

THE FUTURE OF THE NEWS INDUSTRY IN THE **DIGITAL ERA**



PRESENTED BY
Georgia Gardner
Adaku Lawson
YeYoung Lee
Seth Nefsky
Tomas Vine
Leon Xu
Angela Zemingui

WITH THE LEADERSHIP OF:
Meghan Little
Jacqueline Rintjema
August 1, 2024





About the Future of Law Lab

The Future of Law Lab is a platform for students, academics, lawyers, and other professionals to participate in collaborative initiatives exploring how the law will evolve in the future. We will dive into the intersection of law, technology, innovation, and entrepreneurship, with programming dedicated to each of these streams. As a hub of interdisciplinary activity, we are dedicated to bringing together individuals from all backgrounds to examine the changing face of the legal profession.

About the Working Group

This report was written by Georgia Gardner, Adaku Lawson, YeYoung Lee, Seth Nefsky, Tomas Vine, Leon Xu, and Angela Zemingui under the supervision of Meghan Little and Jacqueline Rintjema, upper-year student leaders of the group. It was edited by Julissa Gonzalez and Joshua Morrison.

This report will broadly explore the current diversity in Canada's existing news media landscape and discuss whether the Online News Act ("Act") will promote or hinder the accessibility and representation of diverse voices in the Canadian news media landscape. It will also examine what lessons can be learned from Australia's experience with similar online news legislation and conclude with policy recommendations on how sustainability and diversity in the Canadian news industry can be promoted.



UNIVERSITY OF TORONTO
FACULTY OF LAW

About the University of Toronto Faculty of Law

Established in 1887, the Faculty of Law is one of the oldest professional faculties at the University of Toronto, with a long and illustrious history. Today, it is one of the world's great law schools, a dynamic academic and social community with more than 50 full-time faculty members and up to a dozen distinguished short-term visiting professors from the world's leading law schools, as well as 600 undergraduate and graduate students.

The Faculty's rich academic programs are complemented by its many legal clinics and public interest programs, and its close links to the Faculty's more than 6,000 alumni, who enjoy rewarding careers in every sector of Canadian society and remain involved in many aspects of life at the law school.

The Future of the News Industry in the Digital Era

Introduction

Rapid technological advancements, globalization, and the rise of social media have drastically changed the ways in which Canadians consume their news. This has led to significant revenue shortages for the Canadian news industry via their distribution of traditional print news. Maintaining channels of reliable and accessible news content is a cornerstone of Canadian democracy and has remained an important policy concern for Canadian governments throughout history. Adding to the issue of readers moving online to consume news, the Canadian news industry has also suffered from longstanding anti-competitive mergers. These have led to significant vertical interaction among major players, consolidating a considerable portion of the market share. This trend has raised concerns about the potential reduction in editorial diversity in Canadian news media.

In 2023, Canada enacted the *Online News Act (Bill C-18)* (“Act”) to protect local and national news interests in an increasingly digital era. The *Act* provides a framework for the regulation of digital news intermediaries in Canada, including by establishing a bargaining process between news entities and big technology companies to ensure adequate compensation for any news sharing between platforms. However, since its introduction, the *Act* has received significant criticisms. Canadian news creators and consumers have raised concerns regarding the effectiveness of the legislation, such as safeguarding editorial independence and promoting media plurality. There are concerns that rather than enhancing the bargaining power of smaller news outlets, the *Act* excludes smaller players from benefiting altogether. Additionally, the *Act* may provide overbroad exemptions from the *Competition Act*, raising concerns that anti-competitive agreements that are typically illegal may proliferate under the *Act*.

Competition in news is necessary to foster diverse and reliable news sources, which in turn promotes Canadian democracy and cultural identity. As a nation known for its cultural mosaic, Canada prides itself on the rich tapestry of ethnicities, languages, and perspectives that contribute to its social fabric. Therefore, any legislation affecting the news industry must be evaluated in terms of its ability to uphold and promote this diversity. **This report will broadly explore the current diversity in Canada’s existing news media landscape and discuss whether the *Online News Act* (“Act”) will promote or hinder the accessibility and representation of diverse voices in the Canadian news media landscape. It will also examine what lessons can be learned from Australia’s experience with similar online news legislation and conclude with policy recommendations on how sustainability and diversity in the Canadian news industry can be promoted.** By acknowledging the complexities of the news media landscape and the need for regulatory measures to safeguard editorial independence

and promote media plurality, our recommendations strive to support a diverse and inclusive Canadian media environment that serves the interests of all Canadians.

This report is comprised of five sections:

1. An overview of the importance of diversity in Canadian news;
2. An inquiry into the diversity of Canada's current news media landscape;
3. A summary of the *Online News Act*, including a case study on the most recent deal with Google and the collective bargaining process issues inherent in the *Act*;
4. A look at the *Act's Competition Act* exemptions; and
5. A final analysis on the lessons Canada can learn from Australia's similar legislative history, and suggested policy approaches to addressing these issues.

Canadian Cultural Preservation and the Importance of Diversity in News

Promoting Canadian news content has been a longstanding policy priority for the Canadian government. This arose out of a need to protect Canadian cultural identity in light of powerful American media influences. However, establishing and maintaining a news media landscape that reflects Canada's increasingly diverse population is also an important policy objective that has lacked government attention thus far. In particular, today's news policy must be responsive to the unique challenges of protecting diverse Canadian news content in the digital era.

Historical Overview of Canadian News Media Policies

Embedded in the history of Canadian news policy is a fear of being absorbed into the larger, more powerful American cultural machine. As Pierre Juneau, the head of the Canadian Radio-Television Commission said in the 1970s, 'Canadian broadcasting should be Canadian. Canadian broadcasters are behaving like mouthpieces for American "entertainment factories."' ¹ Today, this sentiment is more pertinent than ever, as news media serves as a vital platform that encapsulates not only ideas and societal values, but culture and entertainment.

In the 1950s, the Canadian government approved the *National Film Act*, which was aimed at "producing, distributing and promoting the production and distribution of films designed to interpret Canada to Canadians and other nations." ² This legislation was enacted in response to concerns about the overwhelming presence of American media and the potential dilution of Canadian cultural identity. Post World War II, Hollywood films permeated global

¹ "Ruling the Airwaves: The CRTC and Canadian Content", *CBC News* (14 January 1992), online: <http://archives.cbc.ca/economy_business/the_media/topics/1150-6306/>

² "The National Film Board's Mandate Over the Years", *The Government of Canada* (16 February 2023), online: <<https://www.canada.ca/en/national-film-board/corporate/archives-and-history/history/mandate-timeline.html>>

markets, shaping perceptions and narratives about the world.³ By investing in the creation and dissemination of Canadian films, the government not only aimed to cultivate a distinct national narrative but also recognized the power of cinema as a tool for cultural diplomacy and nation-building. The *National Film Act* was a strategic response to the dominance of American media and an assertion of Canada's sovereignty in shaping its own cultural landscape.

In 1955, amidst the overwhelming presence of American content, the Canadian government instituted a quota system to protect Canadian content on television and radio stations. *The Broadcasting Act*, created and passed in 1958, saw the formation of a Broadcast Governors – who were responsible for regulating the relationships between Canadian broadcasters and “ensuring the efficient operation of national radio and television broadcasting.”⁴ Today, this *Act* is overseen and enforced by the Canadian Radio Television Corporation (CRTC). The quota began with a minimum requirement of 45%. Recognizing the paramount importance of Canadian voices and perspectives, this quota was later increased to 55% in 1962.⁵ These measures represented a bold assertion of Canadian cultural sovereignty and a concerted effort to counteract the dominance of American media. By championing policies that promoted homegrown talent and narratives, the Canadian government underscored its commitment to nurturing a vibrant and distinctive national identity within the evolving media landscape. Under the *Broadcasting Act*, Canadian programming notably included news along with other forms of media entertainment.⁶

Legislative interventions such as article 19 of the *Income Tax Act* in the early 1970s and Bill C-103 in 1993 demonstrated Canada’s ongoing vigilance in protecting its media ecosystem. In early 1976, Canadian parliament added article 19 to the *Income Tax Act*, which prevented Canadians from claiming income tax deductions for advertisements placed in publications owned by entities outside of Canada.⁷ By disallowing deductions for advertisements placed in foreign-owned-publications, the government sought to bolster the financial stability of homegrown media outlets, nurturing the Canadian media ecosystem and safeguarding its cultural and journalistic diversity. In 1993, technological advances enabled foreign publishers to circumvent this policy, allowing foreign publishers to “split-run” their publications.⁸ In response, Canada passed Bill C-103, imposing an 80% tax on revenue from split-run editions of foreign publications. These measures were not merely about economic protectionism, but rather, symbolized a commitment to nurturing Canadian identity by regulating media dissemination.

