

# The Online News Act

(or the artist formerly known as Bill C-18)

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# Context: Why the Online News Act?

CANADA

**Flurry of newspaper closures raise concern about future of local news**

# Context: Why the Online News Act?

Purpose: Get major news-hosting search engines or social media platforms to pay their fair share towards Canadian journalism, which has suffered from lost advertising revenue because of link-sharing on these platforms. (allegedly)

Logic: If search engines or social media platforms (that fit specific criteria) allow sharing of news content from Canadian news outlets (that fit specific criteria), they must share in the revenues to ensure the longevity of quality Canadian journalism.

# Purpose of the Act

*“The Act introduces a new legislative and regulatory framework that ensures fair revenue sharing between digital platforms and news businesses. The Act is expected to **enhance fairness in the Canadian news ecosystem** and contribute to its sustainability. The key objective of the Act is to encourage platforms and news businesses to reach **voluntary commercial agreements**. Failing that, it provides for a **mandatory bargaining process**, backstopped by final offer arbitration. Large platforms that have a **significant bargaining power imbalance with news businesses** are subject to this legislation.”*

- Online News Act Application and Exemption Regulations: SOR/2023-276

# Key definitions

**Commission** means the Canadian Radio-television and Telecommunications Commission. (*Conseil*).

**News content** means content – in **any format**, including an audio or audiovisual format – that **reports on, investigates or explains current issues or events of public interest** and includes such content that an Indigenous news outlet makes available by means of Indigenous storytelling.

**News outlet** means an undertaking or any distinct part of an undertaking whose primary purpose is to **produce news content** and includes an Indigenous news outlet or an official language minority community news outlet.

**News business** means an individual or entity that **operates a news outlet** in Canada. (*entreprise de nouvelles*).

# Key definitions

**Digital news intermediary** means an online communications platform, including a search engine or social media service, that is subject to the legislative authority of Parliament and that **makes news content** produced by **news outlets available** to persons in Canada. It does not include an online communications platform that is a messaging service the primary purpose of which is to allow persons to communicate with each other privately.

**Operator** means an individual or entity that, through any means, operates a digital news intermediary.

# Key definitions

## Making available of news content

(2) For the purposes of this Act, news content is made available if

- (a) the news content, or any portion of it, is reproduced; or
- (b) access to the news content, or any portion of it, is facilitated by any means, including an index, aggregation or ranking of news content.



# Who does it apply to?

## Application

**6** This Act applies in respect of a **digital news intermediary** if, having regard to the following factors, there is a **significant bargaining power imbalance** between its operator and news businesses:

- (a) the size of the intermediary or the operator;
- (b) whether the market for the intermediary gives the operator a **strategic advantage over news businesses**; and
- (c) whether the intermediary **occupies a prominent market position**.



# Who does it apply to?

## Application of the “bargaining imbalance test”

A digital platform **must meet all the following thresholds** in order to be subject to the framework:

- *earn a total global revenue of Can\$1 billion or more in a calendar year;*
- *operate in a search engine or social media market; and*
- *have 20 million or more Canadian average monthly unique visitors or Canadian average monthly active users.*

*Together, these thresholds establish when there is a significant bargaining imbalance between the operator of a digital platform and news businesses.*

**-- Online News Act Application and Exemption Regulations: SOR/2023-276**

# What are the possible outcomes under the Act?

Main outcome: one of two types of agreements for revenue sharing between **news businesses** and **digital news intermediaries** (that meet the bargaining imbalance test) **who make available Canadian news content:**

1. **Voluntary agreements** (which give rise to an Exemption from the Act) – 11(1)(a)
2. **“Covered agreements”** – mandatory bargaining (19(1)) or final offer arbitration (s. 42) under the Act.



# How does it work?

**First step: 'duty to notify' (s.7(1))**=> operator of major digital news intermediary who is covered under the act must let the CRTC know if the Act applies to them.

**Second step:** Try to enter into voluntary agreements with eligible news businesses, which lead to Exemptions from the Act.

**Third step:** If that fails, you must do mandatory bargaining or mediation with eligible news businesses.

**Final step:** If bargaining and mediation fail, it goes to final offer arbitration.

# Voluntary Agreements (Exemptions, s.11)

The Commission must grant an exemption to digital news intermediaries if they have agreements with Canadian news businesses that provide fair compensation, support local and diverse news production (including Indigenous and minority language outlets), and maintain journalistic independence. The agreements must also contribute to the sustainability of the Canadian news marketplace and public consultations must be held. Compliance with additional regulations set by the Governor in Council is required.

