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Legislative Summary

BILL C-18: AN ACT RESPECTING ONLINE COMMUNICATIONS PLATFORMS THAT MAKE NEWS CONTENT AVAILABLE TO PERSONS IN CANADA

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Legislative Summary of Bill C-18
(Preliminary version)

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LEGISLATIVE SUMMARY OF BILL C-18: AN ACT RESPECTING ONLINE COMMUNICATIONS PLATFORMS THAT MAKE NEWS CONTENT AVAILABLE TO PERSONS IN CANADA

1 BACKGROUND

On 5 April 2022, the Honourable Pablo Rodriguez, Minister of Canadian Heritage, introduced in the House of Commons Bill C-18, An Act respecting online communications platforms that make news content available to persons in Canada¹ (short title: Online News Act). On 31 May 2022, at second reading, the bill was referred to the House of Commons Standing Committee on Canadian Heritage.

The purpose of Bill C-18 is to rebalance the power dynamics in the digital news marketplace in order to ensure fair compensation for Canadian media outlets and journalists. It creates a new legislative and regulatory framework to enable digital businesses to negotiate agreements with Canadian media to authorize them to disseminate Canadian media content on their platforms. The bill sets up a process that enables smaller media outlets to bargain collectively.

The bill expands the mandate and powers of the Canadian Radio-television and Telecommunications Commission (CRTC). The CRTC is responsible for developing the code of conduct governing bargaining between digital news intermediaries and news businesses. The CRTC must also determine whether agreements made outside the bargaining process meet the exemption criteria.

According to the Charter Statement on Bill C-18 prepared by the Department of Justice, Bill C-18 is consistent with the *Canadian Charter of Rights and Freedoms*.² The Charter Statement assesses the bill's potential impacts on freedom of expression (section 2(b)), searches or seizures (section 8) and fair trial rights (section 11).

1.1 CURRENT STATUS OF MEDIA IN CANADA

Bill C-18 arrives at a time when Canadian media outlets have experienced years of major declines in revenue. The loss of trust in journalism and the rise of disinformation are also major challenges for Canadian media.

The report entitled *The Shattered Mirror: News, Democracy and Trust in the Digital Age*, published by the Public Policy Forum, stated that the Communications Workers of America reported having lost one-third of their editorial members since 2010.³ The Digital News Report of the Reuters Institute for the Study of Journalism, which studies issues such as the Canadian public's trust in the media, revealed that this trust has fallen from 58% to 42% over the past four years.⁴

During the 42nd Parliament, the House of Commons Standing Committee on Canadian Heritage published *Disruption: Change and Churning in Canada's Media Landscape* following its study on the media and local communities. The report showed the serious advertising revenue declines suffered by community and daily newspapers. Conversely, the report indicated that online advertising revenues grew exponentially over the same period. The Committee therefore recommended that the government “level the playing field among industries publishing Canadian news, on all platforms.”⁵

2 DESCRIPTION AND ANALYSIS

Bill C-18 has 93 clauses, the most important of which are reviewed in the following sections.

2.1 INTERPRETATION (CLAUSES 2 AND 3)

Clause 2 of the bill defines terms that were not previously defined in Canadian legislation. The new definitions include the following:

- 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. (*intermédiaire de nouvelles numériques*);
- news business means an individual or entity that operates a news outlet. (*entreprise de nouvelles*); and
- operator means an individual or entity that, through any means, operates a digital news intermediary. (*exploitant*) (clause 2(1)).

Clause 2 also stipulates that news content is “made available” if two conditions are met: that it, or any portion of it, is reproduced, and that access to it is facilitated by “any means, including an index, aggregation or ranking of news content.”

Clause 3 states that the bill is designed to be consistent with freedom of expression (clause 3(1)), to support journalistic independence (clause 3(2)) and to prevent interference in news content by digital news intermediaries (clause 3(3)).

2.2 DESIGNATION OF MINISTER
(CLAUSE 5)

Clause 5 enables the government to designate by order the minister responsible for implementing the Act. In the absence of such an order, the Minister of Canadian Heritage is the designated minister, pursuant to clause 2(1).

