

Canada, Bill C-18 - Proposed Amendments
April 2023

Below, Meta Platforms, Inc. has proposed important amendments to the *Online News Act* (C-18). Proposed amendments are represented in **red text**.

PRIORITY AMENDMENTS

1. Revising definitions of “news content” and “making available” to preserve principles of copyright law and clarify content that should/should not be covered and under the law. → s. 2.
2. Revising copyright clause → s. 24.
3. Addressing The Test for Digital News Intermediary Coverage → s. 6
- 4.** Deleting or clarifying the Discrimination, Preference and Disadvantage Clause → s. 51
5. Adding clause to protect content moderation → after s. 51

1. Revising definitions of “news content” and “making available” to preserve principles of copyright law and clarify content that should/should not be covered and under the law.	
<ul style="list-style-type: none"> • In keeping with well-established principles behind copyright law, the Act should respect exclusions from copyright protection and should clarify that free linking between sites is allowed, recognizing the “core significance of the role of hyperlinking to the Internet” (as stated by the Supreme Court of Canada in <i>Crookes v. Newton</i>). • Additionally, content that publishers voluntarily post to a platform should be expressly clarified as being out of scope. Publishers choose to post to platforms when it benefits them, including by allowing them to reach existing and new audiences. A model that allows publishers to get paid for what they choose to post gives publishers a perverse incentive to post as much content as possible— regardless of its quality—and leaves platforms unable to control their costs. • Audio/audio-visual content (and broadcasters/radio generally) should also be excluded from the scope of the Bill. The premise of these news regulations is the declining revenues of the <i>written</i> news publishing industry in the digital age; to lump audio/audiovisual content and broadcasters into the Bill could end up affecting the written news industry. Broadcasters are already regulated under the <i>Broadcasting Act</i> and related regulations, so there is no reason for additional regulation under C-18. At the very least, because this Bill focuses on sustainability of the <i>news</i> marketplace, radio, television and other broadcasters shouldn’t be included, unless they primarily produce <i>news</i> and meet the criteria under ss. 27 (1)(b) / 31 (2). 	
Section	Draft Law Suggested Amendments
S. 2	<p>[Definition of news content] <i>news content</i> means <u>copyrighted</u> content—in any format, including an audio or audiovisual format— that reports on, investigates or explains current issues or events of public interest and includes such news content that an Indigenous news outlet makes available to an Indigenous community by means of Indigenous storytelling. (<i>contenu de nouvelles</i>) excluding:</p> <ol style="list-style-type: none"> a. <u>Audio or audiovisual format;</u> b. <u>News content or any part thereof that is posted by a news outlet itself on a hosting platform;</u> c. <u>Hyperlinks/URLs to news content;</u>

	d. <u>Very short extracts of news content.</u>
S. 2	<p>[Definition of making available] Making available of news content (2) For the purposes of this Act, news content is made available if</p> <ul style="list-style-type: none"> • (a) the news content, or any a substantial portion of it, is reproduced <u>and displayed to persons in Canada</u>; or • (b) access to the news content, or <u>any a substantial</u> portion of it, is <u>facilitated communicated to the public by telecommunication any means</u>, including an index or aggregation or ranking of news content. <p><u>(2.1) For greater certainty, the following activities do not constitute the making available of news content by a DNI under this Act:</u> <u>(a) posting of hyperlinks/URLs to news content by users; and</u> <u>(b) any uses allowed under the Copyright Act.</u></p>

2. Revising copyright clause so that the Bill does not override/undermine important copyright law principles	
Section	Draft Law Suggested Amendments
S. 24	<p>Copyright Limitations and exceptions 24 For greater certainty, limitations and exceptions to copyright under the <i>Copyright Act</i> shall do not limit the scope of the bargaining process.</p>

3. Addressing The Test for Digital News Intermediary Coverage	
<p>To determine whether a specific digital news intermediary is covered, the Act's significant bargaining power imbalance test should be applied as between that particular intermediary and news businesses. Additionally, while "prominent" market position is a vague and unclear term, "dominant" market position is a concept that is well-defined under Canadian competition law. Finally, to clarify the meaning of "significant bargaining power imbalance," the Act should consider whether news businesses are financially reliant on the intermediary. This is a measurable factor that directly relates to the relative power between two commercial entities.</p>	
Section	Draft Law Suggested Amendments