# Initiation of the Bargaining Process (s.20)

Section 20: *Only an **eligible news business** or a group of eligible news businesses may initiate the bargaining process with an operator.*

Eligible news businesses or their representatives can **initiate negotiations** only if:

- They either hold the copyright to the content or
- Have the authority to negotiate on behalf of the copyright owner.

Importantly, the existing limitations and exceptions under the Copyright Act **do not** constrain the bargaining process. In contrast to news businesses, digital platforms **that enter agreements concerning news content distribution are not** held liable for copyright infringement in relation to activities covered by these agreements.

# Eligible News Businesses (s.27(1))

To be designated as "**eligible**" a news business must:

- Be recognized as a Canadian journalism organization under the Income Tax Act or be licensed as a campus, community, or Indigenous station under the Broadcasting Act.
- Produce general news content focused on public interest and current events, such as democratic processes, employ at least two journalists based in Canada, operate and edit content within Canada, not specialize in areas like sports or entertainment, and belong to a recognized journalistic association or adhere to an ethical code ensuring fairness and independence.
- Indigenous news outlets must cover topics relevant to Indigenous rights, such as self-government and treaty rights.

# Mandatory bargaining process (19(1))

**19 (1)** The bargaining process consists of

- **(a) negotiation or bargaining sessions** over a period of 90 days;
- **(b)** if the parties are unable, within the negotiation or bargaining period, to reach an agreement, **mediation sessions over a period of 120 days**, beginning on the day after the end of the negotiation or bargaining period; and
- **(c)** if the parties are unable, within the mediation period, to reach an agreement and at least one of the parties wishes to initiate arbitration, **final offer arbitration for a period of 45 days**, beginning on the day after the end of the mediation period.

# Final Offer Arbitration (s.42)

The Commission is responsible for maintaining and publishing a roster of qualified arbitrators. Parties may propose candidates for this roster. **Arbitration panel** consists of three arbitrators who must maintain the confidentiality of information shared during the arbitration process. The panel's decision is based on choosing one of the final offers submitted by the parties. **Factors** considered include the value added by each party, benefits gained from making the content available, and any imbalance in bargaining power.

Offers **may be dismissed** if they grant undue influence over compensation, harm the provision of news content in Canada, or do not support fairness in the digital news marketplace. Its decision is **final and legally binding**, considered an agreement between the parties.



# Common Principles applying to "covered agreements"

- ❑ Eligible news businesses have the right to **recover payments** due under covered agreements through legal action if payments are not made. Additionally, a **compliance order** can be sought through the courts to enforce adherence to the provisions of a covered agreement.
- ❑ Certain activities under **covered agreements**, such as payments and information exchanges, are exempt from specific sections of the Competition Act. This includes bargaining or mediation sessions and final offer arbitration.
- ❑ The Commission is mandated to establish a Code of Conduct to govern bargaining processes related to news content. The **purpose** of this code is to ensure fairness and transparency in negotiations between digital news intermediaries and eligible news businesses. If there is a failure to comply with the code, the Commission can issue **corrective orders** that are not subject to the Statutory Instruments Act.
- ❑ Digital news intermediaries are prohibited from unjustly **discriminating** against eligible news businesses, giving undue preference, or imposing unreasonable disadvantage. If an eligible news business believes this section has been violated, they can file a complaint with the Commission. complaints deemed frivolous, vexatious, or not made in good faith can be dismissed.
- ❑ **Confidential information**, such as trade secrets and financial data, are designated and protected. The Act prohibits unauthorized disclosure and use of this information, with specific penalties outlined for breaches. For instance, individuals who unlawfully disclose confidential information face fines of up to \$5,000 for a first **offense** and \$10,000 for subsequent offenses. Unauthorized use of such information also carries similar **penalties**.

# Enforcement and Compliance

- ❑ The Commission has the authority to issue **production orders** for records, reports, and data and impose conditions, suspend, or revoke their designation. **Administrative monetary penalties**, promoting compliance, for violations are detailed in the Act, with maximum amounts set at up to \$25,000 for individuals and \$15 million for entities.
- ❑ The Commission holds the **powers of a superior court** concerning the attendance and examination of witnesses as well as the production and examination of documents or things.
- ❑ The Commission has the authority to **regulate fees** for services related to the Act and allocate costs for bargaining processes between parties, considering factors such as each party's ability to pay and conduct during sessions.
- ❑ An independent auditor is required to prepare an annual **report evaluating the Act's impact on the Canadian digital news marketplace**. This report must analyze the total commercial value of agreements, distribution among eligible news businesses, effects on news expenditures, and impacts on diverse populations, including Indigenous and minority language news outlets, without disclosing confidential information.