³ Jonathan Derek Silver, “Post World War II, Hollywood films permeated global markets, shaping perceptions and narratives about the world” (2007) QUTA, online: <<https://core.ac.uk/download/pdf/10885386.pdf>>.

⁴ “Standing Committee on Canadian Heritage Report”, *Canada House of Commons* (30 September 2002), online: <<https://www.ourcommons.ca/DocumentViewer/en/37-2/HERI/report-2/page-54>> [House of Commons].

⁵ *Ibid* at page 133.

⁶ *Ibid*.

⁷ Huhmann, B. A., & Saqib, N. U, “Effects of Changing Public Policies of Cultural Protectionism on Sources of Cultural Identity and Consumer Information. *Journal of Public Policy & Marketing*” (2007) 26(1) at 75-88, online: <<https://doi.org/10.1509/jppm.26.1.75>>.

⁸ *Ibid* at page 1.

Canada's approach to media and cultural preservation reflects an ongoing desire to preserve national identity amidst challenges of globalization. Today, many CRTC policies remain in force, which include the following:

- Content licenses are required to contribute 4.7% of its gross broadcasting revenues;⁹
- TV stations must show at least 60% local community programs on their channels each week;¹⁰
- Television licensees must prioritize Canadian programming in content offered to subscribers.¹¹

These media policies, enforced by the CRTC, reflect a strong desire to continue to uphold a Canadian national identity.

Defining News Diversity

Challenges remain in providing a clear definition of what news diversity means.¹² This report refers to diversity from a diversity of ownership perspective, with the recognition that maintaining competition and diversity in news is important not merely for economic reasons but also for the importance of news for democracy. Ensuring a competitive business environment is important for maintaining a plurality of editorial voices. However, in light of a wide variety of perspectives, theoretical frameworks, and methods of analysis, there are different ways to define diversity in the media.¹³ The Canadian Radio-Television and Telecommunications Commission has taken the approach of defining diversity in broadcasting by three categories: diversity of elements, plurality of editorial voices, and diversity of programming.¹⁴ Diversity of elements represents the different types of broadcasting services available, including language, region, and use of public frequencies to promote national and cultural interests. Plurality refers to the number of separately owned voices, with the CRTC recognizing in 2008 that amidst greater consolidation in the private sector, encouraging plurality is pivotal to maintaining a diverse range of editorial voices.¹⁵ Diversity of programming is determined by assessing the availability of Canadian vs. foreign sources, different programming mediums, and different producers / news

⁹ *Canadian Broadcasting Act*, RSC 1985, c C-15 (Can) at s. 52(1).

¹⁰ *Ibid* at s. 33(1).

¹¹ *Supra* note 9 at s. 6.

¹² Glen Joris et al, "News Diversity Reconsidered: A Systematic Literature Review Unraveling the Diversity in Conceptualizations" (2020) 21 *Journalism Studies* 1893 at 1893.

¹³ *Ibid* at 1897.

¹⁴ Canada, Canadian Radio-television and Telecommunications Commission, *Broadcasting Public Notice CRTC 2008-4* (Ottawa: CRTC, 2008) at paras 6 – 21, online: <https://crtc.gc.ca/eng/archive/2008/pb2008-4.htm> [*CRTC 2008 Notice*].

¹⁵ *Ibid* at para 1.

sources.¹⁶ However, it should be noted that the CRTC approach may inadvertently rest on normative and conceptual assumptions about defining and measuring diversity.¹⁷

Making the Case for Diversity in News Media

The promotion and maintenance of diversity in news media has been absent from government policy priorities. With digital platforms playing an increasingly significant role in media dissemination and consumption, protecting diverse Canadian content in an increasingly digital era is an urgent policy objective.

Diverse perspectives in the media can provide a wide range of benefits, including supporting strong democratic institutions. The Government of Canada has recognized that “[a] healthy democracy requires its citizens to have access and be exposed to information and content from a wide range of views and perspectives” as this “promotes a healthy public discourse; fosters greater social inclusion; encourages understanding and tolerance between different cultures and communities; and builds citizens’ resilience to disinformation.”¹⁸ However, it has been argued that Canada’s oligopolistic media structure poses risks to democracy and civic literacy, as it minimizes public debate and prevents people from forming informed opinions on societal issues.¹⁹

Diverse perspectives in news are essential for both practical and ethical reasons. Practically, they help citizens make well-informed decisions by presenting a range of viewpoints and addressing misinformation. Ethically, a lack of diversity can perpetuate stereotypes and historical inequities, marginalizing underrepresented groups and limiting their ability to challenge these narratives. Authentic representation, however, fosters self-esteem and opportunities for all individuals, ensuring that all communities are accurately and fairly depicted.

Finally, research demonstrates that diversity in news ownership is important to Canadians. A 2023 poll showed that almost 60% of Canadians believe that the government should discourage consolidation of news agencies in order to preserve a diverse range of editorial voices.²⁰

Diversity in News: Context and Importance

The *Online News Act* will have a significant effect on Indigenous communities.²¹ Many Indigenous communities are isolated, and the *Online News Act* has the effect of making it more

¹⁶ *Ibid* at para 6.

¹⁷ *Ibid* at 1906.

¹⁸ <https://www.canada.ca/en/canadian-heritage/services/diversity-content-digital-age.html>

¹⁹ Institut Du Nouveau Monde, “Dialogue on the Role of the Media in Canadian Democracy” (2022), online: <<https://inm.qc.ca/dialogue-role-media-canadian-democracy/>>

²⁰ *Angus Reid*, *supra* note 9.

²¹ Angelina Jaya Siew, Canada’s Indigenous communities left vulnerable by Meta’s news content block (Toronto: The Medium, 2023), online: <www.themedium.ca> [perma.cc/4XJB-9GM2].

cumbersome for these communities to receive timely access to locally relevant news.²² Meta’s ban of Canadian news on Facebook has already been felt by rural Indigenous communities.²³ Many Indigenous communities are dependent on Facebook for timely news as it pertains to wildfires.²⁴ The ban has decreased smaller news providers’ revenue streams and has impeded their ability to disseminate necessary time-sensitive information.²⁵ Given the lack of access to local news following the introduction of the *Act*, this raises significant public health and safety concerns for local Indigenous communities.

How diverse is the current Canadian news landscape from a competition perspective?

The historical merging and amalgamation of news agencies has resulted in fewer editorial voices in Canada, eroding opportunities for diversity in Canadian news media. The shift towards sourcing news online has posed further difficulties to maintaining editorial diversity.

The Canadian news landscape has faced increasing top-end consolidation, with the five largest companies (Bell Canada Enterprises, Corus/Shaw, Rogers, CBC/ SRC, Quebecor) generating revenues of \$12.4 billion in 2023, representing approximately 79% of total Canadian broadcasting revenues (including television, radio and broadcast distribution).²⁶ 61% (44) of Canadian daily newspapers are owned by Postmedia, Torstar, or Coopérative Nationale de l’Information Indépendante, while another 35% (22) are owned by other corporations.²⁷ Of the 70+ daily newspapers in Canada, the ownership list can be broken down into 15 parties, with just 3 of those being independent and representing just 4% of the available offerings.²⁸ Of the over 950 community newspapers published monthly, 55% of them are now owned by corporations, up from 51% in 2018.²⁹³⁰ In the last 4 years alone, over 85 newspapers, primarily independent,

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Unifor, “*Unifor Media Policy September 2023*” (Unifor, Sept 2023) at page 4, online:

<<https://www.unifor.org/sites/default/files/documents/Unifor-Media-Policy-2023-EN-web.pdf>> [Unifor].

²⁷ *Ibid* at page 6.