2.3 APPLICATION
(CLAUSES 6 TO 10)

Clause 6 of the bill sets out the factors used to determine whether there is a “significant ... imbalance” between the operator of the digital news intermediary and news businesses. These factors are the size of the operator or intermediary in question, whether the operator has a strategic advantage over the news business and whether the intermediary occupies a prominent market position.

Clause 7 creates a duty for the operator to notify the CRTC if the Act applies in respect of its digital news intermediary (clause 7(1)). The operator must also provide any information the CRTC requires that shows the Act does not apply to its operator, as the case may be (clause 7(2)).

Clause 8 requires the CRTC to maintain a list of digital news intermediaries in respect of which the Online News Act applies.

Clauses 9 and 10 state that the Online News Act does not apply to digital news intermediaries in respect of their broadcasting (clause 9) or to telecommunications service providers (clause 10).

2.4 EXEMPTIONS
(CLAUSES 11 TO 17)

Clause 11(1) of the bill provides that the CRTC may exempt, by order, operators of digital news intermediaries if they have entered into agreements with news businesses. These agreements must satisfy certain conditions:

- they provide for fair compensation to eligible news businesses;
- they ensure that some of this compensation is used to support the production of local, regional and national news content;
- they do not undermine freedom of expression and journalistic independence;
- they contribute to the sustainability of the Canadian news marketplace and encourage innovative business models in that marketplace; and
- they involve a range of news outlets that reflect the diversity of the Canadian news marketplace, including diversity with respect to language, racialized groups, Indigenous communities and local news.

The CRTC may make an interim order respecting a digital news intermediary (clause 12(1)). Clauses 14(2) and 14(3) set out the conditions under which the CRTC may repeal exemption orders and interim orders.

2.5 BARGAINING PROCESS
(CLAUSES 18 TO 45)

The bargaining process for an agreement between an operator of a digital news intermediary and eligible news businesses involves certain steps. The parties to the bargaining process are required to participate in good faith (clause 22). If the parties do not reach an agreement, any one of them may initiate final offer arbitration (clause 19(1)(c)).

2.5.1 Copyright
(Clauses 23 to 26)

Clause 23 of the bill provides that news businesses may bargain only in relation to news content for which they own the copyright or are authorized to bargain.

Clause 25 stipulates that the bargaining process may not be used if an operator has previously made payments for the news content in accordance with the relevant tariff approved by the Copyright Board or any other licence or agreement reached outside the process.

Where an agreement between the parties exists, an operator is not responsible for copyright infringement respecting content made available as provided by that agreement (clause 26(1)). However, operators are not absolved of their responsibilities for copyright infringement outside the scope of such an agreement (clause 26(2)).

2.5.2 Eligibility
(Clauses 27 to 31)

The CRTC designates the “qualified Canadian journalism organizations” that are enabled to enter into agreements with operators of digital news intermediaries (clause 27(1)). To be designated as eligible, news businesses must meet the definition of “qualified Canadian journalism organization” set out in section 248(1) of the *Income Tax Act* (clause 27(1)(a)). In addition, they must employ at least two journalists and operate in Canada (clause 27(1)(b)). The CRTC must maintain a list of eligible news businesses and publish it on its website (clause 29(1)).

2.5.3 Agreements
(Clause 32)

A group of eligible news businesses that reaches an agreement with an operator of a digital news intermediaries must file a copy of the agreement with the CRTC. Eligible news businesses can join this group after the agreement is reached (clause 32(2)).

2.5.4 Final Offer Arbitration
(Clauses 33 to 44)

Final offer arbitration encourages the parties to reach an agreement. The parties choose arbitrators from a roster maintained by the CRTC (clause 34(1)). The CRTC takes the preferences of the parties into account in appointing an arbitrator, but it reserves the right to reject an arbitrator if they have a conflict of interest (clauses 34(2) and 35(1)).

In deciding to select the final offer of one of the parties, the arbitrators take the following factors into account:

- 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 (clause 38(a)); and
- the benefits, monetary and otherwise, that each party receives from the content being made available by the digital news intermediary in question (clause 38(b)).