# The Online News Act: In Practice

Who does it apply to? => **digital news intermediaries** who make news content available in Canada.

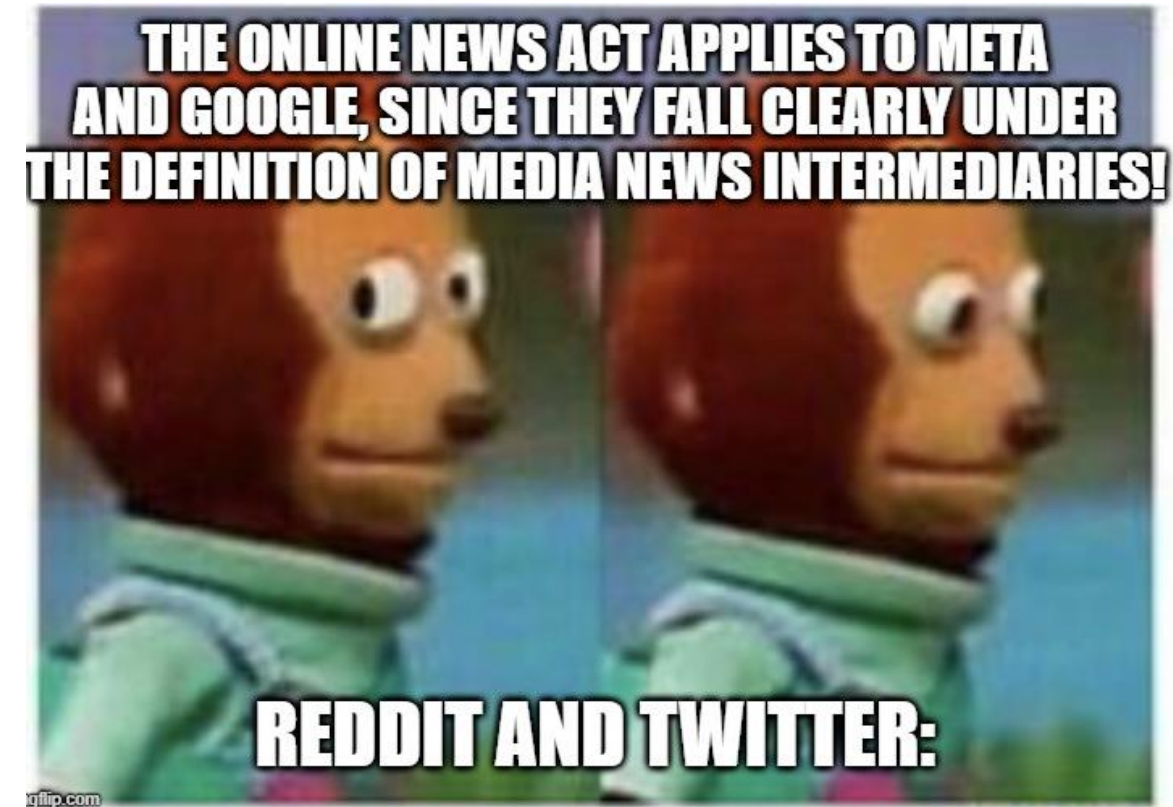
BUT in practice: **only Meta and Google...** Regulations make that clear through "bargaining imbalance test":

- earn a total global revenue of Can\$1 billion or more in a calendar year;
- operate in a search engine or social media market; and
- have 20 million or more Canadian average monthly unique visitors or Canadian average monthly active users.