S. 6	<p><u>Proposed Amendments to Section 6:</u> This Act applies in respect of a digital news intermediary if, having regard to and satisfying each of the following factors, there is a significant bargaining power imbalance between its operator the intermediary and news businesses:</p> <ul style="list-style-type: none"> • (a) the size of the intermediary or the operator; • (b) whether the market for the intermediary gives it the operator a strategic advantage over news businesses; and • (c) whether the intermediary occupies a prominent dominant market position in a relevant market; and • (d) whether news businesses are financially reliant on the intermediary.
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<p>4. Deleting (or at the very least, clarifying) the Discrimination, Preference and Disadvantage Clause</p>	<ul style="list-style-type: none"> • The clause as currently drafted is extremely open-ended, and has the potential to infringe on fundamental principles of freedom of contract by e.g. seeking to impose uniform treatment across a wide and disparate group of news businesses, or potentially impacting an online platform's business much more widely (such as which other content types it chooses to make available, and in what form) and should therefore be removed. For example, there is no clarity as to what could constitute an undue or unreasonable preference or advantage. • To the extent that the prohibition contained in Section 51 is maintained, it should at the very least take into account whether actual, substantial harm, in a relevant market could be caused - concepts which are well-defined under competition law.
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Section	Draft Law Suggested Amendments
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S. 51	<p>51 - Discrimination, Preference and Disadvantage [Note: Preferred amendment is to delete s. 51 entirely + delete ss. 52 and s. 68 in their entirety which relate to this clause]</p> <p>Prohibition 51 In the course of making available news content that is produced primarily for the Canadian news marketplace by news outlets operated by eligible news businesses, the operator of a digital news intermediary must not act in any way that:</p> <ul style="list-style-type: none"> • (a) unjustly discriminates against an eligible news business; • (b) gives undue or unreasonable preference to any individual or entity, including itself; or • (c) subjects an eligible news business to an undue or unreasonable disadvantage. <p>[Note: If deletion of ss. 51, 52, and 68 is not possible, an alternative amendment proposal is below in purple font]</p> <p>Prohibition 51 In the course of <u>a digital news intermediary intentionally</u> making available news content that is produced primarily for the Canadian news marketplace by news outlets operated by eligible news businesses <u>to persons in Canada</u>, the operator of a digital news intermediary must not act in any way that <u>intentionally</u> :</p> <ul style="list-style-type: none"> • (a) unjustly discriminates against an eligible news business <u>in a manner that substantially harms competition in a relevant market;</u> • (b) gives undue or unreasonable preference to any individual or entity, <u>including itself in a manner that substantially harms competition in a relevant market;</u> or
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	<p>(c) subjects an eligible news business to an undue or unreasonable disadvantage <u>in a manner that substantially harms competition in a relevant market;</u></p> <p>Complaint 52 (1) An eligible news business or group of eligible news businesses may make a complaint to the Commission if the business or group has reasonable grounds to believe that an operator has, in relation to the business or a member of the group, contravened section 51.</p> <p>Factors to take into account (2) In determining whether an operator has contravened section 51, the Commission may take into account any factor it considers appropriate, but it must take into account whether the conduct in question is</p> <ul style="list-style-type: none"> • (a) in the normal course of business for the operator or otherwise for a reasonable business interest; or • (b) deliberately retaliatory in nature against the particular eligible news business; or • (c) consistent with the purposes of this Act. <p>Dismissal of complaint (3) If the Commission is of the opinion that a complaint under subsection (1) is frivolous, vexatious or not made in good faith, it may dismiss the complaint summarily.</p> <p>Burden of Proof 68 In a proceeding in respect of a violation in respect of a contravention of section 51, the burden of establishing that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the <u>Commission</u> individual or entity that is believed to have contravened that section.</p>
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<p>5. Adding clause to protect content moderation</p> <p>Adds clarity and preserves platforms' ability to protect community standards, safeguard users, and create environments in which people feel empowered to communicate.</p>	
Section	Draft Law Suggested Amendments
New S. 52.1 [to be added after S. 51]	<p>Protection for content moderation.</p> <p>52 For greater certainty, nothing in this Act shall be construed to impose liability on a digital news intermediary or its operator for:</p> <p>(a) removing or moderating hate speech, disinformation, or any other objectionable content under existing law;</p> <p>(b) removing or moderating content that poses risks to the safety, security, or integrity of its users, products, or services; or</p> <p>(c) otherwise enforcing its Terms of Service.</p>

