressing other related policy considerations under study.

Using the Order-in-Council exemption power of subsection 3(2) of the *Radiocommunication Act* provides for the most timely and appropriate response to this situation.

Benefits and Costs

This exemption order, which addresses an unanticipated application of the *Radiocommunication Act*, provides an efficient means to meet CSE's requirements. The CSE will incur minor costs to acquire equipment and subscription fees. Other federal entities, such as CSIS, could derive similar benefits and incur comparable costs. The exemption order serves as a measure to strengthen Canada's ability to prevent, detect and respond to existing and emerging national security threats.

Consultations

Consultations were undertaken with the officials from the CSE and CSIS and the Department of Canadian Heritage. They recognize that this initiative supports the Government's anti-terrorism plan for protecting Canadians.

Compliance and Enforcement

The exemption order is required for compliance with Canadian laws and regulations.

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