²⁸ News Media Canada, “*News Media Canada: Snapshot 2022*” (News Media Canada, Dec 2022), online:

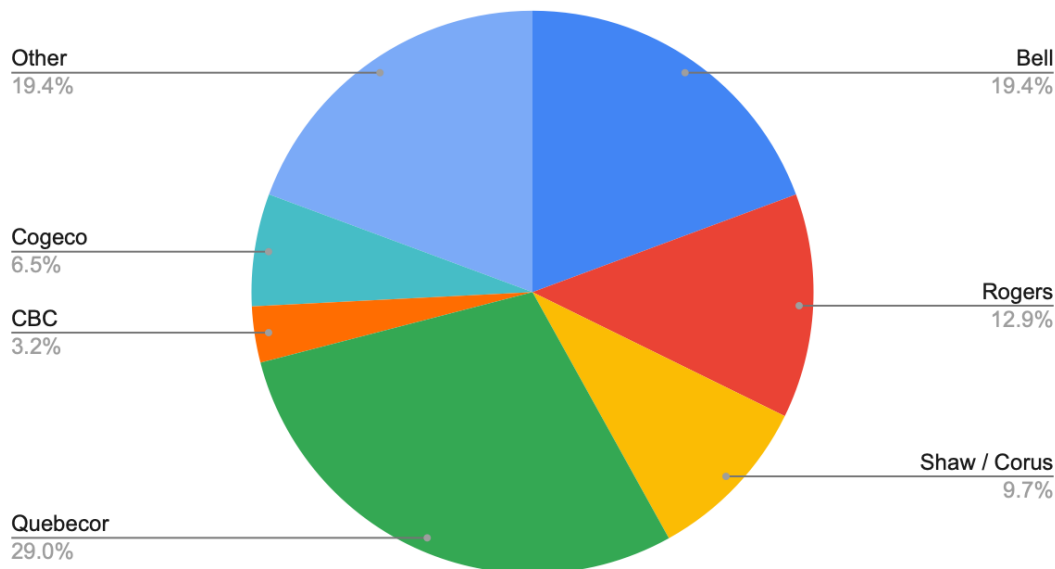
<https://nmc-mic.ca/wp-content/uploads/2023/02/Snapshot-2022-FACT-SHEET_Final-02.02.2023.pdf> [NMC Snapshot].

²⁹ *Ibid.*

³⁰ *CRTC 2008 Notice, supra* note 1 at para 33.

local ones, have been forced to shut down because of decreasing revenues and an inability to compete with larger service providers.³¹

2023 Canadian Media Industry Revenue Breakdown (\$15.4 Billion)



(Angus Reid 2023)^

A key factor in these controversial mergers relates to the Competition Bureau Authorities' and the Competition Tribunals' reluctance to accept editorial diversity as a valid argument for blocking acquisitions.³² By focusing on economic factors such as financial efficiencies and economies of scale, the Competition Bureau has allowed mergers that have negative impacts on Canadians' access to a diverse range of editorial voices and sources.³³ Some believe that the CRTC should deal with any political or democratic issues after these deals are approved by the Competition Bureau, and that it is the appropriate venue for diversity arguments to be raised.³⁴ Meanwhile, the CRTC has argued that it is up to the Tribunal to make decisions on mergers in industry.³⁵ This perfectly represents the degradation of the ability for Canadian governmental and quasi-governmental to work cooperatively towards social and economic goals that are truly desirable for Canadians. The government is attempting to solve this issue with the implementation of the Canadian Digital Regulators Forum, which is comprised of the CRTC, the Competition Bureau, and the Privacy Commissioner.

³¹ Angus Reid Institute, "As newsrooms grapple with shifting media landscape, most Canadians oppose government intervention" (Angus Reid Institute, July 13, 2023), online: <<https://angusreid.org/canada-media-consolidation-torstar-postmedia-government-funding-cbc/#gsc.tab=0>> [Angus Reid].

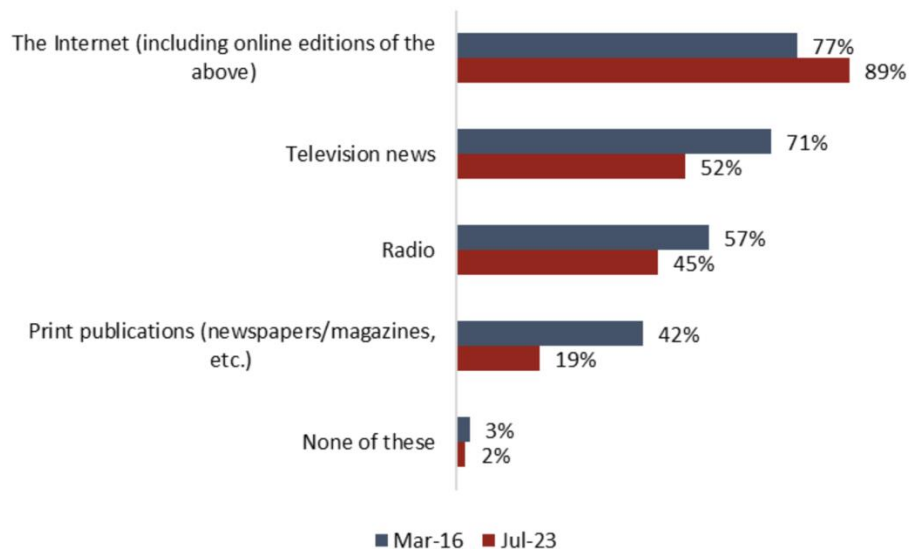
³² Dale Smith, "Why competition law has failed Canadian media" (Canadian Bar Association National Magazine, July 24, 2023), online: <<https://www.nationalmagazine.ca/en-ca/articles/law/business-corporate/2023/why-competition-law-has-failed-canadian-media>> [National Magazine].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

Canadians have been shifting heavily towards accessing their news through the internet, with 89% of those polled stating that they access online news daily.³⁶ This rate has been consistently increasing year over year. 52% and 45% of those same Canadians accessed news daily through TV or radio respectively, with only 19% stating that they used print publications.³⁷ Traditional media was most popularly accessed by groups aged 50+, while younger generations largely composed the online user demographic.³⁸



(Angus Reid, 2023).

The Online News Act

The remainder of the report focuses on the *Online News Act*. The *Act* was passed into law on June 22, 2023.³⁹ Despite the *Act*'s stated purpose of enhancing fairness and sustainability in the digital news marketplace,⁴⁰ the *Act* has the effect of reducing competition and diversity in Canadian news. The *Act* disproportionately favours large media organizations, putting smaller independent outlets at a disadvantage.⁴¹ This section outlines the problem the *Act* aims to address, an overview of the *Act*'s bargaining process, a case study on Google's November 2023

³⁶ Angus Reid, *supra* note 9.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ <https://crtc.gc.ca/eng/industr/info.htm>

⁴⁰ Online News Act section 4

⁴¹ Tracey Gray, Paying for Online News: "The problem with the federal government's new Online News Act" (2023), The Conservative MP for Kelowna-Lake Country, online: <https://www.castanet.net/news/In-Your-Service/433281/The-problem-with-the-federal-government-s-new-Online-News-Act>.

deal with the government, and an overview of *Competition Act* exemptions. To successfully promote diversity in Canadian news, we recommend the *Act* be repealed.⁴²

The Problem the *Act* Aims to Address

The *Act* addresses several key issues in Canada's digital news ecosystem. It aims to mitigate the significant revenue declines faced by Canadian news organizations, which saw a nearly \$6 billion drop from 2008 to 2020 and a substantial loss of journalism jobs.⁴³ The *Act* also seeks to correct the bargaining imbalance between news organizations and large digital platforms like Google and Meta, ensuring fair compensation for news content.⁴⁴ Each of the platforms has benefitted from increased user engagement and advertising revenue via the distribution of news content, while news organizations have rarely been compensated for these materials.⁴⁵ The *Act* also intends to address market dominance, where social media companies *Act* as gatekeepers and can leverage their control to prioritize certain pieces of content and limit the visibility of others.⁴⁶ This significantly impacts the diversity and accessibility of information available to the public. By requiring digital platforms to negotiate fair compensation agreements with news organizations, the *Act* aims to ensure the sustainability of journalism in Canada.

For small news agencies, the *Act* mandates fair compensation and supports collective bargaining, allowing them to negotiate better terms collectively, thereby enhancing their financial stability and visibility.⁴⁷ This is crucial for maintaining their journalistic independence and ensuring they can continue to provide diverse, locally focused news coverage. By mandating fair compensation and negotiation, the *Act* indirectly supports better distribution terms and visibility for small news outlets, ensuring their content can reach wider audiences without being overshadowed by larger entities.⁴⁸ In supporting local and community news outlets, the *Act* aims to protect essential coverage of local issues often overlooked by larger media organizations.⁴⁹

⁴² See the [policy recommendations](#) section of our report

⁴³ Colin Deacon, “Canada Needs to Protect ‘weakening news outlets’: Will Bill C-18 Help Sustain an Journalism Ecosystem”, (speech delivered to Senate chamber on March 9, 2023). Online:< <https://www.policymagazine.ca/canada-needs-to-protect-weakening-news-outlets-will-bill-c-18-help-sustain-a-journalism-ecosystem/>>

⁴⁴ *Ibid.*

⁴⁵ Andrew Sullivan, Natalie Campbell, “Internet Impact Brief: How Canada’s Online News Act Will Harm the Internet, Restricting Innovation, Security, and Growth of the Digital Economy” (February 14, 2023). Online:< <https://www.internetsociety.org/resources/doc/2023/internet-impact-brief-how-canadas-online-news-act-will-harm-the-internet-restricting-innovation-security-and-growth-of-the-digital-economy/>>

⁴⁶ *Supra* note 54.