OTHER AMENDMENTS

- 6. Including important safeguards in the information disclosure clauses → s. 7(2) and s. 53
- 7. Revising the definition of “news outlets” for greater certainty → s. 2

- 8. Revising the eligibility of news outlets and businesses subject to the bargaining process → s. 27 and 31
- 9. Including an appeal mechanism →s. 41
- 10. Revising personal and vicarious liability provisions → ss. 60, 70, 71

Other Amendments (2nd priority)	
6. Including important safeguards in the information disclosure clauses that respect privilege and protect private user data/company information	
Section	Draft Law Suggested Amendments
S. 7 (2)	<p>Information required</p> <p>7 (2) An individual or entity that operates an online communications platform must, at the request of the Commission and within a reasonable time and a reasonable manner [that it specifies], provide the Commission with any- relevant information that is necessary for the purpose of verifying compliance with subsection (1) or preventing non-compliance with it.</p> <p>Operators shall not be required to disclose private user data or other information protected by a privilege, intellectual property law, trade secrets law, or other law.</p>
S. 53	<p>Provision of Information</p> <p>Duty to provide information</p> <p>53 An operator or news business must, at the request of the Commission and within the time and in the manner that it specifies a reasonable time period and in a reasonable manner, provide the Commission with relevant any- information that it requires that is necessary for the purpose of exercising its powers or performing its duties and functions under this Act.</p> <p>Operators shall not be required to disclose private user data or other information protected by a privilege, intellectual property law, trade secrets law, or other law.</p>
7. Revising the definition of “news outlets” for greater certainty For greater certainty and so the Act is consistent and reflective of the stated purpose of the Bill (of sustaining the Canadian digital news marketplace)	
Section	Draft Law Suggested Amendments

S. 2	<p>[Definition of news outlet]</p> <p>news outlet means an undertaking or any distinct part of an undertaking, such as a section of a newspaper, the primary purpose of which is to produce news content and includes an Indigenous news outlet.</p> <p style="color: red;">For greater certainty, a news outlet shall satisfy the criteria in 31(2).</p>
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8.	<p style="text-align: center;">Revising the eligibility of news outlets and businesses subject to the bargaining process</p> <ul style="list-style-type: none"> • To ensure consistency of treatment in the digital news marketplace and clarity for all stakeholders involved, Indigenous outlets and other in-scope entities (QCJO entities) should be considered according to the same criteria that would apply to other news outlets/businesses (per ss. 27 (1)(b) / 31 (2)). • Also, campus stations, community stations, and native stations should be excluded from this Act. This is consistent with our request to exclude audio and audio-visual content from the scope of the bill and to exclude broadcasters (per our s. 2 amendment proposals above). Radio stations are already regulated under the Broadcasting Act and radio regulations; there should be no reason for additional regulation under C-18. At the very least, this is a Bill focusing on sustainability of the news marketplace so radio stations (and any other broadcaster) should not be included, unless they primarily produce news and meet the criteria under ss. 27 (1)(b) / 31 (2), as required for other news outlets/businesses.
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Section	Draft Law Suggested Amendments
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S. 27	<p>Eligible news businesses — designation</p> <p>27 (1) At the request of a news business, the Commission must, by order, designate the business as eligible if it</p> <ul style="list-style-type: none"> • (a) is a <i>qualified Canadian journalism organization</i> as defined in subsection 248(1) of the <i>Income Tax Act</i>, or is licensed by the Commission under paragraph 9(1)(b) of the <i>Broadcasting Act</i> 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 and meets the requirements under (b) below, as members of the digital news marketplace; 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 coverage of matters relating to the rights of Indigenous peoples, and <ul style="list-style-type: none"> ○ (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, and ○ (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
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	<p>fairness, independence and rigour in reporting news and handling sources;³</p> <p>or</p> <ul style="list-style-type: none"> (c) operates an Indigenous news outlet in Canada and produces 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.
S. 31	<p>Application to Commission</p> <p>31 (1) If the operator is of the opinion that a news outlet identified under section 30 by an eligible news business or group of eligible news businesses should not be a subject of the bargaining process, it may apply to the Commission for a determination of the issue.</p> <p>Determination</p> <p>(2) A news outlet, including an Indigenous news outlet, is to be a subject of the bargaining process if the Commission is of the opinion that the outlet is operated exclusively for the purpose of producing news content — including local, regional and national news content — consisting primarily of original news content that is</p> <ul style="list-style-type: none"> (a) produced primarily for the Canadian news marketplace; (b) focused on matters of general interest and reports of current events, including coverage of democratic institutions and processes and coverage of the rights of indigenous people, including the rights of self government; (c) not focused on a particular topic such as industry-specific news, sports, recreation, arts, lifestyle or entertainment; and (d) not intended to promote the interests, or report on the activities, of an organization, an association or its members. <p>Special case — Indigenous news outlet</p> <p>(2.1) Despite subsection (2), an Indigenous news outlet is to be a subject of the bargaining process if it</p> <ul style="list-style-type: none"> (a) operates in Canada; and (b) produces 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.

