Canadian Radio-television and Telecommunications Commission | Conseil de la radiodiffusion et des télécommunications canadiennes

Online News Regulatory Policy CRTC 2024-327

PDF version

Reference: 2024-55

Ottawa, 12 December 2024

Framework under the *Online News Act* (formerly Bill C-18)

Summary

The *Online News Act* (the Act) received royal assent on 22 June 2023, and on 19 December 2023, the *Online News Act Application and Exemption Regulations*, made by the Government of Canada, came into force. The purpose of the Act is to enhance fairness in the Canadian digital news marketplace and contribute to its sustainability. The Act sets out a framework requiring the largest online platforms to negotiate for compensation with eligible news businesses in Canada and to reach fair commercial deals for the news content made available by the online platforms.

The Commission is responsible for implementing and overseeing key parts of the Act, and must implement a bargaining framework. The Commission is also required to consider complaints from eligible news businesses about the actions of online platforms that could create an undue preference or disadvantage in the course of making news content available. It must also gather information relevant to its role under the Act and have an independent auditor prepare an annual report on the impact of the Act on the Canadian digital news marketplace.

On 13 March 2024, the Commission launched a public consultation on the mandatory bargaining framework, undue preference, discrimination and disadvantage complaints, and data collection.

In this decision, the Commission establishes the mandatory bargaining framework that will apply to the major online platforms and eligible Canadian news businesses in negotiating fair commercial deals for news content made available online. The decision also addresses how the Commission will handle complaints from eligible news businesses about unfair practices, and the data it will collect from major online platforms and news businesses, such as the number and value of agreements.

The Commission sets out the policy framework on these issues below.

Background

1. The *Online News Act* (the Act) received royal assent on 22 June 2023, and on 19 December 2023, the *Online News Act Application and Exemption Regulations* (the Regulations) came into force. The purpose of the Act is to enhance fairness in the Canadian digital news marketplace and contribute to its sustainability. The Commission is responsible for implementing and overseeing parts of the Act.

2. The Act sets out a mandatory bargaining process requiring the largest online platforms to negotiate for compensation with eligible news businesses in Canada and to reach fair commercial deals for the news content made available by the online platforms. If they cannot come to an agreement during a 90-day bargaining period and a 120-day mediation period, a final 45-day arbitration period would follow where a panel of independent arbitrators will select the final offer made by one of the parties. The Commission has an oversight role to ensure that parties participate in good faith throughout this process.

3. The Regulations provide online platforms with a path to receiving an exemption from the Act based on agreements they have reached with news businesses without using the mandatory bargaining process. If an exemption order is granted based on those existing agreements, the mandatory bargaining process would not be used for that online platform. Nonetheless, the Commission must be prepared to administer the mandatory bargaining process.

4. Under section 52 of the Act, the Commission is also required to consider complaints from eligible news businesses about the actions of online platforms that could create an undue preference or disadvantage in the course of making news content available. It must also gather information relevant to its role under the Act and have an independent auditor prepare an annual report on the impact of the Act on the Canadian digital news marketplace, which will be published by the Commission.

5. Consistent with its regulatory plan, in Online News Notice of Consultation 2024-55 (the Notice), published on 13 March 2024, the Commission sought comments on how it should oversee the mandatory bargaining framework, undue preference, discrimination and disadvantage complaints, and data collection. The record of the proceeding closed on 7 June 2024.

Interventions

6. The Commission received 46 interventions in response to the Notice, mainly from news businesses and news industry organizations.

Issues

7. After examining the record for this public proceeding, the Commission considered the following issues regarding the development of a policy framework under the Act:

    - the bargaining process;
    - undue preference, discrimination and disadvantage complaints; and
    - data collection.

Bargaining process

8. Only news businesses or a group of news businesses that have been designated as eligible under section 27 of the Act may initiate the mandatory bargaining process with an online

platform. As set out in subsection 19(1) of the Act, the full bargaining process includes a 90-day bargaining period, a 120-day mediation period and a 45-day final offer arbitration (FOA) period.[1]

90-day bargaining period

9. In the Notice, the Commission sought comments on its preliminary view that eligible news businesses or groups of eligible news businesses should be required to give notice of their intent to initiate mandatory bargaining by submitting a written package of information to both the online platform and the Commission. It also sought comments on the deadline for parties to establish a bargaining schedule.

Positions of parties

10. Rogers Media Inc. (Rogers), the Canadian Association of Broadcasters (CAB), News Media Canada (NMC), the Global Media & Internet Concentration Project (GMICP), and the National Campus and Community Radio Association/l'Association nationale de radios étudiantes et communautaires (NCRA/ANREC) supported the Commission's preliminary view.

11. The CAB submitted that the written package should include proposed mediators and arbitrators. It also indicated that there is no need for a deadline to agree on the bargaining schedule.

Commission's decisions

12. The Commission maintains its preliminary view. It therefore requires eligible news businesses or groups of eligible news businesses to give notice of their intent to initiate the mandatory bargaining process by submitting a written package of information to both the online platform and to the Commission, which must include the following information:

    - the name and contact information for the person(s) authorized to bargain on behalf of the news business(es);
        - for groups of news businesses, a list of all news businesses participating and an attestation that the representative(s) have written authorization to bargain on behalf of each news business. The written authorizations must be made available to the Commission upon request;
    - a list of the news outlets operated by the news businesses that are to be the subject of bargaining;
    - the date on which the 90-day bargaining period is to begin; and
    - a proposed schedule for bargaining activities that contains the following elements:

[1] See Appendix 2 for all relevant periods in the bargaining process.

- a determination of the initial information to be shared between parties;
- the sharing of initial information between parties;
- the initial proposals from each party;
- the responses (including reasons) to the proposals from each party;
- the counter-proposals from each party; and
- the responses (including reasons) to the counter-proposals.

