

## Bill C-18

### Priority Concerns & Proposed Amendments

#### **INTRODUCTION**

- **We share the Government's objective of ensuring a sustainable Canadian news ecosystem.**
  - We are already one of the biggest financial supporters of journalism in the world
  - This includes voluntary commercial agreements via Google News Showcase; several streams of funding and partnership under the Google News Initiative; and of course, the valuable traffic we drive to publishers' websites
    - In the last year alone, we sent more than 3.6 billion visits to Canadian news publishers - at no charge - helping them make money with ads and new subscriptions. This traffic drove an estimated CDN\$250m worth of value
- **Unfortunately, Bill C-18, in its current form, is putting these investments at risk**
  - Specifically, exemption and arbitration provisions, along with a significant expansion of eligible news businesses, are inconsistent with the objective of supporting news by including non-news media, and are **unworkable** for platforms
- **The path forward:** We have a simple choice. Either we can amend this legislation to the policy goals that we all support in a workable manner, or we will be left with a piece of legislation that will actively harm the Canadian news ecosystem by:
  - **Slowing existing support to Canadian news publishers while platforms seek clarity & ensure fair outcomes;**
  - **Supporting outlets that do not actually produce news;**
  - **Stifling innovation; and**
  - **Incentivizing product changes that could reduce the availability of news to Canadians**
- **We have four priority areas of concerns, and proposed amendments to address these issues:**
  - By legislating **payment for links**, C-18 will radically change the legal framework under which we link to news, in a manner that is both inconsistent with fundamental principles of the open web and international copyright norms, while providing no means to manage costs;
  - In order to incentivize voluntary agreements, C-18 contains an exemption process, but the **criteria to obtain exemption are so vague and broad** they will have the opposite effect;
  - The **scope of "eligible news businesses" under the Bill is so broad** as to potentially include outlets that do not produce news content, and requirements that outlets adhere to journalistic standards are not consistently applied;
  - The **arbitration provisions** are very heavily weighted against platforms, and will prohibit arbitrators from properly weighing platform contributions and devising compromise solutions;

#### **ISSUES & CONCERNS**

## 1) Payment for Links

- The Bill establishes “making news content available”, which expressly includes linking to news sites, as the basis for payment.
- However, arbitrarily requiring a narrow range of “digital news intermediaries” (DNIs) pay a very specific class of “eligible news businesses” (ENBs) to link to their content:
  - **violates foundational principles of the open web**, is wholly **inconsistent with international copyright norms** (including Canadian copyright law and the European Copyright Directive) and **raises serious trade issues under USMCA**, which USTR has directly flagged with Cdn Govt;
  - incentivizes platforms to pay publishers on a per link basis, which
    - benefits those with more content to link to, namely large publishers over small publishers
    - benefits certain business models, such as ad supported, over others
    - will incentivize short-form, click-bait content over long-form, public interest journalism, as the former is cheaper to produce and platforms will pay by volume;
  - fails to recognize the very substantial value platforms provide to news publishers in the form of referral traffic; and
  - exposes platforms like search engines to potentially unlimited, uncapped financial liability for merely linking to news content, which seriously incentivizes platforms to consider limiting access to news to reduce financial exposure.

**Solution:** *Revise Bill to align with international norms (including EUCD & AU Code) by using display as basis for payment and preserving copyright limitations and exceptions.*

### Proposed Legislative Text:

#### **Section 2(2): Definition of “Making Available”**

(2) For the purposes of this Act, news content is made available if  
~~(a) the news content, or any substantial portion of it, is reproduced displayed to the public; or~~  
~~(b) access to the news content from an eligible news business, or any portion of it, is facilitated by any means, including an index, aggregation or ranking of news content.~~

#### **Section 24: Copyright limitations and exceptions**

**24** For greater certainty, use of news content that is within the limitations and exceptions to copyright under the *Copyright Act* shall not be included in the ~~do not limit the scope of the~~ bargaining process.