<p>9. Including an appeal mechanism</p> <p>Appeals are important for both parties and should be allowed as of right. It is <i>especially</i> critical here since the law contemplates a forced arbitration regime; no party should be forced to participate in an arbitration most especially where there is no option for appeal.</p>	
Section	Draft Law Suggested Amendments
S. 41	<p>Decision Final Appeals</p> <p>41. An arbitration panel's decision is final. An appeal lies to the Federal Court from any decision or order, whether final, interlocutory or interim, of an arbitration panel as if it were a judgment of the Federal Court.</p>

10. Revise personal and vicarious liability provisions

In line with established legal principles, an individual should not be held de facto personally liable for the actions of a corporation they are employed by, or which they manage, direct or govern, merely by virtue of the fact that they directed an act which turned out to be in violation. The proposed amendments seek to ensure that the Bill tracks more closely with established legal principles and does not broaden the class of people potentially liable or the circumstances in which they become liable. It is particularly unusual to see 'employees' included and 'agent' is very broad and vague.

Section	Draft Law Suggested Amendments
S. 60	<p>Violation — operators, directors, etc. 60 (1) Subject to any regulations made under paragraph 76(a), an operator or a director, officer, employee or agent or mandatary of an operator commits a violation if <u>it they</u></p> <ul style="list-style-type: none"> • (a) contravenes a provision of this Act, a provision of the regulations, an order made under this Act or an undertaking that they entered into under section 65; or • (b) makes a misrepresentation of a material fact or an intentional omission to state a material fact to a person designated under section 57 or paragraph 63(a). <p>Violation — other individuals and entities (2) An individual or entity commits a violation if they contravene subsection 7(2).</p>
S. 70	<p>Directors, officers, etc. 70 A director, officer or agent or mandatary of an entity that commits a violation is liable for the violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the entity is proceeded against.</p> <p><i>Replace with:</i></p> <p>An officer or director who knowingly directs and causes an operator to engage in an activity that constitutes a contravention of a provision of this Act, a provision of the regulations, an order made under this Act or an undertaking the operator has entered into under section 65, also commits a violation of the Act, unless they can establish that they had no reasonable grounds upon which to believe that such activity could or would constitute such a contravention</p>
S. 71	<p>Vicarious liability 71 An individual or entity is liable for a violation that is committed by their employee acting within the scope of their employment or their agent or mandatary acting within the scope of their authority, whether or not the employee or agent or mandatary is identified or proceeded against.</p>