13. The Commission considers that requiring parties to include a list of proposed mediators and arbitrators at the very outset of the bargaining process is not necessary. As explained below, in-house mediation by Commission staff will be the default method if parties do not agree to external mediation. The Commission will maintain a list of qualified arbitrators, as required by the Act, and if parties wish to propose additions to the list, they may do so following the procedures outlined in paragraph 45.

14. Further, no deadline should be established for parties to agree on the bargaining schedule. This will allow parties flexibility to adjust schedules throughout the bargaining period. The Commission reminds parties that bargaining must proceed as efficiently as possible given the statutory deadlines, though efficiency may look different for parties with different capacities.

120-day mediation period

15. In the Notice, the Commission sought comments on its preliminary views that (a) parties should be required to notify the Commission within 24 hours after the final day of the 90-day bargaining period if they are unable to reach an agreement; and (b) mediation should be facilitated by Commission staff based on the practices and procedures outlined in Broadcasting and Telecom Information Bulletin 2019-184 (the Bulletin).

Positions of parties

16. U Multicultural Inc. (UMI), NMC, the Canadian Broadcasting Corporation (CBC) and GMICP supported the Commission's preliminary views.

17. Rogers and the CAB suggested that parties should notify the Commission on the following business day, while the NCRA/ANREC suggested that parties should be given 48 hours to allow smaller news businesses more time to notify.

18. The CAB and NMC suggested that using external mediators should be an option and this should be agreed upon before the end of the 90-day bargaining period. Rogers agreed and further suggested that the Commission establish a list of qualified external mediators.

19. Canadian Association of Community Television Users and Stations (CACTUS) and the Forum for Research and Policy in Communications (FRPC) were of the view that Commission staff would favour large companies in mediation, and should not conduct

mediation for this reason. CACTUS, however, acknowledged that community broadcasters may not have the resources necessary to engage external mediators.

Commission's decisions

20. Under section 12 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (Rules of Procedure), when a deadline lands on a Saturday, Sunday, or federal holiday, the deadline is the next business day. While the Rules of Procedure do not apply to mandatory bargaining under the Act, the Commission considers it appropriate to follow the Rules of Procedure for calculating when notice is required.

21. The Commission determines that if parties are unable to reach an agreement, they must notify the Commission, and all other parties involved in the mediation process, by no later than 5 p.m. Vancouver time (8 p.m. Ottawa time) the next business day after day 90 of the bargaining period. Consistent with the Rules of Procedure, this should be understood as the next day that is not a Saturday, Sunday, or federal holiday. The Commission considers that this should provide enough time for parties to notify the Commission in cases where they are unable to reach an agreement.

22. To provide parties with flexibility, the Commission allows parties to choose external mediation if they both agree. The Commission notes that many arbitrators also offer mediation services. Therefore, parties could also use the list of arbitrators that the Commission must maintain as a resource for identifying potential mediators.

23. If both parties do not agree to external mediation, the mediation will, by default, be facilitated by Commission staff. The Commission already has established, effective mediation processes for disputes in the Bulletin. These mediation processes could be extended to the Act, with minimal adjustment.

24. Therefore, Commission staff-assisted mediation will be based on the relevant practices and procedures outlined in the Bulletin. In order to allow Commission staff time to prepare and manage its resources accordingly, parties must notify the Commission of their intentions to use Commission staff-assisted mediation or external mediation by day 75 of the 90-day bargaining period, if mediation is necessary.

45-day FOA period

25. In the Notice, the Commission sought comments on its preliminary view that parties should be required to notify the Commission, in writing, no later than 24 hours after the final day of the 120-day mediation period, if they have not reached an agreement.

Positions of parties

26. Interveners generally agreed with the Commission's preliminary view, and they shared the same concerns, about the length of the notification period as those mentioned in paragraph 17.

Commission's decisions

27. The 45-day FOA period follows immediately after the 120-day mediation period. To ensure that parties transition between phases as efficiently as possible, and consistent with the approach to notification at paragraph 21 above, the Commission determines that parties must notify the Commission that they have not reached an agreement by the next business day after day 120 of the mediation period, if parties are unable to reach an agreement. Notification must be received by the Commission and all other parties involved in the bargaining process by 5 p.m. Vancouver time (8 p.m. Ottawa time).

Roster of qualified arbitrators

28. In the Notice, the Commission asked several questions about the roster of qualified arbitrators. This included a proposed list of arbitrator qualifications, how it can ensure that Indigenous arbitrators are included on the roster, and how that roster can reflect the linguistic, racial and geographic diversity of Canada's population. The Commission also asked for comments on its preliminary view that a separate code of conduct for arbitrators is not necessary, and on whether the timeline of 60 days before the end of the mediation period would be acceptable for proposing additions to the roster of qualified arbitrators.

Positions of parties

29. While interveners generally agreed that the proposed list of qualifications[2] was complete and appropriate, some additions were proposed.

30. Rogers and the CAB suggested that arbitrators should be required to understand and analyze differences between markets in which the parties operate. The FRPC stated that additional clarity needs to be provided regarding the requirement that arbitrators be able to conduct an "efficient" and "effective" arbitration process.

31. Several interveners also addressed diversity. The Green Line Inc. (Green Line), which describes itself as a small, independent publisher, suggested that arbitrators should demonstrate an understanding and commitment to diversity, equity, and inclusion in the media landscape.

32. To ensure the roster includes Indigenous arbitrators, and qualified arbitrators that reflect linguistic, racial, and geographic diversity, Rogers, the CAB, and the NCRA/ANREC stated that the best solution would be to work with existing arbitration organizations to proactively seek out and identify qualified and representative arbitrators. Rogers noted that the Commission should ensure that it reaches out to Indigenous arbitrators in its communications when establishing the roster.

33. Interveners generally agreed with the Commission's preliminary view that creating a separate code of conduct for arbitrators was not necessary.

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[2] See appendix to Notice of Consultation 2024-55.