The arbitrators can dismiss a final offer if it is not in the public interest or is inconsistent with the purpose of enhancing fairness in the Canadian digital news marketplace (clause 39(1)).

2.6 CIVIL REMEDIES
(CLAUSES 45 AND 46)

An eligible news business or group of eligible news businesses can collect payments due under an agreement and, if they are not made, recover them in court. If a provision of an agreement is not complied with, any party may apply to a court for an order directing compliance with it.

2.7 *COMPETITION ACT*
(CLAUSES 47 AND 48)

Section 45 of the *Competition Act* prohibits agreements between competitors to fix prices, allocate markets or control the supply of a product. Section 90.1 of the *Competition Act* prohibits agreements that are likely to prevent or lessen competition.

Clause 47 of the bill provides that these two provisions of the *Competition Act* do not apply to the making of payments or the exchange of information carried out under an agreement between an operator of digital news intermediaries and a group of eligible news businesses (clause 47(a)). Nor do these two provisions apply to the bargaining, mediation or arbitration sessions involving the parties.

2.8 CODE OF CONDUCT
(CLAUSES 49 AND 50)

Clause 49 of the bill imposes on the CRTC a duty to establish, by regulation, a code of conduct to support fairness and transparency in news content bargaining (clauses 49(1) and 49(2)). This code of conduct must include provisions requiring operators of digital news intermediaries and eligible news businesses to bargain in good faith (clause 49(3)).

The CRTC may prohibit the use of certain provisions in the agreements the parties reach (clause 49(4)). Furthermore, if the signatories fail to comply with the code of conduct, the CRTC can order them to comply (clause 50(1)).

2.9 DISCRIMINATION, PREFERENCE AND DISADVANTAGE
(CLAUSES 51 AND 52)

Clause 51 prohibits an operator, as regards news content produced primarily for the Canadian news marketplace by a news outlet operated by an eligible news business and made available by a digital news intermediary, from unjustly discriminating against that business, giving the business undue preference or subjecting it to an undue disadvantage. If the above occurs, an eligible news business or group of eligible news businesses may make a complaint to the CRTC (clause 52).

2.10 PROVISION OF INFORMATION
(CLAUSES 53 TO 56)

Operators of digital news intermediaries and eligible news businesses must provide the CRTC with any information it requires (clause 53). The CRTC may provide this information to the minister responsible or the Chief Statistician of Canada (clause 54). An individual or entity that submits information to the CRTC can designate it as confidential (clause 55).

Furthermore, clause 55(4) authorizes the CRTC to disclose or require the disclosure of confidential information in the course of proceedings before it if it determines that this disclosure is in the public interest. The CRTC can also disclose or require the disclosure of this information to the Commissioner of Competition at the latter's request.

2.11 ADMINISTRATION AND ENFORCEMENT
(CLAUSES 57 TO 78)

2.11.1 Production Orders
(Clauses 57 and 58)

The CRTC may by order require an operator of a digital news intermediary or a news business to provide it with any document it has reasonable grounds to believe contains information relevant to administration and enforcement (clause 58(1)). The rules set out in clause 55 of the bill concerning confidential information apply.

2.11.2 News Businesses
(Clause 59)

Clause 59(1) provides that the CRTC may impose conditions on eligible news businesses that contravene a provision of the Act or the regulations or an order made under the Act. It can also suspend or revoke the order designating a news business as eligible.

2.11.3 Administrative Monetary Penalties
(Clauses 60 to 76)

Clauses 60 to 76 of the bill establish an administrative monetary penalties regime.

An operator of a digital news intermediary or a director, officer, employee or agent or mandatory of an operator commits a violation if they contravene a provision of the Online News Act, its regulations or an order made under the Act (clause 60(1)).

Clause 61(1) provides for a maximum penalty of \$25,000 for a first violation by an individual (clause 61(1)(a)) and \$10 million for a first violation by an entity (clause 61(1)(b)).

Clause 61(2) sets out a list of criteria that the CRTC must take into account when determining the amount of the penalty, including the nature and scope of the violation, the history of the alleged violator and their ability to pay.

