Cassels

# Draft Regulations Released Under the Online News Act; Public Consultation Process Begins

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**September 13, 2023**

On September 1, 2023, Canada's Department of Canadian Heritage published a draft of the highly anticipated *Regulations Respecting the Application of the Online News Act, the Duty to Notify and the Request for Exemptions* (the Regulations) under the *Online News Act*. These draft Regulations detail the mandatory bargaining and compensation process established by the *Online News Act*, including which digital news intermediaries (DNIs) will be subject to the process and the categories and magnitude of compensation DNIs will be required to pay over to Canadian news businesses. A 30-day consultation period on the draft Regulations will run between September 2, 2023 and October 2, 2023, during which interested members of the public may comment before the Regulations are finalized.

## Background

As discussed in our previous Cassels Comment, the *Online News Act* received royal assent in June 2023. The *Online News Act* establishes a mandatory bargaining process that will require DNIs – online platforms that make news content produced by other businesses available on their platform – to enter into commercial agreements with eligible Canadian news businesses. Pursuant to these contractual agreements, DNIs will be required to compensate Canadian news businesses for sharing their news content on the DNIs' platforms.

The *Online News Act* continues to garner public attention months after its passage. In our previous Cassels Comments, we discussed Meta's decision to block news content in Canada in response to the legislation, as well as the CRTC's regulatory plan for the development of the framework that will govern the mandated bargaining process between DNIs and eligible news businesses.

## The Draft Regulations

The text of the *Online News Act* provides few details on the newly mandated bargaining process and how it will work in practice, including which DNIs will be required to participate, how much they will be required to contribute to compensate eligible Canadian news businesses, and how DNIs will satisfy the conditions for an exemption order from the process. The Canadian government purposefully left the drill down on the details to the new Regulations in order to garner valuable comments and buy-in from stakeholders and the

public.

Arguably, the most notable aspect of the Regulations is the establishment of a specific minimum compensation amount that a DNI will be required to pay to eligible Canadian news businesses. Somewhat uniquely, the draft Regulations suggest but do not expressly state a minimum threshold contribution obligation for non-exempt DNIs who are required to engage in the mandatory bargaining process. The draft Regulations do this by instead setting the level of contribution that DNIs must establish to qualify for an exemption order from mandatory bargaining. The draft Regulations provide that a DNI will be found to "contribute to the sustainability of the Canadian news marketplace" for the purpose of receiving an exemption order from the bargaining framework if the DNI is able to establish pre-existing agreements with eligible Canadian news businesses that collectively provide for compensation equaling 4% of the DNI's annual global (not just domestic Canadian) revenue multiplied by Canada's share of global gross domestic product.[1]

As well, the draft Regulations provide that "compensation" may consist of both monetary compensation and the dollar value of any non-monetary compensation. However, no examples are provided of acceptable non-monetary compensation, other than to affirm that the mere value assigned to the DNI making news available on its platform does not count.[2]

Aside from the contribution requirement itself, the draft Regulations also clarify the categories of DNIs that are subject to the *Online News Act* bargaining and compensation framework. A DNI will be considered captured by the framework if a "significant bargaining power imbalance" exists between the DNI and Canadian news businesses. A significant bargaining power imbalance exists if the DNI's annual revenues exceed $1 billion, the DNI offers either a search engine that aggregates news content or a social media service which allows users to interact with news content, and the DNI has at least 20 million unique visitors (for search engines) or active users (for social media platforms) on a yearly basis.[3]

Finally, the draft Regulations expand on one of the conditions for an exemption order from the bargaining and compensation framework; namely, that the agreements between the DNI and Canadian news businesses must provide that an "appropriate portion" of the compensation provided under those agreements be used by the news businesses to support the production of news content. However, the draft Regulations do not quantify what constitutes a minimum appropriate portion. If the recipient news businesses commit to using "some or all" of the compensation provided under the agreements for the production of news content, the draft Regulations require the CRTC to interpret that application of funds to confirm that the agreements provide that an "appropriate portion" of the compensation be used for news production. However, the draft language is unclear whether this means that the CRTC must decide if the portion used by the news business on news production is enough to be a yet undefined "appropriate portion" or, as some commenters have suggested, that the CRTC must *automatically* find any portion used on news production to meet the threshold for an "appropriate portion."