34. The ministère de la Culture et des Communications du Québec (MCCQ) expressed that there needs to be francophone arbitrators on the list, and that francophone, Quebec-based arbitrators should be appointed in FOAs involving Quebec-based, French-language news businesses.

35. Rogers and the CAB stressed that identification of potential arbitrators should begin early in the bargaining process so that parties can move forward with the identification of the arbitration panel in parallel.

36. Finally, NMC agreed that an appropriate deadline for proposing additions to the roster of arbitrators would be 60 days prior to the end of mediation. The CAB proposed that the Commission should add arbitrators to the roster no later than 60 days prior to the end of the mediation period, which would require proposing them even earlier in the mediation process.

Commission's decisions

37. The Commission considers that the requirement for arbitrators to be able to conduct efficient and effective arbitration communicates a general standard of competence in managing the arbitration process and does not require further clarification. Arbitrators will be able to demonstrate this by supplying application materials, which will be reviewed on a case-by-case basis.

38. The Commission concludes that the proposed list of arbitrator qualifications in the appendix to the Notice should be adopted without changes to the proposed qualifications.

39. The Commission will, however, add the following additional qualifications as assets:

    - Arbitrators should be able to understand and analyze differences between markets in which the parties operate.

    - Arbitrators should demonstrate an understanding of, and commitment to, diversity, equity, and inclusion in the media landscape.

40. These will be considered assets for arbitrators as they align with the Act's emphasis on diversity in news media, and could help parties in their selection of arbitrators. The list of qualifications for arbitrators is set out in Appendix 1 to this decision.

41. The Act includes some requirements around arbitrator conduct, and also provides penalties should an arbitrator disclose confidential information. Additionally, arbitrators are often already governed by separate codes of conduct administered by professional bodies. Therefore, the Commission maintains its preliminary view that a separate code of conduct for arbitrators is not necessary.

42. The Commission agrees that an outreach strategy in seeking arbitrators is required and, in creating one, it intends to leverage its existing outreach mechanisms, including its Indigenous outreach resources. This will help ensure the roster contains Indigenous

arbitrators and arbitrators that reflect the linguistic, racial, and geographic diversity emphasized in the Act.

43. The Commission also intends to collaborate with existing arbitration organizations to identify potential candidates for inclusion in the roster, though the final decision will remain with the Commission.

44. The Commission notes the importance of the linguistic profile of arbitrators, including Francophone arbitrators. However, the Commission highlights that the Act leaves the selection of arbitrators first to the parties. The Commission cannot impose additional selection parameters on parties. Where parties cannot agree, the Commission will appoint arbitrators to the panel, in which case it must take the parties' preferences into consideration.

45. Any party can propose an arbitrator for addition to the roster. If a party wishes to have a specific arbitrator available for selection in its own arbitration, that party should ensure the proposed arbitrator files application materials demonstrating that they meet the required qualifications no later than day 60 of the mediation period. This should provide sufficient time for the Commission to review the applications for addition to the roster while allowing parties adequate time to propose arbitrators of their preference.

46. Applications filed later than this may not be treated by the time the mediation ends and the arbitration period begins.

Scope of the FOA

47. Under subsection 19(3) of the Act, FOA is limited to "monetary disputes". In the Notice, the Commission asked what types of contractual clauses should be considered monetary or non-monetary. Additionally, the Commission asked what actions it could take to assist parties in resolving any non-monetary issues.

Positions of parties

48. Rogers suggested that the length of the agreement and audit rights must fall within the scope of the FOA as they relate directly to monetary value and compensation.

49. The CBC suggested that the Commission should assist parties in resolving any non-monetary issues by running its own form of mediation process, and framing the process using the factors set out in section 38 of the Act, which are flexible and encapsulate all types of value associated with making news content available online.

50. Finally, some interveners[3] suggested that the Commission can assist parties in resolving non-monetary issues by remaining vigilant in its oversight of the negotiations between news businesses and online platforms and in its consideration of whether online platforms are engaging in unjust discrimination or undue preference or disadvantage.

[3] Including GMICP, Rogers and the CAB.

Commission's decisions

51. The Act makes it clear that the scope of FOA is limited to monetary issues, meaning that all non-monetary issues will need to be agreed upon by parties outside of FOA. The Commission considers that monetary issues could include things other than simply the dollar value of the compensation provided for in the agreement, where there is a sufficient connection to that value, such as the length of an agreement, audit rights and payment schedules. Other elements of the agreement such as access to, and use of, audience data and labeling or branding measures for content would generally not have a sufficient connection and would be considered non-monetary.

52. The Commission acknowledges that although it has a limited role in the mandatory bargaining process, there is an opportunity for it to contribute to the resolution of non-monetary issues, for example through mediation. The criteria set out in section 38 of the Act, which consists of factors that an arbitration panel must take into account in making its decision, can serve as a guide for framing discussions during mediation and resolving non-monetary issues.

53. Certain non-monetary issues may also be brought before the Commission under section 52 of the Act in the context of undue preference and disadvantage complaints.

54. The Commission also reminds parties that a code of conduct will be established by regulation to govern the conduct of parties during the bargaining process, including with respect to information sharing, and may prohibit certain kinds of provisions in agreements.

FOA procedures

55. In the Notice, the Commission stated the importance of providing standardized procedures to ensure time is not unduly consumed with deciding procedures in every FOA. It sought comments on the following:

    - adapting the procedures outlined in the Bulletin to suit the Act's FOA period, including the timeline for the FOA process and the preliminary view that procedural guidance should be non-binding;

    - procedures and timelines for initiating FOA; and

    - procedures for arbitrators, including the sharing of confidential information and how to deal with the dismissal of offers.

Timelines and non-binding procedural guidelines

Positions of parties

56. Rogers, the CAB, and NMC proposed that specific timelines should be implemented for the FOA process. They suggested that these should include 15 business days to submit the offers, 5 business days to reply, and no more than 25 business days for arbitrators to issue their decision.