⁴⁷ Dilshad Burman, “Explainer: What does Bill C-18, the Online News Act, mean for your access to news?” (July 19, 2023). Online:< <https://toronto.citynews.ca/2023/07/19/explainer-what-does-bill-c-18-the-online-news-act-mean-for-your-access-to-news/>>

⁴⁸ Ashee Pamma, “Canadians undergoing a shift in news consumption habits amid Bill C-18 standoff: Report” (September 15, 2023). Online:< <https://www.itworldcanada.com/article/canadians-undergoing-a-shift-in-news-consumption-habits-amid-bill-c-18-standoff-report/546917>>

⁴⁹ *Ibid.*

Overall, Bill C-18 seeks to create a more equitable and sustainable digital news environment in Canada.

The Government of Canada characterizes the *Act* as a response to the rise of search engines and social media platforms dominating access to news content and the corresponding decline in advertising revenue for news publishers.⁵⁰ Section 4 of the *Act* specifies the purpose as regulating digital platforms “with a view to enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability”.⁵¹ The *Act* “aims to ensure that dominant platforms compensate news businesses” when their content is made available on these platforms. Despite these admirable objectives, the *Act* fails to adequately account for the imbalanced relationship between news publishers and Big Tech. Platforms like Meta and Google are not dependent on news publishers. News publishers, conversely, rely on distribution of their content on these platforms, driving traffic to their news sites.⁵²

Meta and Google’s responses to the *Act* demonstrate their outsized market power and the government’s inability to regulate them. Following the *Act*’s announcement, Meta and Google blocked Canadian news content. Google, however, reached a deal in November 2023 to compensate news publishers fairly.⁵³ Meta, on the other hand, shows no sign of putting Canadian news back on their platforms.⁵⁴ This response has impacted smaller news outlets disproportionately and raised questions about the government’s ability to effectively regulate Big Tech.⁵⁵

Overview of the *Act*’s Bargaining Process

The *Act* outlines a bargaining process between “digital news intermediaries” and eligible news businesses to ensure that platforms compensate news businesses fairly for the sharing of news links on their platforms. “Digital news intermediary” refers to online communications platforms that make news content available to people in Canada, including search engines and social media sites.⁵⁶

Under the *Act*, digital news intermediaries are obligated to participate in the bargaining process with the eligible news business that initiated it.⁵⁷ The scope of the bargaining process is limited to matters related to the making available of news content by the digital news

⁵⁰ <https://www.gazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html>

⁵¹ Government of Canada, “*The Online News Act*”, online: <<https://www.canada.ca/en/canadian-heritage/services/online-news.html>>.

⁵² https://www.cjr.org/tow_center/online-news-act-hearings.php

⁵³ See page x of this report

⁵⁴ Michael Geist, “A Reality Check on the Online News Act: Why Bill C-18 has been a Total Policy Disaster” (20 September 2023), online: <<https://www.michaelgeist.ca/2023/09/a-reality-check-on-the-online-news-act-why-bill-c-18-has-been-a-total-policy-disaster/>>.

⁵⁵ Time & Space, “*Consequences of The Online News Act*” (2023), online: <<https://timespacemedia.com/consequences-of-the-online-news-act/>>; Public Policy Forum, “*The Online News Act gets an edit. What it means for the Canadian news media*” (2023), online: <<https://ppforum.ca/policy-speaking/online-news-act/>>

⁵⁶ Online News Act section 2(1)

⁵⁷ *Ibid*, s.21.

intermediary.⁵⁸ A key feature of the bargaining process is that all parties that are participating in the bargaining process must do so in good faith.⁵⁹

This bargaining process begins with negotiation sessions over 90 days.⁶⁰ If an agreement cannot be reached within the negotiation period, parties will engage in mediation sessions over 120 days.⁶¹ If an agreement still cannot be reached, either party can initiate final offer arbitration.⁶²

The *Act* provides that eligible news businesses may bargain only regarding news content for which they own the copyright or for which they are authorized to bargain.⁶³ The *Act* clarifies that limitations and exceptions to copyright under the *Copyright Act* do not restrict the bargaining scope.⁶⁴

In order to be considered an eligible news business, the business must first be a qualified Canadian journalism organization as defined in the *Income Tax Act* or be licensed under the *Broadcasting Act* as a campus station, community station or native station.⁶⁵ The news business must also produce news content of public interest that is primarily focused on matters of general interest and reports of current events.⁶⁶ Further, the news business must regularly employ two or more journalists in Canada,⁶⁷ operate in Canada,⁶⁸ produce news content that is not primarily focused on a particular topic,⁶⁹ and be either a member of a recognized journalistic association and follow the association's code of ethics or have its own code of ethics.⁷⁰ A news business may also be eligible if it operates an Indigenous news outlet in Canada and produces news content that includes matters of general interest.⁷¹

Exemptions

A digital news intermediary is entitled to an exemption from the *Act*'s bargaining process if certain conditions in section 11(1) are met. Significantly, the exemption recognizes the importance of local news and diversity of news content. For example, one condition for exemption is that the digital news intermediary ensures that "a significant portion of independent local news businesses benefit".⁷² Additionally, the digital news intermediary must ensure a range

⁵⁸ *Ibid*, s.22.

⁵⁹ *Ibid*, s.22.

⁶⁰ *Online News Act* S.C. 2023, c. 23, s 19(1)(a).

⁶¹ *Ibid*, s.19(1)(b).

⁶² *Ibid*, s.19(1)(c).

⁶³ *Ibid*, s.23.

⁶⁴ *Ibid*, s.24.

⁶⁵ *Ibid*, s.27(1)(a).

⁶⁶ *Ibid*, s.27(1)(b).

⁶⁷ *Ibid*, s.27(1)(b)(i).

⁶⁸ *Ibid*, s.27(1)(b)(ii).

⁶⁹ *Ibid*, s.27(1)(b)(iii).

⁷⁰ *Ibid*, s.27(1)(b)(iv).

⁷¹ *Ibid*, s.27(1)(c).

⁷² *Ibid*, s.11(1)(a)(v).

of news outlets are included in the compensation agreed to, including the non-profit sector and news business reflecting a diversity of business models and serving diverse populations.⁷³

The exemption's requirements to support local and diverse news outlets reflect an assumption that the *Act's* bargaining process achieves the same objectives. In what follows, we analyze various critiques of the *Act* and find the *Act* does not support diversity in Canadian news and instead favours larger Canadian news players.

Critiques

The bargaining process mandated by the *Act* significantly impacts smaller, local, and diverse news agencies. Positively, it allows these agencies to collectively negotiate with large digital platforms, enhancing their bargaining power and ensuring fair compensation. This increased revenue stream is crucial for their financial stability, enabling them to sustain operations, invest in quality journalism, and potentially expand their coverage.⁷⁴ Additionally, the *Act* promotes visibility by ensuring that small news agencies' content is prominently featured on digital platforms, helping them reach broader audiences.

The *Act* also includes provisions to ensure representation from Indigenous and minority language communities, helping to promote a diverse and pluralistic landscape. The *Act* includes provisions to ensure representation from local, Indigenous, and minority language communities, promoting a diverse and pluralistic media landscape.

However, there are notable challenges. Implementing the bargaining process can be complex and resource-intensive, posing difficulties for small agencies with limited resources.⁷⁵ Furthermore, stringent eligibility criteria might exclude some innovative or non-traditional news outlets from the *Act's* benefits. Major platforms like Meta and Google have blocked or have threatened to block news content in response to the *Act*, potentially undermining its financial benefits and complicating the media landscape for small outlets. For example, Eagle Feather News, an Indigenous outlet in Saskatchewan, suffered from Meta's decision to block news content, significantly impacting its visibility and audience engagement on social media.⁷⁶ This *Action* had the direct effect of reducing its readership and advertising revenue, critical for its sustainability.

Similarly, allNovaScotia, a subscription-based news outlet in Atlantic Canada, faces challenges despite its reliance on a hard paywall. The complex and resource-intensive nature of the bargaining process strains its limited resources, diverting focus from its core journalistic

⁷³ *Ibid*, s.11(1)(a)(vi).