## 2) Clear and Workable Exemption Criteria

- The purpose of the Bill is to increase financial support for the Canadian news industry quickly. To facilitate this and **incentivize voluntary agreements**, the Bill provides platforms an opportunity for exemption.
- However, current exemption criteria are incredibly vague and broad, and provide no clarity on how many deals would be sufficient
- Further, they **require agreements with outlets even if they are not online, do not produce news content, and the DNI does NOT make their content available to Canadians**
  - **Fundamentally different from AU**, where we had a clear indication of what would be required to not be designated under the Code.
  - **In AU we achieved those requirements quickly** through voluntary arrangements, which is why the Code was never applied to us.
  - **Under C-18, we have no idea. C18 strongly disincentivizes voluntary deals** until the criteria are both known and achievable, which will slow the flow of funds to publishers

**Recommendation:** *Revise Bill to make exemption criteria both clear and reasonably attainable. Specifically add clear and attainable numerical guidelines that indicate what proportion of news ecosystem must be compensated to obtain exemption, and clarify that CRTC can also consider proposals and non-monetary support when evaluating contributions for the purpose of exemption.*

## Proposed Legislative Text:

### Section 11: Exemption order

**11(1)** The Commission must make an exemption order in relation to a digital news intermediary if its operator requests the exemption and the following conditions are met:

**(a)** the operator has entered into ~~arrangements~~ agreements with, can demonstrate that it made reasonable proposals to, or otherwise provides resources to eligible news businesses that operate news outlets that produce news content primarily for the Canadian news marketplace with an aggregate reach of at least [X]% of the Canadian population and, taken as a whole, the ~~arrangements~~ agreements, proposals and resources satisfy the following criteria:

- (i) they provide for fair compensation to the news businesses for the making available of news content ~~that is made available by the intermediary,~~
- (ii) they ~~ensure that an appropriate portion of the compensation will be used by the news businesses to~~ support the production of local, regional and national news content,
- (iii) they do not allow corporate influence to undermine the freedom of expression and journalistic independence enjoyed by news outlets,
- (iv) they contribute to the sustainability of, and encourage innovation in, the Canadian news marketplace,
- (v) ~~they ensure a significant portion of independent local news businesses benefit from them, they contribute to the sustainability of those businesses and they encourage innovative business models in the Canadian news marketplace, and~~
- (vi) they involve a range of news outlets in both the non-profit and for-profit sectors and they were entered into with news businesses that reflect a diversity of business models that provide services to a variety of ~~all~~ markets and diverse populations, including local and regional markets in every province and territory, anglophone and

- francophone communities, including official language minority communities, and Black and other racialized communities, and
- (vii) they ensure a significant portion of Indigenous news outlets benefit from them and they contribute to the sustainability of those outlets in a way that supports the provision of news content by and for Indigenous peoples;
- (a.1) the Commission has held public consultations in accordance with any conditions that its Chairperson may specify; and
- (b) any condition set out in regulations made by the Governor in Council.
- (2) The order exempts the operator, in relation to the intermediary, from the application of
- ~~(a) section 21 and any provision of any regulations made under section 85 that is in relation to section 21; and~~
- ~~(b) any other provision of this Act and any provision of any regulations made under subsection 81(1) or section 85 that is specified by the Commission, in its discretion, in the order for a period of X years from the date of its issuance.~~
- ...
- (6) The Commission must, by regulation, establish clear thresholds for each criterion under this section.

### 3) Limiting the Scope of ENBs

- **The Bill significantly expanded the number and range of outlets** that will be eligible, and **created inconsistent eligibility criteria**, allowing some **businesses to benefit even if they do not produce news content**, while others must adhere to journalistic standards
  - For instance, community & campus stations are eligible, even if they do not produce news content, and have no obligation to adhere to a codes of ethics
- **This incentivizes DNIs to consider product changes to limit potential exposure** to non-news outlets

**Recommendation:** *Revise Bill to ensure only news businesses that produce news and adhere to journalistic standards are eligible, add process to evaluate Code of Ethics and requirement that funding be invested in journalism.*

#### Proposed Legislative Text:

##### Eligible news businesses — designation

- 27 (1)** At the request of a news business, the Commission must, by order, designate the business as eligible if it
- (a)** is a *qualified Canadian journalism organization* as defined in subsection 248(1) of the *Income Tax Act*, ~~or is licensed by the Commission under paragraph 9(1)(b) of the *Broadcasting Act* as a~~