57. Further, numerous interveners, including Rogers, the CAB, NMC, the CBC, and the NCRA/ANREC, supported making the procedural guidelines for FOA non-binding, as it would promote efficiency and flexibility in the FOA process.

Commission's decisions

58. The Bulletin includes an existing FOA model that can be adapted to reflect the specifics of FOA under the Act. As such, the Commission determines that it should adopt the procedures set out in the Bulletin and adapt the timelines for the FOA process. Given the 45-day period set out in the Act for FOA, the Commission considers that parties would need to submit their offers by day 15, their replies by day 20 and the arbitration panel should issue its decision by day 45.

59. Further, the Commission maintains its preliminary view that the procedural guidelines regarding FOA will be non-binding. Giving non-binding guidance will provide clarity to parties, while remaining flexible enough for arbitrators to address the unique circumstances of each case.

Initiating FOA

Positions of parties

60. Many interveners stated that parties should begin coordinating FOA arrangements before the end of the mediation period, including determining scope, agreeing on arbitrators and making other administrative preparations. The CBC specifically proposed that if it is reasonably foreseeable that FOA will be necessary, then at the 100-day mark of the 120-day mediation period, both parties should begin coordinating FOA arrangements.

61. Rogers and NMC stated that the FOA period must begin on the next business day following the end of the mediation period to be consistent with the Act. The CBC and the CAB argued that the FOA period should only begin when one of the negotiating parties requests it.

62. Rogers and the CBC stated that parties should use the final 20 days of mediation to coordinate FOA arrangements, including the scope of monetary issues. Rogers and the CAB suggested that arbitrators must be selected before the start of FOA.

63. The CAB suggested that news businesses should propose a panel of arbitrators as part of their notice of intent to bargain. This would allow parties to move forward with the identification of the arbitration panel in parallel with the initial bargaining period and, if necessary, during mediation.

Commission's decisions

64. FOA cannot begin if an arbitration panel has not been selected. To avoid any delay in the FOA process, the selection of arbitrators should be made as early as reasonably possible.

65. To allow enough time to select an arbitration panel, when necessary, the Commission determines that the 100-day mark of the mediation period should be the deadline for the arbitration panel to be agreed upon by parties. If parties fail to agree on the panel by that

deadline, the Commission would appoint the arbitration panel in the remaining 20 days of the mediation period. This should give the Commission sufficient time to appoint a panel of arbitrators while respecting its statutory responsibilities to ensure there is no conflict of interest and that parties' preferences are taken into consideration.

66. Therefore, at the 100-day mark of the mediation period, parties using external mediators[4] that have not yet reached an agreement are to notify the Commission of:

    - the status of the mediation (i.e., whether they are close to an agreement); and
    - their intent to continue to FOA if no agreement is reached by the end of the 120-day mediation period.

67. Once parties have notified the Commission, parties are expected to begin preparing for FOA by:

    - adjusting the focus of the mediation to include preparation for the FOA process (with the help of the mediator); and
    - agreeing on the specific monetary issues to be addressed in the FOA, if necessary.

68. FOA begins the day after the end of the mediation period, unless both parties agree to extend mediation. This is consistent with the Act, which sets out a mandatory bargaining process with strict, legislated timelines. It is also consistent with the purpose of the Act to enhance fairness and contribute to the sustainability of the digital news marketplace, which is served by timely resolutions to bargaining.

69. Since the 45-day FOA period begins immediately following the end of mediation, there is a risk that parties who are not properly organized will have less time available to engage in FOA. Therefore, if parties notify of their intention to enter FOA late (i.e., beyond the 100-day mark), they will be expected to seek an extension to the 120-day mediation period at the same time, to ensure they have sufficient time to prepare for FOA.

Procedures for arbitrators

Position of parties

70. Rogers and the CAB suggested that the Commission can assist arbitrators by providing them with any additional information relevant to the case, at either their request or that of the parties. However, they also emphasized that it is the responsibility of the arbitrators to conduct their own analysis of proposals, and all supplementary data presented by the parties before coming to a decision, and not the responsibility of the Commission.

71. Most interveners supported the use of a non-disclosure agreement between the parties and the arbitrators to ensure that the information exchanged remains confidential. However,

[4] These notification guidelines do not apply to parties using Commission staff-assisted mediation, as the Commission will be aware of the status of mediation for those parties.

GMICP suggested that the Commission should encourage more measures to increase transparency within the FOA process so that Canadians can be better informed of the state of Canada's digital news marketplace.

72. With respect to the Commission's question in the Notice on what should happen if arbitrators reject both parties' offers, no interveners supported the idea of having a new 45-day FOA period. However, the idea of a new FOA period limited to 15 days was supported by NMC and the CBC.

73. Rogers cautioned against additional FOA periods and suggested that arbitrators should be required to choose one of the parties' offers unless both offers meet one or more of the criteria for dismissal under subsection 39(1) of the Act.

74. Finally, the CAB suggested that the Commission should leave the protocol following dismissal of offers from both parties up to the arbitrators in each case.

Commission's decisions

75. Section 36 of the Act allows the Commission to provide administrative and technical assistance to arbitration panels upon request. It may also share information with the panel, including information that has been designated as confidential under the Act. Given that the qualifications for arbitrators include the ability to conduct FOA efficiently and effectively, the Commission considers that administrative and technical assistance should generally not be necessary. Rather, the Commission's assistance should be limited to sharing additional information necessary to the arbitration panel's decision-making process when requested by the panel.

76. A party that believes that the Commission should provide additional information to the panel should make its case to the arbitration panel, which could then make the request to the Commission, if it agrees.

