

The Next Round for Canada's Online News Act: Broadcasters Request Inquiry into Meta's Decision to Block News Content in Canada

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On August 7, 2023, a coalition of Canadian broadcasting and news media associations (namely, the Canadian Association of Broadcasters, News Media Canada and the Canadian Broadcasting Corporation) (the Broadcasters) requested that Canada's Commissioner of Competition commence an inquiry into Meta Platforms Inc.'s decision to block news content in Canada on its platforms, including on Facebook and Instagram. This inquiry request is the latest development in the contentious aftermath of the passage of the *Online News Act* and highlights the challenges the Canadian government and the CRTC will face when implementing the operative provisions of that legislation.

Background

As discussed in more detail in our previous Cassels Comment, the *Online News Act* received royal assent on June 22, 2023. The stated purpose of the *Online News Act* is to establish a mandatory bargaining process that will require "digital news intermediaries" (DNIs) – online platforms that make news content produced by other businesses available on their platform – to enter into commercial agreements with Canadian news businesses. Under those agreements, DNIs will be required to compensate Canadian news businesses for making those businesses' news content available on the DNIs' platforms. Notably, the *Online News Act* does not mandate that DNIs must in fact carry or make news content available on their platforms, regardless of their designation as a DNI.

Although the list of DNIs that will be subject to the *Online News Act* has not yet been finalized, Meta Platforms Inc. – the owner of several large social media platforms, including Facebook and Instagram – is widely expected to be designated as a DNI. On the same day that the *Online News Act* received royal assent, Meta announced that it intends to end all news availability on Facebook and Instagram for users located in Canada, which it views as the only way it can reasonably comply with the legislation. As of August 1, 2023, Meta started to implement this Canadian news block and expects the block to be in effect for all users in Canada over the next several weeks.¹

The Inquiry Request

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Given that Meta's plan to block news content availability on its platforms may not be a clear and direct violation of the *Online News Act*, the Broadcasters have requested that the Commissioner of Competition commence an inquiry into Meta's blocking decision under sections 9 and 79 of the *Competition Act*. Specifically, the request claims that Meta's decision violates the *Competition Act's* prohibition against abuse of dominance. Abuse of dominance is found to exist where an organization holds a substantial degree of power in a market and practices anti-competitive acts which result in a substantial prevention or lessening of competition in that market. The Broadcasters have also asked the Commissioner of Competition to consider whether Meta's intended blocking plan constitutes a refusal to deal under section 75 of the *Competition Act*.

The Broadcasters argue that Meta's decision satisfies all the criteria needed to find abuse of dominance. Specifically, the Broadcasters assert that Meta substantially controls the Canadian news publishing and online advertising markets due to Facebook and Instagram collectively accounting for over 70% of Canada's online social media market, which has increasingly become the manner by which many Canadians access news content. The Broadcasters also argue that Meta's decision is inherently anti-competitive, as it will result in diminished access to quality Canadian news content and decreased revenues to Canadian news businesses, thus forcing those news businesses to reduce the quality and quantity of their news content. Finally, the Broadcasters assert that Meta's decision will substantially lessen competition in the Canadian news market by removing a "critical channel" that Canadian news businesses rely on to distribute their content, which will inevitably impair the ability of those Canadian businesses to compete for both online advertising revenue and subscription revenue from Canadian consumers.

To avoid "devastating harm" to the Canadian news industry, the Broadcasters also request that the Competition Bureau file an application before the Competition Tribunal seeking orders prohibiting Meta from blocking news content on its platforms in Canada and from discriminating on its platforms against content by Canadian news organizations.

While Meta itself has not yet publicly responded to the Broadcasters' request, some commentators on the *Online News Act* observe that it may be challenging to successfully prosecute the inquiry through to the outcome the Broadcasters request. For example, the Broadcasters' focus on the essential value that Meta brings to Canadian news businesses may contradict the premise of the *Online News Act* that the sharing of news content by DNIs is unfair to Canadian news businesses. Further, prohibiting Meta from blocking news availability features on its platforms in Canada may contradict previous comments made by the Minister of Canadian Heritage that DNIs are free to make a "business choice" about how to best comply with the requirements of the *Online News Act*.

Conclusion

The requested inquiry into Meta under the *Competition Act* is the latest example of the challenges that the passage of the *Online News Act* has introduced in the Canadian news industry. As the CRTC prepares to

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develop a framework for the implementation of the *Online News Act*, it will likely focus on balancing the competing demands of different stakeholders and finding a solution that achieves the stated goals of the *Online News Act* without causing unintended harm to the very Canadian news businesses that the legislation is intended to protect.

The Cassels Entertainment & Sports Law group will continue to monitor developments related to the implementation of the *Online News Act*. If you have any questions about the *Online News Act* and how it may impact your business, please reach out to any member of our team.

¹ Meta, “Changes to News Availability on Our Platforms in Canada”,
<<https://about.fb.com/news/2023/06/changes-to-news-availability-on-our-platforms-in-canada/>>.

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