⁷⁴ Government of Canada, "Questions & Answers on the Online News Act". Online:< <https://www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/standing-committee/pablo-rodriguez-bill-c18/questions-answers.html>>

⁷⁵ Government of Canada, "Canada Gazette, Part I, Volume 157, Number 35: Regulations Respecting the Application of the Online News Act..." (September 2, 2023). Online:< <https://canadagazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html>>

⁷⁶ Angela Amato, "'A new generation': Eagle Feather News to relaunch with new name after brief hiatus" (July 28, 2024). Online:<

Activities and impacting overall operations.⁷⁷ Windspeaker, part of the Aboriginal Multi-Media Society, benefits from collective bargaining provisions but struggles with the administrative and legal complexities of the process. These demands can divert essential resources away from journalism, affecting the quality and coverage of its news.⁷⁸ Innovative outlets like BetaKit, which focuses on startup and technology news, are at risk from platform responses such as content blocking by Meta and Google. These *Actions* limit their reach and audience engagement, undermining the financial benefits anticipated from the *Act* and threatening their growth.

Overall, while Bill C-18 aims to support small news agencies through fair compensation, the implementation complexities, potential exclusions, and adverse responses from major platforms present significant hurdles that can undermine its intended benefits.

The Act Magnifies Power Imbalances of Small News Publishers

Ariel Katz has criticized the mandated collective bargaining scheme proposed by the *Act* for being “entirely permissive” regarding its treatment of eligible news businesses, while creating obligations on the digital news intermediaries such as the duty to participate in collective bargaining and the duty to pay.⁷⁹ Katz argues, that instead of reducing the market power of content providers, the *Act* aims to enhance it.⁸⁰ Katz compares the collective bargaining scheme outlined in the *Act* to collective bargaining in the labour law context, which seeks to mitigate the inherent imbalance in the bargaining power between employees and employers.⁸¹ While both collective bargaining schemes aim to mitigate against significant bargaining power imbalance, it is important to note the beneficiaries in labour law are individual workers, whereas the beneficiaries of the *Online News Act* are corporations.⁸² Indeed, it is estimated that seventy-five percent of the revenue would go to the largest media organizations in the country, like Bell, Rogers, and the CBC.⁸³ Eligibility criteria that require news businesses to regularly employ two or more journalists in Canada exclude smaller entrepreneurial businesses, thereby enhancing the bargaining power of powerful organizations and precluding bargaining power for small businesses.⁸⁴

The Act Grants Excessive Power to the CRTC

Sabrina Geremia has also criticized the *Act* for granting excessive powers to the CRTC.⁸⁵ The CRTC has the power to determine what constitutes an eligible news business, and the compensation that will be provided to each organization.⁸⁶ Geremia argues that these powers are

⁷⁷ *Supra* note 54.

⁷⁸ *Ibid.*

⁷⁹ Ariel Katz, “Sedating Democracy’s Watchdogs” (2003) 46:3 Colum. J.L. & Arts 345 at 358 [Katz].

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Katz at 359.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Sabrina Geremia, “Our concerns with Bill C-18, the Online News Act” (16 May 2022), online: <<https://blog.google/intl/en-ca/our-concerns-with-bill-c-18-the-online-news-act/>>.

⁸⁶ *Ibid.*

outside CRTC's expertise as a broadcast regulator.⁸⁷ The CRTC will also be required to oversee negotiations between eligible news businesses and digital news intermediaries, including setting mandatory terms, resolving disputes, and issuing penalties.⁸⁸ Geremia regards these as “unprecedented, sweeping new powers”, and worries about the limited checks and balances in place.⁸⁹

Copyright is Undermined

Michael Geist argues that the copyright provisions under the collective bargaining scheme undermine Canadian copyright law and international copyright treaty obligations.⁹⁰ Geist believes there is danger in section 24, which provides that limitations and exceptions to copyright under the *Copyright Act* do not limit the scope of the bargaining process. He finds this problematic because digital news intermediaries typically do not use news in a manner that should be compensated, for example, in the case that a platform provides a link or headline to the news.⁹¹ Such uses are typically allowed under the fair dealing exception in copyright law, which renders a license or compensation unnecessary.⁹² Section 24 *practically* eliminates fair dealing rights during the bargaining process, which is contrary to Canadian copyright law and international treaty obligations.⁹³ At the national level, the Supreme Court of Canada has confirmed that fair dealing is a user's right that must be balanced against authors' rights.⁹⁴ At the international level, Article 10(1) of the *Berne Convention*⁹⁵ requires a right of quotation within national copyright law, including the right to quote news articles.

Katz echoes Geists' concerns. He notes that section 24 suggests that the *Act* “would mandate bargaining not only over what news publishers are entitled to (uses that fall within the scope of any exclusive right that they own) but also with respect to uses of news content which, as a matter of law, are intended to be in the public domain and not subject to publishers' control”.⁹⁶

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Michael Geist, “Why the Online News Act is a Bad Solution to a Real Problem, Part Four: Undermining Canadian Copyright Law and International Copyright Treaty Obligations” (23 September 2022), online: <<https://www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-four/>>.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), 10(1), S. Treaty Doc. No. 99-27 (1986), <https://wipolex.wipo.int/en/text/283698> [<https://perma.cc/8UG7-RJQJ>].

⁹⁶ [Katz] at 356.

Case Study

Case Study: Google's Deal with the Canadian Government

On November 29, 2023, the Minister of Canadian Heritage, Pascale St-Onge, announced that a deal had been struck with Google in lieu of the *Online News Act*.⁹⁷ This deal follows months of uncertainty regarding the future of both the *Act* and of Canadian news outlets, as Google had previously refused to partake in the negotiations that the *Act* had called for. One of Google's primary concerns regarding the *Act* was that it had "serious structural issues... that regrettably were not dealt with during the legislative process", and that the *Act* as it was proposed would create "uncapped financial liability" for the tech giant.⁹⁸ Prior to the deal, Google had indicated that the legislation could result in the company following Meta's lead and blocking access to news links in its search results for Canadians. However, they did not follow through with the news blockage and instead continued negotiations and discussions with the Government of Canada.⁹⁹

The discussions culminated in a deal, where Google agreed to pay \$100 million per year to eligible Canadian news sites in exchange for keeping the news up on their site.¹⁰⁰ Notably, and despite St-Onge's declaration that the government made "absolutely no concessions" in the bargaining process, the dollar amount that Google will provide to the news outlets is considerably less than the originally estimated amount of \$172 million.¹⁰¹ Another change made to the bargaining process as a result of this deal is that, instead of having the digital news intermediaries bargain with news outlets directly to reach an agreement for a fair compensation amount, Google will instead provide the \$100M to a singular collective. The collective would then mediate and appropriately disperse the money to individual news outlets.¹⁰² Interestingly, many authorities, such as Professor Michael Geist, have pointed out that this single payer fund model was really what Google was after since the inception of Bill C-18.¹⁰³ In its early days, the government had reportedly told the Heritage committee that they estimate a total of \$150 million in revenue, with Google being responsible for two-thirds of this amount, and Meta taking over

⁹⁷ Rachel Aiello, "No concessions' St-Onge says in \$100M a year news deal with Google", *CTV News* (29 November 2023), online: <<https://www.ctvnews.ca/politics/no-concessions-st-onge-says-in-100m-a-year-news-deal-with-google-1.6665565>>.

⁹⁸ *Ibid.*

⁹⁹ Daniel Thibeault, "Federal government reaches deal with Google on Online News Act", *CBC News* (29 November 2023), online: <<https://www.cbc.ca/news/politics/google-online-news-act-1.7043330>>.

¹⁰⁰ *Ibid.*

¹⁰¹ Aiello, *supra*.

¹⁰² Thibeault *supra*.