The full draft Regulations are available to review online on the Canada Gazette's website and contain additional details and requirements.

## The Debate Continues

While the draft Regulations provide much-needed clarity on many of the broader aspects of the *Online News Act*, they are unlikely to resolve the ongoing tension and debate in the Canadian digital news industry. For example, Meta has already publicly stated that the draft Regulations have not altered its decision to block Canadian user access to news on its platforms, including Facebook and Instagram. Meanwhile, Google – which is reportedly considering implementing a similar news block but has not yet done so – has stated it has not yet decided if the draft Regulations are sufficient to address its concerns with the *Online News Act*.[4]

From one perspective, the draft Regulations can be interpreted as providing an appropriate balance between, on the one hand, the primary goal of the *Online News Act* (namely, achieving fairness in the Canadian news industry) and, on the other hand, the challenges that DNIs may face when implementing the legislation. For example, while the draft Regulations do not specify what forms of "non-monetary compensation" will count towards a DNI's compensation requirement, government officials have already indicated that money spent by DNIs on training and advertising of news content and eligible Canadian news businesses may end up being eligible forms of compensation.[5] The draft Regulations also ensure that smaller DNIs who may be less equipped to participate in the mandatory compensation framework will not be subject to the *Online News Act*, given that the mandatory compensation requirement only comes into play where there is a "significant bargaining power imbalance," which is intended to capture only those DNIs with significant Canadian market reach (such as Google and Facebook).[6]

From another perspective, some industry participants argue that the draft Regulations render various aspects of the *Online News Act* more arbitrary instead of less. For example, some commenters note that the formula for determining a DNI's minimum contribution requirement is not directly tied to the value of the news content within the DNI's overall service offering (as the value may vary based on the DNI's particular service offering and the type of news subject matter), and that the rationale for the 4% figure was not sufficiently explained (although the Regulatory Impact Analysis Statement that accompanied the draft Regulations notes that the 4% gross revenue percentage is generally consistent with what other countries, such as Australia, have imposed under similar legislation). In addition, others have commented that some of the language used in the draft Regulations is ambiguous and can be interpreted to suggest that a Canadian news business that spends "some or all" of the compensation it receives from a DNI on news production will automatically be found to meet the "appropriate portion" spend requirement on news production, even though most of the DNI compensation may end up being spent on other activities of the eligible Canadian news business.

Recognizing the foregoing and other issues currently in debate under the *Online News Act*, the Department of Canadian Heritage has initiated a 30-day consultation period during which industry stakeholders and members of the public may provide written comments on the draft Regulations or the accompanying Regulatory Impact Analysis Statement. The consultation period began on September 2, 2023 and will run until October 2, 2023. Given stakeholder commentary to date and additional commentary anticipated during the consultation period, one would expect further clarification in the final form of the Regulations to issue following this consultation process.

The Cassels Entertainment & Sports Group will continue to monitor developments related to the implementation of the *Online News Act*. If you would like assistance submitting comments on the Regulations as part of the consultation period or are seeking further information on how the *Online News Act* may impact your business, please do not hesitate to reach out to any member of our team.

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[1] Regulations, s. 9(1).

[2] Regulations, s. 1.

[3] Regulations, s. 2.

[4] Daniel Johnson, "Meta, Google respond to Canada's proposed Online News Act regulations." BNN Bloomberg. September 1, 2023, online: <https://www.bnnbloomberg.ca/meta-says-it-won-t-stop-blocking-news-in-canada-as-govt-outlines-regulations-1.1966346>.

[5] Tara Deschamps, "Online News Act could see Google, Meta pay combined $234 million to Canadian media." CBC. September 1, 2023, online: <https://www.cbc.ca/news/politics/online-news-act-google-meta-1.6954656>.

[6] *Ibid*.

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