Twitter fails test => not enough monthly Canadian users

Reddit fails test => not enough revenue or monthly Canadian users

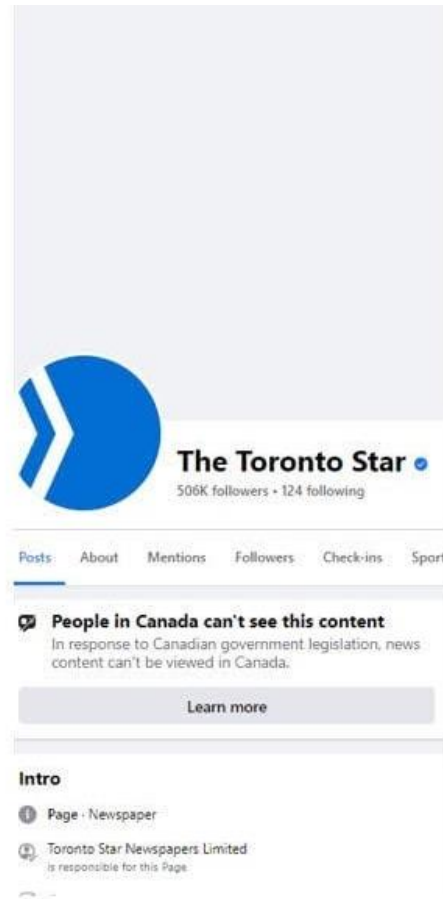
But still host content...?



# How to get away with murder...



**digital news intermediary** means an online communications platform, including a search engine or social media service, that is subject to the legislative authority of Parliament and that **makes news content** produced by **news outlets available to persons in Canada**. It does not include an online communications platform that is a messaging service the primary purpose of which is to allow persons to communicate with each other privately.



# Criticisms and implications

Clear loophole in the legislation - social media companies can simply choose not to 'make Canadian news content available' and therefore no longer fall under the definition

Concerns about open internet, free flow of information and ability to share and access content

Democratic values of access to information - and quality information - and generation of discussion

Troll news sites/inaccurate sites not covered - only misinformation or inaccurate news remains

Whole articles are typically not reproduced, just links and snippets

Links do promote web traffic to news sites, now that traffic and potential ad revenue is lost, since Meta no longer hosting this type of content.

Canadian news outlets struggling, claim they have lost revenue to digital news intermediaries and want their fair share of the revenues from advertising



Pass  
the Online  
News Act



Meta and Google refuse to host links to Canadian news, resulting in even less web traffic to Canadian news outlet websites, and therefore even less ad revenue



# At least one person warned this would happen...

“...this bill is that it is predicated on a lie. The bill adopts a very ancient complaint of newspaper publishers that aggregation-based news websites and social media networks **are unduly profiting by “publishing” our content..** In fact, the value proposition runs in exactly the opposite direction. **We publishers are the ones who benefit when a user posts a link to our content on Facebook, Twitter and the like.** This free distribution drives traffic to our websites, which we can then try to monetize through subscriptions and advertising.”

“I fear that **Bill C-18 is going to backfire spectacularly**, undermining the very problems that it is trying to fix... if organizations like Facebook... respond to this legislation by **simply restricting access to mainstream news articles on their site**—as the company has openly threatened to do—who do you think is going to be most harmed by that decision? Facebook? No. It will be Canadian publishers that are harmed by losing access to a major distribution hub...”

“Do we think that removing news links from Facebook or Twitter will somehow create a digitized version of the glory days ... or are we risking the opposite effect? **Would it strip mainstream media content from the websites and social media platforms where more Canadians live their online lives?** I fear the latter outcome.”

Jen Gerson, Co-founder of The Line, independent journalist; Called to testify at the Standing Committee on Canadian Heritage on Bill C-18.

<https://www.ourcommons.ca/documentviewer/en/44-1/CHPC/meeting-43/evidence#Int-11813272>





August 9, 2023

Attn: Mark Zuckerberg  
Meta  
1 Hacker Way  
Menlo Park, CA 94025

Dear Mr. Zuckerberg

It has been brought to our attention that, as part of your company's response to Bill C-18, you are purporting to block the content of our website from appearing on the facebook and instagram feeds of some of our fellow Canadians. According to the message our followers have received when attempting to view our content, this is part of a general block on all Canadian news providers.

This action is outrageous. To label us and our content as "news" is not only false, it is highly insulting and DEFAMATORY. We are not, and never have been, news and to call us such is an insult to our well-earned reputation as the finest fake news merchants in all of Canada.

To be clear, we are satirists, liars, miscreants, fabulists, hyperbolists, beguilers, tricksters and, every other Tuesday, charlatans. If Meta (god what a stupid name) chose to block the content of pages that engaged in this activity, we would have no choice other than to accept it. But to be labeled as a common news organization alongside such dreck as The Rebel and the National Post? It makes us feel dirty just to think about it.

Therefore, consider yourself on notice that The Beaverton will not tolerate this attack on our lack of character. If you do not take immediate action to unblock our content we will have no choice but to instruct the lawyer who advertises on the bus bench near our office to commence an action against you.

Govern Yourself Accordingly,

But don't  
worry... *The  
Beaverton* got  
unblocked after  
threatening to  
sue.

The end. Thank you!