¹⁰³ Michael Geist, "Salvaging Bill C-18: Government Upends Legislation To Bring Google Onside the Online News Act", (29 November 2023), online (blog): <<https://www.michaelgeist.ca/2023/11/salvaging-bill-c-18-government-upends-legislation-to-bring-google-onside-the-online-news-act/>>.

the final third.¹⁰⁴ Google had indicated that this amount (\$100 million) is acceptable, but that they preferred a single fund distribution method.¹⁰⁵ Geist notes that because this is exactly what was obtained through this recent deal, it suggests that the “months of uncertainty, reduced investment, and risks to Canadian news outlets could have been avoided”.¹⁰⁶

While this deal has been lauded a success by both the Government of Canada and Google, it does not exclude the possibility of further negotiation.¹⁰⁷ According to St-Onge, if other countries introduce their own legislation that results in a more favourable deal being reached with Google, the deal can be reopened for further negotiations.¹⁰⁸ This is, perhaps, one of the main unspoken concerns that may lead Meta to refrain from entering into a deal in Canada. Currently, Meta is still blocking Canadian news content from being available on their social media sites and have reiterated that they will not lift this ban until they are fully exempt from the *Online News Act*.¹⁰⁹ From the tech giants’ perspective, agreeing to pay in one country may leave them vulnerable to setting a payout precedent for their company, causing them to be even more weary of entering into deals with governments. According to Meta, however, the reason for withholding from striking a deal is because, “unlike search engines, we do not proactively pull news from the internet to place in our users’ feeds and we have long been clear that the only way we can reasonably comply with the *Online News Act* is by ending news availability for people in Canada”.¹¹⁰ While this may be true, there is speculation that if a single collective payment method had been proposed, Meta may not have pulled Canadian news from their sites in the first place. As Professor Geist said, “[the] government and industry ignored the obvious risks of its legislative approach and was ultimately left desperate for a deal to salvage something for a sector that is enormously important to a free and open democracy”.¹¹¹ While the opportunity to be more strategic about its demands and stipulations have already come and gone, it is unfortunate to think that the numerous small news outlets disproportionately suffering from the Meta news ban may not have had to endure this fate had the Bill been framed differently, or perhaps, had the *Act* not been created at all. As of April 1, 2024, Meta has yet to create any deals with the Government of Canada or through the *Act*’s bargaining process.

Competition Act Exemptions

The *Online News Act* provides exemptions regarding two key provisions in the *Competition Act*¹¹²: s.45, which relates to agreements between competitors, and 90.1, which relates to agreements that prevent or lessen competition substantially. Section 45(1) provides that

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Thibeault, *supra*.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Geist, *supra*.

¹¹² *Competition Act* (R.S.C., 1985, c. C-34).

it is a criminal offence for competitors to: (a) fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product. Section 45(1) is a *per se offence*, meaning it does not require an adverse effect on competition to be proven.¹¹³ Section 90.1 allows the Tribunal, in the case the Tribunal finds that agreement prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, to make an order prohibiting any person from *Acting* under the agreement or requiring any person to take action. For s.90.1, the Commissioner of Competition must prove that the agreement prevents or lessens competition substantially or is likely to prevent or lessen it substantially.¹¹⁴

Section 47 of the *Online News Act* provides that s.45 and 90.1 of the *Competition Act* do not apply with respect to ‘covered agreements.’ ‘Covered agreements’ are (a) an agreement entered into as a result of bargaining or mediation sessions outlined in s.19(1) or (b) an arbitration panel’s decision that is deemed to be an agreement under s.42.¹¹⁵ Section 48 of the *Online News Act* expands the s.45 and s.90.1 exemptions to other agreements, more specifically those entered into by an operator and a group of news publishers outside the statutory bargaining process.

Criticisms

Ariel Katz has criticized the *Online News Act* for providing overbroad competition law exemptions.¹¹⁶ He notes that the exemption from s.45 of the *Competition Act* applies to the entire section, not only to ss.45(1)(a), which prohibits price-fixing.¹¹⁷ Including an exemption in relation to price-fixing makes sense, as engaging in the collective bargaining outlined by the *Online News Act* may violate ss.45(1)(a), and an exemption may be necessary to fulfill the purpose of the *Act*.¹¹⁸ However, Katz cautions against providing exemptions for ss.45(1)(b) and ss.45(1)(c). Katz argues these exemptions allow anti-competitive agreements that would typically be illegal to proliferate under the *Act*, and such exemptions have nothing to do with “the mischief [the *Act*] is supposed to remedy”.¹¹⁹

Katz also questions the necessity of the blanket exemption of s.90.1, given that s.90.1 includes subsections which could allow the Tribunal to deny an order in circumstances where granting it would be contrary to the purposes of the *Online News Act*.¹²⁰ For example, the efficiency exception in ss.90.1(4) provides that the Tribunal should not make an order under s.90.1 if the agreement has brought or is likely to bring gains in efficiency that will be greater

¹¹³ Katz at 361.

¹¹⁴ *Ibid* at 362.

¹¹⁵ *Supra* note 1 at 2(1).

¹¹⁶ Katz, at 360.

¹¹⁷ *Ibid* at 361.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

than and offset the effects of any prevention or lessening of competition.¹²¹ Subsection 90.1(4) would likely catch the collective bargaining contemplated by the *Act*, given that it may result in efficiency gains such as greater and better news output.¹²² Kat argues at the very least, s.90.1 could help ensure that collective bargaining is only pursued when its benefits in terms of efficiency gains clearly outweigh any adverse effects to competition.¹²³ Additionally, ss.90.1(2) outlines a list of factors the Tribunal may take into account when determining whether to make a finding referred to in ss.90.1(1). Among this list is "any other factor that is relevant to competition in the market affected or potentially affected by the agreement or arrangement".¹²⁴ Parliament's deliberate decision to allow collective bargaining to address the imbalance between dominant tech companies and news publishers would likely be caught by this provision.¹²⁵ Thus, the blanket exemption to s.90.1 appears overbroad and unnecessary when considering ss.90.1(4) and 90.1(2) already address the collective bargaining contemplated by the *Act*.

Finally, Katz criticizes the legislation for introducing additional barriers for the Competition Bureau when investigating non-exempt anti-competitive behaviour.¹²⁶ Section 53 of the *Online News Act* requires an operator or news business to provide the CRTC with any information it requires for the purpose of exercising its powers or performing its duties and functions. The *Act* allows anyone who submits information to the CRTC to designate it as confidential.¹²⁷ The CRTC may disclose the confidential information to the Commissioner of Competition if the information is relevant to competition issues being considered.¹²⁸ The issue arises by virtue of the fact that the confidential information can only be used to support the Commissioner in the *Online News Act* proceedings for which the information was provided.¹²⁹ This means that if the information exhibits anti-competitive behaviour that falls outside the scope of the bargaining process, the Commissioner of Competition is not allowed to initiate an investigation into these behaviours.¹³⁰ These provisions may allow participants to exploit the collective bargaining process and use it to conceal anti-competitive behaviour.¹³¹

What can Canada learn from Australia?

Preceding Canada's *Online News Act* ("Act"), Australia's *News Media and Digital Platforms Bargaining Code* ("Code") was enacted on February 25, 2021 as an amendment to the

¹²¹ *Ibid* at 362.

¹²² *Ibid*.

¹²³ *Ibid*.

¹²⁴ *Supra* note 45, s. 90.1(2)(h)

¹²⁵ *Supra* note 54.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

¹²⁹ *Ibid* at 363.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

*Competition and Consumer Act 2010*¹³² According to the Australian Competition & Consumer Commission (“ACCC”), the *Code* aims “to establish a mandatory code under which registered Australian news business corporations and designated digital platform corporations must comply with mandatory requirements including the provision of information and non-differentiation, and may bargain about the amount to be paid for making available certain news content on designated platform services.”¹³³ Additionally, Australian officials described the *Code* as “[ensuring] that news media businesses are fairly remunerated for the content they generate, helping to sustain public interest journalism in Australia.”¹³⁴ Both pieces of legislation create mandatory bargaining practices to compensate Canadian and Australian journalistic entities, respectively, for appearing on Google and Meta platforms, Facebook and Instagram. Despite the similarities of their frameworks, the *Online News Act* and *News Media Bargaining Code* have led to vastly different outcomes for their countries’ news industries.

COMPARING AND CONTRASTING THE *ONLINE NEWS ACT*’S AND *NEWS MEDIA BARGAINING CODE*’S FRAMEWORKS

i. Requirements for Bargaining

The *Act* applies specifically to digital news intermediaries and news businesses, if a power imbalance exists between the two.¹³⁵ This is based on an assessment that includes three factors: the size of the intermediary, if the intermediary gives the operator a strategic advantage over news businesses, and if the intermediary has a prominent market position.¹³⁶ Similarly the *Code* applies to designated digital platform corporations if the Minister determines that there is a significant power imbalance between them and the Australian news businesses.¹³⁷ Under the Australian Competition and Consumer Commission, news businesses with under ten million Australian dollars (roughly nine million Canadian dollars) in revenue may bargain collectively.¹³⁸ Additionally, both the *Act* and the *Code* provide an exemption in which platforms can skirt the bargaining framework (cite the exemption here rather than list)

ii. The Negotiation Period

According to the *Act*, the bargaining process between the applicable parties consists of a 90 day negotiation period initiated by the news business.¹³⁹ The first step of the *Code*’s bargaining process is notification, in which representatives for news businesses can notify digital platform corporations about their intention to bargain over issues related to the news business’

¹³² *Online News Act*, SC 2023, c. 23 s. 4.