77. Regarding the protection of confidential information, the proposed Code of Conduct[5] that the Commission is mandated to establish by regulation would establish additional rules for protecting confidential information provided to parties through FOA. Arbitrators are also required by the Act to take steps to maintain the confidentiality of information received from the Commission. Nevertheless, it is open to parties to sign a non-disclosure agreement if they choose and to seek arbitrators who are also willing to do so.

78. While the arbitration panel should ensure a just and expedient resolution of the FOA process, the Act requires an arbitration panel to dismiss offers that meet the criteria set out in subsection 39(1) of the Act. In the unlikely event that both offers are rejected, the Commission considers that this should not automatically result in the beginning of a new 45-day FOA period, as such a doubling of the time for FOA would not be in keeping with the Act's emphasis on rapid resolutions to bargaining. The panel of arbitrators would be in the

[5] At the time the interveners filed comments, the proposed Code of Conduct had not yet been published for comment.

best position to determine how to proceed without unnecessary delay, and should be responsible for establishing further procedures for submitting new offers.

Undue preference, discrimination and disadvantage complaints

79. Section 51 of the Act restricts online platforms, when making news content available, from acting in a way that unduly discriminates against an eligible news business, subjects an eligible news business to an unreasonable disadvantage, or gives an undue preference to any party. Under subsection 52(1) of the Act, only news businesses that have been designated as eligible by the Commission may make such complaints. If an eligible news business can demonstrate a preference, discrimination or disadvantage, section 68 of the Act shifts the responsibility to the platform to demonstrate that it is not undue, unreasonable or unjust. The Commission must consider the factors in subsection 52(2) of the Act when deciding whether discrimination, preference or disadvantage is undue, including whether it was in the normal course of business, retaliatory, or consistent with the purposes of the Act. The Commission can also consider any other relevant factor.

80. In the Notice, the Commission sought comments on whether it should provide guidance on the specific types of actions that would constitute undue preference, disadvantage or discrimination. It also asked what additional factors beyond those listed in subsection 52(2) of the Act the Commission should consider when making its decision.

Positions of parties

81. Most news businesses suggested that the Commission should not try to predict what complaints might be raised or what types of actions would represent undue preference, disadvantage or discrimination that would be prohibited.

82. Other interveners[6] suggested that the Commission could provide non-exhaustive guidance on the scope of undue preference.

83. Conversely, Google suggested that the Commission should issue a full list of prohibited actions so it can govern its actions accordingly and avoid dealing with complaints that are unlikely to be successful. It also argued that content ranking decisions intended to be responsive to user preferences or elevate trustworthy sources of information should not be considered undue preferences.

84. Interveners suggested the following behaviours could be examples of undue preference:

    - reducing the value, attractiveness or discoverability of news content in order to reduce payments;

[6] Including the CBC, GMICP, the FRPC, and le Conseil provincial du secteur des communications du Syndicat canadien de la fonction publique (CPSC-SCFP).

- actions prohibited by the ‘non-differentiation’ provisions of the Australian *News Media and Digital Platforms Mandatory Bargaining Code*;[7]

- recouping regulatory fees or levies from news businesses;

- denying some businesses access to data that other businesses receive; and

- discriminating against French-language publications.

85. Rogers, the CBC, and Channel Zero Inc. (Channel Zero) suggested not limiting the factors that the Commission might consider related to undue preference, at this time, as the Commission has not dealt with these issues before.

86. Google stated that the Commission should consider whether content is made available in a manner responsive to users, and suggested there should be proof of an intent to discriminate against a news business. In response, the FRPC replied that establishing proof of intent would require evidence that is unlikely to be available to news businesses.

Commission’s decisions

87. The Commission considers that providing general guidance would help online platforms govern their own actions and could limit complaints with no prospect of success from eligible news businesses. Every case, however, must be assessed on its facts. At this point, the Commission is not prepared to prohibit specific actions or exclude them from the scope of section 51 of the Act.

88. The Commission acknowledges that ranking and suggesting content is the core function of search engines and a main function for most social media networks. Rankings, and changes in rankings based on users’ interests, are part of the ordinary course of business for platforms. This could make certain types of complaints, including those based on the content's language, difficult to substantiate. Although, a case of French-language news content not being made readily available to francophone users, for instance, could bear closer examination.

89. Further, where differential treatment unduly disadvantages or discriminates against eligible news businesses, because it could be retaliatory or inconsistent with the purpose of the Act, it could be within the scope of section 51 of the Act.

90. The following are non-exhaustive examples of actions that could, in the Commission’s view, create undue preference, unjust discrimination, or unreasonable disadvantage:

- ranking or otherwise treating a news business’s content differently based on whether the news business participates in the mandatory bargaining process (e.g., favouring content from news businesses that have not sought compensation under the Act); and

[7] These generally prohibit treating a news business differently than others based solely on its participation in the statutory remuneration regime.

- providing news businesses with differing access to data, such as allowing some news businesses more detailed information on how many users their content reached.

91. In undue preference proceedings, the Commission generally considers outcomes rather than the intent of the parties. Evidence of intent may help differentiate the normal course of business from retaliatory action, but the timing or scale of an impact could support a finding of undue preference even without evidence of intent. Based on this, evidence of intent to discriminate would be relevant but would not be required.

92. With respect to factors beyond those listed in subsection 52(2) of the Act, parties that wish to do so may raise additional factors for the Commission's consideration during disputes.

Data collection requirements

93. Section 53 of the Act grants the Commission the ability to collect information from online platforms and news businesses where it requires the information to perform its duties. This could include collecting data even if an online platform has received an exemption from mandatory bargaining. As such, the Commission may require data to verify that the appropriate online platforms are included on its list of digital news intermediaries, to assess applications for exemption, and to provide data for the independent auditor's annual report.

94. In the Notice, the Commission sought comments on the data it should collect in order to perform its duties under the Act, including:

    - whether all agreements between online platforms and news businesses regarding compensation for making news content available should be automatically filed with the Commission;

    - the data online platforms should be required to provide;

    - the data eligible news businesses should be required to provide;

    - the data news businesses that have not been designated as eligible should be required to provide; and

    - the types of data required for the calculation of newsroom expenditures.