Clause 62 outlines a procedure for violations pursuant to clause 60(1). The CRTC may designate persons who are authorized to issue notices of violation (clause 63). If they believe on reasonable grounds that an individual or entity has committed a violation, these persons are authorized to issue notices of violation to the individual or entity in question (clause 64(1)).

Clauses 64(2)(b) and 64(2)(c) specify that a notice of violation must set out the act or omission giving rise to the violation, a reference to the provision that is at issue, the penalty liable to be paid and the time and manner of payment. Clause 64(2)(d) gives the alleged violator the option of paying the penalty immediately or making representations to the CRTC.

Violations can also be resolved if the alleged violator enters into an undertaking (clause 65(1)). The undertaking sets out the acts or omissions it covers and, if applicable, the requirement for the alleged violator to pay a specified amount (clause 65(2)). The undertaking ends the violation proceeding as regards the acts or omissions referred to in the undertaking (clause 65(4)).

If the individual or entity alleged to have committed a violation makes representations to the CRTC, the CRTC can decide to impose the penalty set out in the notice, a lesser penalty or no penalty (clause 66(2)).

Under clause 69(1), an individual cannot be found liable for a violation, except a contravention of clause 22 (good faith bargaining), if they show that they exercised due diligence to prevent its commission.

Proceedings in respect of a violation may be instituted only within three years after the day on which the subject matter became known to the CRTC (clause 72(1)).

2.11.4 Other Provisions (Clauses 77 and 78)

Clause 77 of the bill states that the CRTC has the powers of a superior court regarding the attendance and examination of witnesses and the production and examination of papers. In addition, clause 78 specifies that sections 126 (disobeying a statute) and 127 (disobeying order of court) of the *Criminal Code* do not apply to contraventions of a provision of the Act, its regulations or an order made under the Act.

2.12 FINANCIAL PROVISIONS (CLAUSES 79 TO 83)

Clause 79 of the bill authorizes the CRTC to make regulations respecting fees to be paid for the provision of services. The CRTC may determine how these fees are calculated and the interest payable on overdue fees. The calculation of fees is based on the revenues of the digital news intermediaries or the group of news businesses and the market in which they operate (clause 79(4)).

2.13 REGULATIONS
(CLAUSES 84 AND 85)

Clause 84 of the bill grants the Governor in Council the power to make regulations respecting certain provisions of the Online News Act, including the following:

- its application;
- the conditions applied by the CRTC when it makes exemption orders; and
- the conditions for applying the Act to the Canadian Broadcasting Corporation.

Clause 85 grants the CRTC regulation-making authority in areas such as the following:

- exemption orders for digital news intermediaries;
- the bargaining process for operators of digital news intermediaries and eligible news businesses;
- the code of conduct for bargaining regarding news content; and
- the provision of information by eligible groups of news businesses.

2.14 INDEPENDENT REVIEW
(CLAUSE 86)

Clause 86 of the bill provides that the CRTC must cause an independent auditor to prepare an annual report on the Online News Act's impact on the Canadian digital news marketplace.

2.15 REVIEW OF THE ACT
(CLAUSE 87)

A review of the Online News Act and its operation must be conducted five years after it comes into force.

2.16 RELATED AMENDMENTS
(CLAUSES 88 TO 92)

Clauses 88 to 92 of the bill set out related amendments to multiple federal Acts: the *Access to Information Act*, the *Canadian Radio-television and Telecommunications Commission Act*, the *Broadcasting Act* and the *Telecommunications Act*.

2.16.1 *Access to Information Act*

Under section 24(1) of the *Access to Information Act*, the head of a government institution must refuse to disclose any record that contains information the disclosure of which is restricted by other federal legislation. The legislative provisions prohibiting such disclosure are set out in Schedule II to the *Access to Information Act*.

Clause 88 of the bill adds a reference to sections 55(2) and 58(4) of the new Online News Act to Schedule II of the *Access to Information Act*. As a result, some information designated as confidential that is provided to the CRTC or a person designated by the CRTC cannot be disclosed under an access to information request.

2.16.2 *Canadian Radio-television and Telecommunications Commission Act*

Section 12 of the *Canadian Radio-television and Telecommunications Commission Act* sets out the objects and powers of the CRTC in relation to broadcasting and telecommunications. Clause 89 of the bill creates new section 12(1.1), which provides that the CRTC also exercise the powers and performs the duties and functions conferred on it by the Online News Act.