¹³³ Austl, Commonwealth, *Department of Parliamentary Services*, Bills Digest No. 48 (2021)

¹³⁴ Treasury, joint media release, “Review of the News Media and Digital Platforms Mandatory Bargaining Code” (28 February 2022).

¹³⁵ *Online News Act*, SC 2023, c. 23 s. 6.

¹³⁶ *Ibid.*

¹³⁷ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52E.(3)(a)

¹³⁸ *Online News Act*, SC 2023, c. 23 s. 32; Austl, Australian Competition & Consumer Commission, *Collective Bargaining Class Exemption* (2021).

¹³⁹ *Online News Act*, SC 2023, c. 23 s. 19(1)(a).

content being made available on the platform.¹⁴⁰ Both parties must agree as to what issues they will be bargaining over, and their negotiation period lasts for three months.¹⁴¹ In the *Act*, the CRTC may extend the negotiation period, or any following periods, at the request of both parties.¹⁴² The *Code* does not refer to any extension mechanism for their negotiation period.

iii. The Mediation Period

Under the *Act*, if the parties cannot come to an agreement in the negotiation period, it is followed by a 120-day mediation period.¹⁴³ The *Code* allows parties a two-month mediation period that can be extended by two months, for a period of four months in total, if the negotiation window passes or if both parties decide to enter mediation after notification.¹⁴⁴ Additionally, the *Code* specifies that the mediator is appointed by the Australian Communications and Media Authority (“ACMA”).¹⁴⁵

iv. The Arbitration Period

Under the *Act*, if the parties do not reach an agreement after mediation, a 45-day arbitration period will occur so long as one party wants it.¹⁴⁶ The arbitration panel would consist of three arbitrators selected by the parties or selected by the CRTC if the parties do not select the arbitrators within a reasonable time.¹⁴⁷ The CRTC would then make their decision by selecting a final offer made by one of the parties accounting for:

- (a) the value added, monetary and otherwise, to the news content in question by each party, as assessed in terms of their investments, expenditures and other *Actions* in relation to that content;
- (b) the benefits, monetary and otherwise, that each party receives from the content being made available by the digital news intermediary in question; and
- (c) the bargaining power imbalance between the news business and the operator of the digital news intermediary in question.¹⁴⁸

Arbitrators must also dismiss any offers that seem to allow a party to exercise undue influence over amount of compensation, result in serious detriment to the provision of news content in Canada, or is inconsistent with enhancing fairness in the Canadian news marketplace

¹⁴⁰ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52E.

¹⁴¹ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZG-ZIA.

¹⁴² *Online News Act*, SC 2023, c. 23 s. 19(1.1).

¹⁴³ *Online News Act*, SC 2023, c. 23 s. 19(1)(b).

¹⁴⁴ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZIA-ZIC.

¹⁴⁵ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZIA(4).

¹⁴⁶ *Online News Act*, SC 2023, c. 23 s. 19(1)(c).

¹⁴⁷ *Online News Act*, SC 2023, c. 23 s. 34(1).

¹⁴⁸ *Online News Act*, SC 2023, c. 23 s. 38.

and contributing to its sustainability. Once the panel selects the final offer, it must be accepted by the offeree.¹⁴⁹

In the *Code*, parties either enter arbitration if there is no agreed upon offer at mediation or if they decide to after notification.¹⁵⁰ The arbitration panel would consist of one Chair and two others or just one Chair if both parties agree.¹⁵¹ If the parties cannot agree on arbitrator appointments, the ACMA appoints the arbitrators from their roster.¹⁵² The arbitration would be able to be terminated if the parties agree that it should be, the panel does not make a determination yet and if no information was given by a party to comply with a request from the other party before the agreement.¹⁵³

The arbitration process reaches a decision after both parties submit a final offer.¹⁵⁴ The arbitrators accept one of the final offers unless the offers are considered to be outside of the public interest.¹⁵⁵ Arbitration decisions must consider:

- (1)(a) the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service;
- (b) the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content;
- (c) the reasonable cost to the registered news business of producing covered news content;
- (ca) the reasonable cost to the designated digital platform service of making available covered news content in Australia;
- (d) whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.¹⁵⁶

Subsection (2) also provides that the panel must consider the power imbalance between Australian news business and designated digital platform corporations.¹⁵⁷

¹⁴⁹ *Online News Act*, SC 2023, c. 23 s. 39(1).

¹⁵⁰ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZL(2).

¹⁵¹ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZM(3).

¹⁵² *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZM.

¹⁵³ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZW(1).

¹⁵⁴ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZX(7).

¹⁵⁵ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZX(7).

¹⁵⁶ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZZ(1).

¹⁵⁷ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Commonwealth), 2021, s. 52ZZ(2).

As a comparison, both the *Act* and the *Code* focus on a number of shared principles. They both identify the value that the news content can bring to the technology platform, as well as the shared value in the platform allowing that content to be displayed. They both also set out to address the inherent power imbalance between news organization and tech platform, while working to enhance the fairness between the parties.

OUTCOMES OF THE ONLINE NEWS ACT

While the full effects of the *Act* are still to be determined given the recency of its implementation, there have been some preliminary outcomes. Prior to its enactment, the *Act* was supported by trade association News Media Canada, who believed it would enhance fairness in the news media industry.¹⁵⁸

However, the *Act* initially led Google and Meta to announce that they would remove links to Canadian news from their products out of protest.¹⁵⁹ Despite this, Google then paid 100 million dollars, less than two third of the estimated annual revenue Canadian news businesses would receive from Google, to a single fund, instead of bargaining with individual news businesses.¹⁶⁰ Meanwhile, Meta continued to ban news from its platform in Canada. Jobs in the Canadian news industry have continued to decline, with the Canadian Broadcasting Corporation and Bell Media, the owners of Canada’s two biggest news websites, respectively, facing mass layoffs.¹⁶¹

The *Code* was supported by private news giants including the *Daily Mail* and News Corp, public broadcaster, the Australian Broadcasting Corporation, hybrid-funded broadcaster, the Special Broadcasting Service (“SBS”), and the Australian Press Council.¹⁶² Meanwhile, Google commented that the company would pull out of the Australian market if enacted, and Meta said the legislation would lead to Facebook banning the sharing of news in Australia on Facebook and Instagram.¹⁶³ Additionally, Eric Beecher, chair of both Private Media and Solstice Media, a smaller publisher, expressed concern that the code favoured dominant media companies.¹⁶⁴

¹⁵⁸ Nadine Yousif, “Meta’s news ban in Canada remains as Online News Act goes into effect”, *BBC News* (19 December 2023).

¹⁵⁹ Tracey Lindeman, “‘Disaster’: warning for democracy as experts condemn Meta over Canada news ban”, *The Guardian* (4 August 2023).

¹⁶⁰ Daniel Thibeault, David Cochrane, Darren Major, “Federal government reaches deal with Google on Online News Act”, *CBC News* (29 November 2023).

¹⁶¹ Reuters Institute for the Study of Journalism, *Digital News Report 2022* (Oxford: Reuters Institute for the Study of Journalism, 2022); Catharine Tunney, “CBC/Radio-Canada to cut 10 per cent of workforce, end some programming as it faces \$125M budget shortfall”, *CBC News* (4 December 2023); Sammy Hudes, “Bell to cut 4.8K jobs, sell 45 radio stations in major shake-up”, *Global News* (8 February 2023).

¹⁶² William Turvill, “Australian documents reveal how News Corp, Mail and other publishers plan to battle tech giants on global scale”, *Press Gazette* (30 September, 2020); Austl, Commonwealth, *Department of Parliamentary Services, Bills Digest No. 48* (2021).

¹⁶³ Kurt Schlosser, “As Google fights with Australia, Microsoft promotes Bing and says it wouldn’t threaten to leave country”, *GeekWire* (3 February, 2021).

¹⁶⁴ Austl, Commonwealth, *Department of Parliamentary Services, Bills Digest No. 48* (2021).

