

Final Regulations Under the Online News Act Are Now in Force

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After months of highly publicized drafts, debates, and deal negotiations, the *Online News Act* now has a finalized set of regulations, titled the *Online News Act Application and Exemption Regulations* (the Regulations), that officially came into force on December 19, 2023. Building off the draft that was published in September 2023, the final version of the Regulations implements the results of the negotiations between Google and the Canadian federal government in November 2023 and provides other clarifications related to how digital news intermediaries may be exempted from the *Online News Act*'s mandatory bargaining requirement.

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 “digital news intermediaries” (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.

Shortly after the passage of the *Online News Act*, Canada's Department of Canadian Heritage published a set of draft regulations clarifying which DNIs would be subject to the mandatory bargaining process and how applicable DNIs could satisfy the criteria in the *Online News Act* to be exempted from the process. Two months later, Google – one of only two DNIs expected to be subject to the bargaining process following the clarifications in the draft regulations – reached a deal with the Canadian government, pursuant to which Google agreed to pay \$100 million per year in compensation to eligible Canadian news businesses that source the news content Google shares on its platform in exchange for Google being exempt from the requirement to engage in mandatory bargaining.

The Final Regulations

Unsurprisingly, one of the biggest changes between the draft set of regulations published in September 2023 and the final Regulations is the codification of Google's deal with the Canadian federal government.

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While the final Regulations do not explicitly refer to Google by name, section 9(2) of the Regulations refers to “the [DNI] that is the search engine with the greatest share of Canadian Internet advertising revenues among all search engines in respect of which the Act applies.” Pursuant to this provision, Google will be considered to satisfy the *Online News Act*’s exemption criterion of “contributing to the sustainability of the Canadian news marketplace” if its agreements with eligible Canadian news businesses provide for \$100 million in monetary compensation per year, with future years indexed to changes in Canada’s Consumer Price Index as compared to 2023.

The final Regulations also reflect the previously reported term of the Google deal which would allow Google to make its contribution payments to one collective fund that represents all eligible Canadian news businesses. Specifically, section 10 of the Regulations acknowledges that a DNI can enter into an agreement with a group of eligible news businesses, so long as the DNI’s agreement with the group provides for “equitable distribution” among the members of the group. “Equitable distribution” is generally based on each news business’s number of full-time employees who are employed for the purpose of producing original news content for the business, although section 10 of the Regulations also clarifies that no more than 30% of the total compensation to the group can be distributed to news broadcasters and no more than 7% can be distributed to the CBC.

Beyond the codification of the Google deal, another notable change in the final Regulations is the further clarification of when an agreement between a DNI and news businesses will be deemed to “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,” which is one of the exemption benchmark criteria under the *Online News Act*. As we previously noted, one of the more controversial aspects of the draft regulations was its vague definition of “appropriate portion,” which left open the possibility that an agreement could satisfy the exemption criteria as long as the news businesses receiving compensation spent some of the compensation on news production, even if they spent most of it on other activities. To resolve these concerns, section 7 of the final Regulations now expressly clarifies that the “appropriate portion” criterion will be satisfied if the agreement contains a commitment by the recipient news businesses to use *a majority* of the compensation provided under the agreement on news production.

Finally, the final Regulations clarify which news businesses will be considered when determining whether a DNI has entered into an agreement with news businesses that satisfies the exemption criteria. While the *Online News Act* itself sets out which news businesses are to be subject to the mandatory bargaining framework, neither the legislation nor the draft regulations explicitly confirmed that those same news businesses must be parties to an agreement under the exemption criteria. Section 5 of the final Regulations provides this confirmation, clarifying that only news businesses that operate news outlets that exist exclusively for the purpose of producing news content for the Canadian market related to matters of general interest and current events – as well as certain Indigenous news outlets – will be considered when assessing whether an agreement between a DNI and news businesses satisfies the exemption criteria.

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Other than the changes to the draft version discussed above, the final Regulations carry over most of the remaining provisions from the draft with minimal revisions, including those that establish which DNIs are subject to the mandatory framework, define “fair compensation” under the *Online News Act*, and provide details of the exemption criterion requiring agreements between DNIs and eligible news businesses to ensure that the news businesses’ freedom of expression and journalistic independence cannot be undermined by corporate influence. The full text of the final Regulations can be viewed on the Government of Canada's website.

Key Takeaways

The final Regulations set out the full details of the negotiated outcome between Google and the Canadian federal government and provide some much-needed clarity on certain aspects of the exemption criteria that were still vague following the publication of the draft regulations. That said, the implementation of the *Online News Act* is far from over. Although Google will now be exempt from the mandatory bargaining process contemplated by the legislation, the Canadian Radio-television and Telecommunications Commission is still tasked with creating a framework and code of conduct for the bargaining process, which it expects to publish in the summer of 2024. Further, many are still wondering if the Canadian government will take further steps to try to persuade Meta – the parent company of Facebook and Instagram that ended its news availability services in Canada following the passage of the *Online News Act* – to agree to a similar deal as the one entered into with Google.

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.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.