~~campus station, community station or native station as those terms are defined in regulations made under that Act or other categories of licensees established by the Commission with a similar community mandate; or~~

(b) produces news content of public interest that is primarily focused on matters of general interest and reports of current events, including coverage of democratic institutions and processes, and

(i) regularly employs two or more journalists in Canada, which journalists may include journalists who own or are a partner in the news business and journalists who do not deal at arm's length with the business,

(ii) operates in Canada, including having content edited and designed in Canada,

(iii) produces news content that is not primarily focused on a particular topic such as industry-specific news, sports, recreation, arts, lifestyle or entertainment; or

~~(iv) is either a member of a recognized journalistic association and follows the code of ethics of a recognized journalistic association or has its own code of ethics whose standards of professional conduct require adherence to the recognized processes and principles of the journalism profession, including fairness, independence and rigour in reporting news and handling sources; or~~

(c) operates an Indigenous news outlet in Canada ~~and that is primarily focused on producing~~ news content that includes matters of general interest, including coverage of matters relating to the rights of Indigenous peoples, including the right of self-government and treaty rights.

(1.1) a news business may only be designated as eligible under (1) if it

(a) is either a member of a recognized journalistic association and follows the code of ethics of a recognized journalistic association or has its own code of ethics whose standards of professional conduct require adherence to the recognized processes and principles of the journalism profession, including fairness, independence and rigour in reporting news and handling sources; and

(b) ensures that compensation received under this Act will be used by the business to support the production of local, regional and national news content; and

(c) any condition set out in regulations made by the Governor in Council.

### **Code of ethics**

(1.2) The code of ethics referred to in subparagraph (1.1)(a) must include measures for ensuring that no news content that promotes hatred or misinformation against any identifiable group is produced or made available and that any errors of fact are corrected promptly and in a transparent manner.

(1.3) The Commission must, by regulation, establish a process to recognize a journalistic association for the purposes of subsection (1.1)(a) that includes an assessment of its code of ethics by an independent expert advisory body and a requirement that the Commission hold public consultations on whether the association be deemed a recognized journalistic association for the purposes of subsection (1.1)(a).

(1.4) The Commission must maintain a list of recognized journalistic associations and publish that list on its website.

(2) The Commission ~~may make an order under subsection (1) on its own initiative~~ shall take into account any recommendations of any body established for the purpose of determining whether a news business is a *qualified Canadian journalism organization* as defined in subsection 248(1) of the Income Tax Act, or any equivalent advisory body established to determine eligibility under subsection (1), before making an order under subsection (1).

#### 4) Fair Arbitration

- **New, stricter provisions were added to the arbitration section, making already biased provisions even more heavily weighted against DNIs**
  - Current version of final offer arbitration essentially ensures DNI offers will be rejected, even if the DNI only minimally makes an ENBs' news content available
- **Further, new fixed timelines for negotiation and dispute resolution were added that will incentivize ENBs to simply wait out the clock rather than negotiate in good faith, and will prevent DNIs from providing evidence supporting their offer or even challenge the eligibility status of an ENB**
- **Unreasonable timelines and unfair processes will invite challenges and likely further delay flow of funds**

**Recommendation:** *Revise Bill to change final offer arbitration to standard commercial arbitration (with expedited timelines) and allow CRTC to extend timelines for bargaining, mediation and arbitration. Alternatively, revise guidance to the arbitration panel so they can assess on available evidence and recognize the value exchange between platforms and publishers.*

#### Proposed Legislative Text:

##### **Steps in bargaining process**

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

**(a)** negotiation or bargaining sessions over a period of 90 days;

**(b)** if the parties are unable, within the negotiation or bargaining period, to reach an agreement, mediation sessions over a period of 120 days, beginning on the day after the end of the negotiation or bargaining period; and

**(c)** if the parties are unable, within the mediation period, to reach an agreement and at least one of the parties wishes to initiate arbitration, ~~final offer an~~ arbitration process for a period of 45 days, beginning on the day after the end of the mediation period.

##### **Extension**

(1.1) On request of ~~either both parties or in its own discretion~~, the Commission may extend a period provided for in any of paragraphs (1)(a) to (c)

...