Filing agreements with the Commission

Positions of parties

95. Most interveners considered that all agreements negotiated under the Act, or the Regulations, should be automatically filed with the Commission. Conversely, CACTUS stated that although the Commission may request agreements, it should not be necessary for all agreements to be filed automatically.

96. Google, the CAB, and the FRPC added that those agreements should be treated as confidential.

Commission's decisions

97. The Commission notes that, to ensure an independent auditor can prepare a fulsome annual report on the Act's impact on Canada's digital news marketplace in accordance with section 86 of the Act, the auditor must have access to all agreements reached under the Act.

98. Additionally, section 55 of the Act allows parties to designate certain information they submit to the Commission as confidential. In Online News Information Bulletin 2024-115, the Commission explains the procedures for parties to submit sensitive information in confidence.

99. The Commission determines that all agreements reached under a process set out in the Act or the Regulations must be automatically filed with the Commission. Parties may designate information confidential at that time.

100. Agreements that are entered into outside a process set out in the Act or the Regulations could still be relevant to the Act's impact on Canada's digital news marketplace. For example, an agreement between a platform regulated under the Act and a news business that has not been designated eligible might be a relevant comparison. However, the Commission considers that there is no need for such agreements to be filed automatically. The Commission will make specific requests for such agreements as needed under section 53 of the Act.

Data from online platforms

Positions of parties

101. Google suggested that the Commission should seek aggregate information from online platforms with respect to total expenditures on agreements.

102. Other interveners suggested various data that online platforms should be required to provide to the Commission. Rogers and the CAB recommended collecting the number of agreements, the average remuneration on a full-time equivalent (FTE) basis, and the total monetary value of agreements. NMC suggested that the number of agreements, the types of businesses involved, and the aggregate value of agreements should be gathered, while the Conseil provincial du secteur des communications du Syndicat canadien de la fonction publique (CPSC-SCFP) added that the amount each outlet will receive, the financial contributions by media type, and a description of any non-financial contributions would be useful.

103. Green Line stated that diversity, equity, and inclusion information should be collected. Channel Zero added that information about any rejected attestations during an open call process[8], along with a rationale as to why the attestation was not accepted, should be collected.

[8] Online platforms seeking an exemption are required, by subsection 4(1) of the Regulations, to conduct an open call for attestations from news businesses that wish to receive compensation from the platform.

Commission's decisions

104. For the independent auditor to create a comprehensive report, the Commission will collect information directly from online platforms regarding the number of agreements signed, the monetary value of agreements, and the names of news businesses covered by those agreements. The Commission will create and make available standard forms that generally collect this information at a disaggregated or individual news business level. The Commission intends to publish information at the aggregate level to preserve the confidentiality of the remuneration paid in specific cases.

105. The Commission notes that the independent auditor may require additional information from online platforms to prepare the annual report in respect of the impact of the Act on the Canadian digital news marketplace. If necessary, additional information from online platforms will be collected by the Commission.

Data from news businesses

Positions of parties

106. Rogers, Channel Zero and the CAB stated that the Commission already has a detailed view of news expenditures in the broadcasting system through broadcasting annual reports and that non-broadcast news businesses should be subject to the same reporting requirements. Channel Zero and the CAB indicated that data should not be collected from ineligible news businesses, while Rogers cautioned against collecting any data that is not relevant to the administration of the Act.

107. CACTUS was of the view that information should be collected from all news businesses that responded to Google's open call and stated that commercial and community newsroom expenditures should not be compared with one another. CPSC-SCFP said that information collection should maintain the same level of detail each year. Finally, Green Line requested that diversity, equity, and inclusion data be included in information gathered from news businesses.

108. Google and the NCRA/ANREC, supported by the FRPC, indicated that ineligible news businesses should provide some information and that this information should be on geographic areas served, nature of content, and reasons why they were designated ineligible. The FRPC further submitted that the Commission should define "fairness" and "sustainability" since those terms are used in the Act.

Commission's decisions

109. Under section 53 of the Act, the Commission may collect information from any news business, whether it has been designated as eligible or not. However, the Commission wishes to avoid unnecessary administrative burdens on news businesses.

110. As a result, the Commission will generally only collect detailed information from news businesses participating under the framework of the Act and Regulations. This information will provide the Commission with a fulsome understanding of those news businesses. The

data points will generally respond to the required contents of the auditor's report set out in section 86 of the Act.

111. News businesses can be designated as eligible to engage in mandatory bargaining by filing an application under section 27 of the Act. Under the Regulations, news businesses that could be eligible, even if they have not been designated as eligible, are able to attest to a platform that holds an open call and receive compensation in that way.

112. With the above in mind, the Commission determines that news businesses that have been designated as eligible, and those that have responded to the platform's open call and whose attestations were accepted, are to provide information directly to the Commission regarding newsroom expenditures, their number of full-time journalists, the number of FTE employees who are engaged in the production of news (other than journalists), the amount of funding received because of the Act, and the number of volunteer hours accumulated annually.

113. These news businesses are also to provide information related to diversity, equity and inclusion, as well as geographic and language groups so the independent auditor can accurately assess the impact of the Act on all regions and communities identified in section 86 of the Act. The Commission will create and make available standard forms to collect this information and will seek the input of the independent auditor to determine the data points associated with diversity, equity, and inclusion.

114. The Commission is of the view that a fulsome picture of all news businesses that were interested in participating under the framework of the Act and the Regulations is also important in understanding the impact of the Act on the digital news marketplace in Canada. However, for businesses not receiving compensation, this information can be less detailed. Therefore, in cases where a news business responds to an online platform's open call and its attestation is rejected, the news business must provide its name and the name of its news outlets, the geographic market(s) it serves, the nature of the news content it produces, and the reason(s) its attestation was rejected by a platform, if these are known.