Upon enactment, Google reached deals with News Corp, Nine Entertainment and Seven West Media, which own three of the four most popular news sites in Australia.¹⁶⁵

There have been more than 30 agreements under the *Code*.¹⁶⁶ One agreement was bargained collectively by 84 companies, while another was bargained by 24.¹⁶⁷ However, platforms such as SBS and non-profit *The Conversation* have not been able to secure deals with Facebook.¹⁶⁸ Through the deals, 200 million Australian dollars (roughly 177 million Canadian dollars) have entered the Australian news industry.¹⁶⁹ The *Code* has been criticized for giving Google and Meta more influence on Australian news media content, with some deals putting more emphasis on specific news content production for its platform as opposed to supporting journalism.¹⁷⁰

Despite the initial success the *Code* has had in supporting Australian news, in late February, Meta announced that it would not renew its deals with Australian outlets, though it has no plans to ban news from its platform as they previously did.¹⁷¹ This is an ongoing issue that may see the Australian government use the *Code* to force Meta into the bargaining process.

CONCLUSION

Given that the *Code* has been significantly more successful in its initial implementation than the *Act*, Australia may have benefited from being the legislative first mover. They were able to secure significantly more funding through their legislation, and Google and Meta cooperated with their bargaining framework, while Google did not want to be forced into a negotiation framework under the *Act*.¹⁷² Having already participated in negotiations under the *Code*, it is possible that Google did not want to expend additional resources bargaining with individual businesses. Meta's unwillingness to negotiate with Canadian news outlets and announcement that they will not be renewing its Australian deals possibly indicates disappointing returns from their Australian deals.

¹⁶⁵ Lauren Feiner, "Google will pay News Corp for the right to showcase its news articles", *CNBC* (17 February 2021); Amanda Meade, "Nine agrees to join Google News Showcase in Australia for reported \$30m a year", *The Guardian* (17 February 2021); Byron Kaye, "Australia's Seven West Media strikes deal with Google for news", *Reuters* (16 February 2021); Reuters Institute for the Study of Journalism, *Digital News Report 2022* (Oxford: Reuters Institute for the Study of Journalism, 2022).

¹⁶⁶ Austl, Commonwealth, The Australian Government the Treasury, *News Media and Digital Platforms Mandatory Bargaining Code* (Canberra: Australian Government Publishing Service, 2022).

¹⁶⁷ Anya Schiffrin, "Australia's news media bargaining code pries \$140 million from Google and Facebook", *Poynter* (16 August 2022).

¹⁶⁸ Diana Bossio, Andrea Carson, James Meese, "A different playbook for the same outcome? Examining Google's and Meta's strategic responses to Australia's News Media Bargaining Code" (2024) *News Media & Society*.

¹⁶⁹ Anya Schiffrin, "Australia's news media bargaining code pries \$140 million from Google and Facebook", *Poynter* (16 August 2022).

¹⁷⁰ Diana Bossio, Andrea Carson, James Meese, "A different playbook for the same outcome? Examining Google's and Meta's strategic responses to Australia's News Media Bargaining Code" (2024) *News Media & Society*.

¹⁷¹ Georgia Roberts & Matthew Doran, "Meta won't renew commercial deals with Australian news media", *ABC News* (1 March 2024).

¹⁷² Daniel Thibeault, David Cochrane, Darren Major, "Federal government reaches deal with Google on Online News Act", *CBC News* (29 November 2023).

Despite Google failing to negotiate within the initial *Online News Act* framework, Google's payment to a single fund could prevent issues that occurred under the *Code*, such as platform influence on individual outlets. On the other hand, Meta's ban on Canadian news has taken away a major avenue of Canadian news consumption, which has hurt regional outlets.¹⁷³

Arguably, both the *Act* and the *Code* misunderstand the relationship between platforms like Google and Meta and news businesses. Google and Meta may gain audience views and retention from featuring news. However, in an increasingly digital era, Meta and Google featuring news on their platforms may lead to news outlets receiving more views.

POLICY RECOMMENDATIONS

Based on the foregoing research and findings, we recommend that the following policies be adopted to promote a more diverse and inclusive Canadian media landscape in the digital era:

1. Repeal the *Online News Act*

In light of significant concerns raised regarding the *Online News Act*, we first recommend that the *Act* be repealed. The *Act* possesses fundamental flaws that prevent it from achieving its purpose of enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability. The *Act*, while aiming to ensure fair compensation for news outlets from digital intermediaries, disproportionately favours large media organizations while disadvantaging smaller, entrepreneurial news outlets. It is difficult to see how the *Act* can enhance the diversity of the news landscape when smaller and independent news outlets are often excluded from the collective bargaining process and compensation. Further, the *Act* concentrates significant regulatory authority in the CRTC, without sufficient oversight mechanisms to ensure that the CRTC's powers are exercised fairly. The unprecedented power and discretion granted to the CRTC raises serious questions regarding fairness and transparency in the news marketplace. Finally, the *Act* undermines fundamental principles in copyright and competition law. The *Act* is contrary to the principle of fair dealing within Canadian copyright law and may disrupt the delicate balance the *Copyright Act* aims to achieve between the rights of users and those of creators. Further, the exemptions from key competition law provisions may allow anti-competitive practices to proliferate, which may have the effect of hindering smaller, entrepreneurial news businesses and decreasing news diversity. Lastly, the confidentiality provisions of the *Act* limit the Competition Bureau's ability to investigate such anti-competitive practices. Repealing the *Act* is vital in upholding the integrity of copyright and competition law principles and fostering a diverse and fair news marketplace.

2. Increase Regulatory Oversight and Coordination

¹⁷³ Jay Heisler, "Facebook News Ban in Canada Leaves Small Outlets Struggling", *Voice of America*(15 February 2024).

The Canadian news media landscape has suffered from a lack of diversity and competition for too long, and Canadians are interested in transparency about their sources of information. This can be helped by the Canadian Digital Regulators Forum (CDRF). If the CDRF conduct a yearly report to be published about ownership information and media concentration / use, including any recent M&A activity and Tribunal decisions, Canadians will be better informed about the severity of the problem. This problem has been allowed to spiral out of control because of a lack of cooperation between the CTRC and the Competition Tribunal. Each defers to the other to consider the merits of editorial diversity and other non-economic arguments against mergers. The CDRF must encourage these arguments to be considered equally to their economic and financial counterparts by the Competition Tribunal, to ensure that the competitive landscape of our news industry is restored.

3. Pilot New Business Models and Economic Incentives in the News Media Industry

In place of the *Online News Act*, another policy recommendation is for the government to support, create, and offer digital news subscription packages to Canadian citizens. Modeled after cable TV packages, the subscription will allow Canadians to subscribe to content from a bundle of Canadian news outlets. These packages can take on diverse forms and be organized according to various topics, thereby increasing the likelihood of engagement and success. For instance, the package may be curated to target sports fans, and include a variety of news outlets (or, specific content from news outlets) that report on sports. While the *Online News Act* originally stipulated that to be eligible for compensation, the news outlet must cover general news and not simply one specific area, this shift reflected in the subscription package system can address the concerns relating to this stipulation and increase the number of news businesses that may partake in, and benefit from, this system. The package, alternatively, can include a bundle of local news sites that may differ in specialty and content. Recently, under the consequence of the *Act* and Meta banning news content on their platforms, a major and repeated area of concern was that of accessibility to news regarding wildfires.¹⁷⁴ With the subscription package replacing the *Act*, Canadians in wildfire-prone localities can access crucial and relevant news effectively, whilst allowing the diverse local news scene to flourish and thrive. Overall, this package service aims to amplify and encourage diversity and diverse consumption of media in Canada, thereby directly addressing one of the objectives of the *Act* in a more inclusive manner.

While having these package options open may in itself provide engagement by Canadians, the efficacy of this policy recommendation may further be enhanced by including a tax-break system, thus making the packages inexpensive and desirable. With this type of subsidy, the idea is to further incentivize and encourage Canadians to purchase these affordable and convenient curated news subscriptions, and in time, boost diversity and success in Canada's

¹⁷⁴ Ali Harb, “‘Stupid and dangerous’: Meta’s news ban fuels anger amid Canada wildfires”, *Al Jazeera* (29 August 2023), online: <<https://www.aljazeera.com/news/2023/8/29/stupid-and-dangerous-metas-news-ban-fuels-anger-amid-canada-wildfires>>.

digital news landscape. This again, may be a way to address some of the concerns that the Online News *Act* endeavoured to alleviate.

4. Implement Economic-based Incentives alongside the *Act*

Alternatively, if the *Act* were to remain in place, we recommend that different economic-based incentives be implemented. For instance, the Canadian government could introduce tax credits for large corporations advertising Canadian media. These could work together with a Journalist Fund which taxes tech giants to fund news companies based on how much they historically made from digital platforms. Other incentives could include a News Outlet Fund, which would support and encourage investments in key sectors of advancing the promotion of Canadian news.



Future of Law Lab



UNIVERSITY OF TORONTO
FACULTY OF LAW

University of Toronto Faculty of Law