Section 13 of the *Canadian Radio-television and Telecommunications Commission Act* provides that the CRTC must submit a report to the Minister of Canadian Heritage at the end of each fiscal year. Clause 90 of the bill creates new section 13(1.1), which provides that this report must include the contents of the annual auditor's report prepared under section 86 of the Online News Act.

2.16.3 *Broadcasting Act*

Section 4 of the *Broadcasting Act* sets out the application of this legislation. Clause 91 of the bill creates new section 4(5), which stipulates that the *Broadcasting Act* does not apply to an operator of a digital news intermediary, to which the Online News Act applies, when the operator acts solely in that capacity.

This same section states that the definitions of “*digital news intermediary*” and “*operator*” set out in section 2(1) of the Online News Act apply in this case.

2.16.4 *Telecommunications Act*

Section 4 of the *Telecommunications Act* sets out the application of this legislation. Clause 91 of the bill creates new section 4.1, which provides that the *Telecommunications Act* does not apply to the making available of news content on or by a digital news intermediary to which the Online News Act applies.

This same clause states that the definitions of “*digital news intermediary*” and “*news content*” set out in section 2(1) of the Online News Act apply in this case. Finally, this clause provides that news content is “made available” if it is reproduced or if access to it is facilitated by any means, including an index, aggregation or ranking.

2.17 COMING INTO FORCE

Clause 93 of the bill provides that its provisions come into force on a day or days to be fixed by order of the Governor in Council.

3 COMMENTARY

3.1 THE NEWS MEDIA AND DIGITAL PLATFORMS BARGAINING CODE (AUSTRALIA)

During the discussions leading to the development of Bill C-18, the Minister of Canadian Heritage reached out to stakeholders in various sectors (media, information technology, broadcasting, etc.). Two options for dealing with the problems in the Canadian media sector were examined: “(1) a mandatory code and arbitration regime and (2) mandatory financial contributions from platforms distributed by an independent fund.”⁶ The Minister’s report states that stakeholders did not agree on which approach to take.

Yet, in introducing Bill C-18, the Minister of Canadian Heritage cited the example of an Australian law.⁷ The *News Media and Digital Platforms Mandatory Bargaining Code* is Australian legislation that was assented to on 2 March 2021.

As described by the Treasurer of the Australian government, the intent of the legislation is to “address the bargaining power imbalances” that exist between the digital platforms and the country’s news businesses.⁸ To achieve this goal, the legislation establishes a code of conduct that requires platforms that wish to use journalistic content to negotiate remuneration for this use with news organizations. If bargaining reaches an impasse, an arbitrator will have the power to determine this remuneration.

Bill C-18 is based on a model similar to the Australian law, but adds some new components. For example, Bill C-18 introduces an independent audit process (clause 86) and requires the publication of certain information on matters such as exemption orders (clause 17) and administrative monetary penalties (clause 73).

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NOTES

1. [Bill C-18, An Act respecting online communications platforms that make news content available to persons in Canada](#), 44th Parliament, 1st Session.
2. Government of Canada, [Bill C-18: An Act respecting online communications platforms that make news content available to persons in Canada](#), Charter Statement, 21 June 2022.
3. Public Policy Forum, [The Shattered Mirror: News, Democracy and Trust in the Digital Age](#), January 2017.
4. Colette Brin and Sébastien Charlton, [Canada](#), 2022 Digital News Report, Reuters Institute for the Study of Journalism, 15 June 2022.
5. House of Commons, Standing Committee on Canadian Heritage, [Disruption: Change and Churning in Canada's Media Landscape](#), Sixth report, June 2017, p. 36.
6. Canadian Heritage, [Stakeholder engagement on fair revenue sharing between digital platforms and news media](#).
7. Canadian Heritage, [Government introduces a bill to ensure fair compensation for news media and the sustainability of local news](#), News release, 5 April 2022.
8. Australia, Parliament, "[Chapter 1: Introduction](#)," *Treasury laws amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 [PROVISIONS]*.