115. In cases where a news business submits an application to be designated as eligible to the Commission and is denied, the Commission will have information on these news businesses as part of their eligibility applications, so collecting further information is not necessary.

116. News businesses that did not come forward with an attestation during an online platform's open call and have never applied for eligibility will not be required to provide any information to the Commission on an annual basis.

117. As with data from online platforms, the independent auditor may require additional information from news businesses to prepare the annual reports and this will be collected as needed.

Newsroom expenditures

Positions of parties

118. The CAB suggested that information on technical and equipment costs should be collected in addition to what broadcasters already report. It argued that the definition of newsroom expenditures should be broad, but not include volunteer labour. La Fédération des télévisions communautaires autonomes du Québec had a similar view and stated that many expenditures related to news production, such as those associated with camera operators and editors, should be included.

119. The FRPC suggested that newsroom expenditures should be kept separate from employment expenditures to avoid larger news businesses being able to show they have higher expenditures, which in turn could put smaller news businesses at a disadvantage. The CBC and NMC stated that data should be limited to newsroom salaries and compensation, while the NCRA/ANREC and CACTUS said that volunteer journalists should be factored into the calculation.

Commission's decisions

120. Information relevant to newsroom expenditures is to be included in the independent auditor's annual report. The Commission notes that newsroom expenditures may vary widely from one news business to another, and smaller news businesses may find it onerous to provide up-to-date information on newsroom expenditures if the Commission collects a large number of very specific data points.

121. The Commission notes that it could be difficult to assess commercial and community newsroom expenditures using separate criteria. Further, volunteers are not compensated financially. In the Commission's view, there is no need to include volunteers directly in the reporting of newsroom expenditures. However, if an organization incurs expenses related to the management or training of its volunteers, it is reasonable that those costs be included in total newsroom expenditures.

122. The information collected from broadcasting and non-broadcasting entities under the Act, as well as the forms to be developed for this purpose, should mirror what is found in the broadcasting annual returns to the extent possible for consistency and to streamline the reporting requirements. The Commission determines that the following news-related information is to be included in total newsroom expenditures:

- salaries, management, and costs of journalists and other employees who are engaged in the production of news (including personnel costs related to training and managing volunteers);

- programming and/or production (expenses related to producing news such as freelancer payments or wire services subscription, but excluding journalist salaries captured above);

- technical expenditures (expenses related to equipment and other technical costs for gathering and distributing news, such as website hosting or studio equipment);

- sales and promotion (expenses related to sales of ads and subscriptions, such as sales commission and promotional costs); and

- administration and general (other overhead expenses, such as licensing fees, cost of premises, and professional services).

123. These categories mirror those used in the broadcasting annual returns process, so broadcasters can submit the portion of those expenses that relate to creation of news.

Secretary General

Related documents

- *Guidance on practice and procedure under the* Online News Act, Online News Information Bulletin CRTC 2024-115, 27 May 2024

- *Call for comments – Framework under the* Online News Act *(formerly Bill C-18),* Online News Notice of Consultation CRTC 2024-55, 13 March 2024

- *Practices and procedures for dispute resolution,* Broadcasting and Telecom Information Bulletin CRTC 2019-184, 29 May 2019

Appendix 1 to Online News Regulatory Policy CRTC 2024-327

List of qualifications for arbitrators

Arbitrators for the Commission's roster of qualified arbitrators under the *Online News Act* must:

- Be able to conduct an efficient and effective arbitration process.
- Adhere to a recognized code of ethics for arbitrators in Canada or be a member of the Bar of one of the provinces or territories of Canada.
- Not disclose information designated as confidential under the *Online News Act*.
- Attest that they have familiarized themselves with the *Online News Act*.

Arbitrators must possess:

- Superior procedural skills and in-depth understanding of rules of procedure.
- A superior understanding of the rules of evidence including the ability to understand, interpret, and use complex technical and financial evidence presented by experts.
- An in-depth understanding of the rules of natural justice.
- The ability to deal with preliminary matters, which may include directions on pleadings and disclosure of evidence, interrogatories, and determination of the necessity for witnesses or experts.
- The ability to maintain appropriate working relationships between the parties in an adversarial atmosphere.
- The ability to organize and analyze quantitative and qualitative information.
- The ability to render independent and impartial decisions, as well as clearly explain, orally and in writing, the reasons behind them – all with due regard for tight time frames.
- The ability to maintain accurate records of all proceedings.

In addition, the following will be considered an asset:

- knowledge of economics;
- understanding of online advertising, marketing analytics, and data monetization;
- knowledge of competition law and policy;

- knowledge of information technology law;
- the ability to work with financial statements and an accounting/financial background;
- training or certification in arbitration;
- the ability to understand and analyze differences between markets in which the parties operate;
- an understanding of, and commitment to diversity, equity, and inclusion in the media landscape;
- willingness to travel; and
- bilingualism in Canada's official languages.

The above-noted competencies and skills will be demonstrated by experience and qualifications that meet the following:

At least 10 years of experience doing complex commercial litigation or dispute resolution, which must include:

- complex issues with significant dollar amounts or important principles at stake;
- areas where complex evidence of a technical or financial nature is presented by experts. Such areas include, but are not limited to, competition law, information technology law, copyright law, and commercial law; and
- where the candidate has no work experience as an arbitrator, judge or tribunal member, arbitration training and certification will be considered essential.

Or

Experience as a judge of a superior court who has presided over commercial cases or dealt extensively with commercial cases involving complex technical or financial evidence provided by experts.

Or

Experience as an adjudicative tribunal member or counsel involved in revenue, price- or rates-setting hearings.

Other requirements

- Adequate insurance to cover potential liabilities (minimum $1,000,000).
- Disclosure of conflicts of interest and information on potential bias.