##### **Scope of ~~final offer~~ arbitration**

**(3)** Any ~~final offer~~ arbitration under the bargaining process is limited to monetary disputes.

...

##### **Mediation and ~~final offer~~ arbitration**

**25** For greater certainty, the use of news content is not to be the subject of mediation sessions or ~~final offer~~ arbitration during the bargaining process if the operator in question

- (a) has made payments to the eligible news business in question for the use of that content in accordance with a licence or agreement between the operator and the business; or
- (b) has made payments or has offered to make payments to the business in question for the use of that content in accordance with the relevant tariff approved by the Copyright Board for the use of that content.

...

#### **Arbitration panel**

**34 (1)** An ~~final offer~~ arbitration must be conducted by a panel that is composed of three arbitrators who

- (a) are selected by the parties from the roster; or
- (b) are appointed by the Commission from the roster, if the parties do not select the arbitrators within 20 days ~~a period that the Commission considers reasonable~~.

...

#### **Commission assistance**

**36** The Commission may, at the request of an arbitration panel, provide administrative and technical assistance to the panel ~~and may, on any terms that the Commission considers necessary, disclose to the panel any confidential information in the Commission's possession that, in the Commission's opinion, is necessary for a balanced and informed decision making process, on the condition that the Commission ensures that the arbitration panel or each individual arbitrator that presides over the final offer arbitration, do not further disclose any such confidential information and under any further terms that the Commission considers necessary.~~

#### **Decision of arbitration panel**

**37** ~~The arbitration panel makes its decision by selecting the final offer made by one of the parties.~~

#### **Factors**

**38** An arbitration panel must take the following factors into account in making its decision:

- ~~(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; and~~
- ~~(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.~~

#### **Dismissal of offers**

**39 (1)** An arbitration panel must dismiss any offer that, in its opinion,

- ~~(a) allows a party to exercise undue influence over the amount of compensation to be paid or received;~~
- ~~(b) is not in the public interest because the offer would be highly likely to result in serious detriment to the provision of news content to persons in Canada; or~~
- ~~(c) is inconsistent with the purposes of enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability.~~

#### **Effect of Dismissal**

**(2)** If the arbitration panel dismisses, in accordance with subsection (1), the final offer made by one of the parties, it must accept the final offer made by the other party.

#### **Reasons and new offers**

~~(3) If the arbitration panel dismisses, in accordance with subsection (1), the final offer made by each of the parties, it must provide written reasons to the parties and give them an opportunity to make a new offer.~~

...

#### **Decision not accepted by the parties**~~deemed to be agreement~~

~~42 If an arbitration panel's decision is not accepted by the parties, deemed, for the purposes of its enforceability, to be an agreement entered into by the parties the digital news intermediary must promptly cease making available the covered news content of the eligible news business or group of eligible news businesses.~~

### **Alternatively:**

#### **Factors**

**38** An arbitration panel must take the following factors into account in making its decision:

(a) the value added, monetary and otherwise, to the news content in question by each party, as assessed in terms of (i) their investments, expenditures and other actions in relation to that content or its making available, and (ii) the number of Internet visitors received by the eligible news business by way of the digital news intermediary; and

(b) the benefits, monetary and otherwise, including Internet visitors received, 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.~~

#### **Dismissal of offers**~~Evidence~~

**39** ~~(1) An arbitration panel must dismiss any offer that, in its opinion,~~

~~(a) allows a party to exercise undue influence over the amount of compensation to be paid or received;~~

~~(b) is not in the public interest because the offer would be highly likely to result in serious detriment to the provision of news content to persons in Canada; or~~

~~(c) is inconsistent with the purposes of enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability.~~

The arbitration panel must rely on evidence submitted by the parties to assess each of the factors set out in section 38.

#### **Effect of Dismissal**

~~(2) If the arbitration panel dismisses, in accordance with subsection (1), the final offer made by one of the parties, it must accept the final offer made by the other party.~~

#### **Reasons and new offers**

~~(3) If the arbitration panel dismisses, in accordance with subsection (1), the final offer made by each of the parties, it must provide written reasons to the parties and give them an opportunity to make a new offer.~~