- Disclosure of fees.
- Availability on short notice.

Voluntary declaration

A candidate who identifies as an Indigenous person may provide a voluntary declaration to that effect.

Appendix 2 to Online News Regulatory Policy CRTC 2024-327

Procedural guidelines

In this appendix, the Commission sets out guidelines for the practices and procedures relating to the three stages of the bargaining process.

90-day bargaining period

Eligible news businesses or groups of eligible news businesses are required to give notice of their intent to initiate the mandatory bargaining process by submitting a written package of information to both the online platform and to the Commission, which must include the following elements:

- name and contact information for the person(s) authorized to bargain on behalf of the news business(es);
    - for groups of news businesses, a list of all news businesses participating and an attestation that the representative(s) have written authorization to bargain on behalf of each news business. The written authorizations must be made available to the Commission upon request;
- a list of the news outlets operated by the news businesses which are to be the subject of bargaining;
- the date on which the 90-day bargaining period is to begin; and
- a proposed schedule for bargaining activities which contains at least the following elements:
    - a determination of the initial information to be shared between parties;
    - the sharing of initial information between parties;
    - the initial proposals from each party;
    - the responses (including reasons) to the proposals from each party;
    - the counter-proposals from each party; and
    - the responses (including reasons) to the counter-proposals.

Unless both parties agree to external mediation, it will, by default, be facilitated by Commission staff. Parties that instead agree on an external mediator should notify the Commission by day 75 of the 90-day bargaining period.

120-day mediation period

When parties are unable to reach an agreement during the 90-day bargaining period, they must notify the Commission, and all parties involved in the mediation process, by no later than 5 p.m. Vancouver time (8 p.m. Ottawa time) the next business day after day 90 of the bargaining period. Consistent with the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (Rules of Procedure), this should be understood as the next day that is not a Saturday, Sunday, or federal holiday.

If a party wishes to have a specific arbitrator available for selection in its own arbitration, that party should ensure the proposed arbitrator files application materials demonstrating that they meet the required qualifications no later than day 60 of the mediation period.

By day 100 of the 120-day mediation period, parties using external mediators that have not yet reached an agreement must notify the Commission of:

- the status of the mediation (i.e., close to an agreement or not); and
- their intent to continue to final offer arbitration (FOA) if no agreement is reached by the end of the 120-day mediation period, whether they have agreed on an arbitration panel and, if not, their preferences.

If parties notify the Commission of their intention to enter FOA beyond the 100-day mark they are expected to seek an extension of the 120-day mediation period at the same time, to ensure they have sufficient time to prepare for FOA.

Once parties have notified the Commission, it will be expected of parties that they begin preparing for FOA by:

- adjusting the focus of the mediation to include preparation for the FOA process (with the help of the mediator); and
- agreeing on the specific monetary issues to be addressed in the FOA, should it be necessary.

Further, by day 100 of the 120-day mediation period, parties should have agreed on the arbitration panel. Should parties not agree by that date, the Commission will appoint the arbitration panel between day 101 and the final day of the mediation period (day 120).

For Commission staff-assisted mediation, where full resolution cannot be achieved, Commission staff will attempt to reduce the number of contentious issues in order to clearly identify those that may need to proceed to arbitration. The criteria set out in section 38 of the *Online News Act* (the Act), which consists of factors that an arbitration panel must take into account in making its decision, can serve as a guide for framing discussions during mediation and resolving non-monetary issues.

Commission staff-assisted mediation may be conducted through direct telephone conversations, conference calls, in-person meetings, or a combination of these methods. During mediation,

Commission staff will assist parties in arriving at a consensual resolution by facilitating communication and exchanges, and by focusing the parties on the issues under dispute. As it is generally in the best interests of the parties to advance in a timely manner towards resolving the dispute or components of the dispute, Commission staff may establish time limitations, having regard to the timelines set out in the Act and this policy.

When a Commission staff-assisted mediation process has been terminated without resolution of all identified issues, Commission staff may, if all parties agree, issue a Staff Mediation Report setting out any outstanding issues. Provided that all parties give their consent, that report may form part of the record for consideration in FOA.

45-day FOA

When parties are unable to reach an agreement during the 120-day mediation period, they should notify the Commission, and all parties involved in the arbitration process, by no later than 5 p.m. Vancouver time (8 p.m. Ottawa time) the next business day after day 120 of the mediation period. Consistent with the Rules of Procedure, this should be understood as the next day that is not a Saturday, Sunday, or federal holiday.

Deadlines for the FOA period include:

- by day 15 of the FOA period, parties should submit their offers;
- by day 20 of the FOA period, parties should submit their replies to the arbitration panel; and
- by day 45 of the FOA period, the arbitration panel should issue its decision.

The notification should set out the proposed scope of the proceeding (i.e., the monetary issues for which a determination is requested) and include a concise statement of the facts and issues.

The Commission expects that, prior to a request for FOA, parties will have discussed the scope of the proceeding, including their expectations regarding the duration and rate structure (i.e., fixed, variable, percentage, etc.) of any proposed solution. The parties may request the assistance of Commission staff in this discussion during the mediation period, should such assistance be necessary.

A party that believes that the Commission should provide additional information to the panel should make its case to the arbitration panel, which could then make the request to the Commission if it agrees.

It is open to parties to sign a non-disclosure agreement if they choose and to seek arbitrators who are also willing to do so.

While the arbitration panel should ensure a just and expedient resolution of the FOA process, the Act requires an arbitration panel to dismiss offers that meet the criteria set out in subsection 39(1) of the Act. In the unlikely event that both offers are rejected, this should not automatically result in the beginning of a new 45-day FOA period. The panel of arbitrators would be in the best

position to determine how to proceed without unnecessary delay, and should be responsible for establishing further procedures for submitting new offers.

The arbitration panel may provide further direction to the parties on the conduct of the arbitration as necessary.