



Also submitted via online form

2 October 2023

Amy Awad
Director General
Digital and Creative Marketplace Frameworks Branch
Department of Canadian Heritage
25 Eddy Street
Gatineau, Quebec
K1A 0M5
reglementsnouvellesenligne-onlinenewsactregulations@pch.gc.ca

Re: Canada Gazette, Part I, Volume 157, Number 35: *Regulations Respecting the Application of the Online News Act, the Duty to Notify and the Request for Exemptions* (Posted 2 September 2023)

As the national voice of small, medium and large Canadian privately-owned and controlled radio, television and discretionary broadcasters, both independent and vertically integrated, including services operating under 9.1(1)(h) distribution orders, the Canadian Association of Broadcasters (CAB) is pleased to provide its comments on the proposed *Regulations Respecting the Application of the Online News Act, the Duty to Notify and the Request for Exemptions* (the proposed Regulations).

The CAB understands that the key objectives of the proposed Regulations are to provide specific criteria for determining which platforms are subject to the legislation and how they must notify the Commission – and interested parties – that the *Online News Act* (the Act) applies to them, and to establish more clearly what it will take for digital platforms to be exempt from the obligation to participate in mandatory bargaining before the CRTC.

Having reviewed the proposed regulations and consulted with its members, the CAB wishes to raise four key considerations:

1. How can we be assured that a full range of news businesses are able to negotiate voluntary agreements before a digital platform will qualify for exemption, and that private radio and television broadcasters, both large and small, cannot be left out;
2. Does the proposed “bargaining imbalance test” properly scope platforms in or are the thresholds too high or too specific;
3. Is the proposed formula (including the proxy for Canadian revenue) appropriate to ensure meaningful contribution to the sustainability of the Canadian news marketplace; and
4. Is the “fair compensation” formula fair and is the number of full-time equivalent journalists the most appropriate metric.

We have also proposed some wording changes to the proposed Regulations, in Appendix 1.

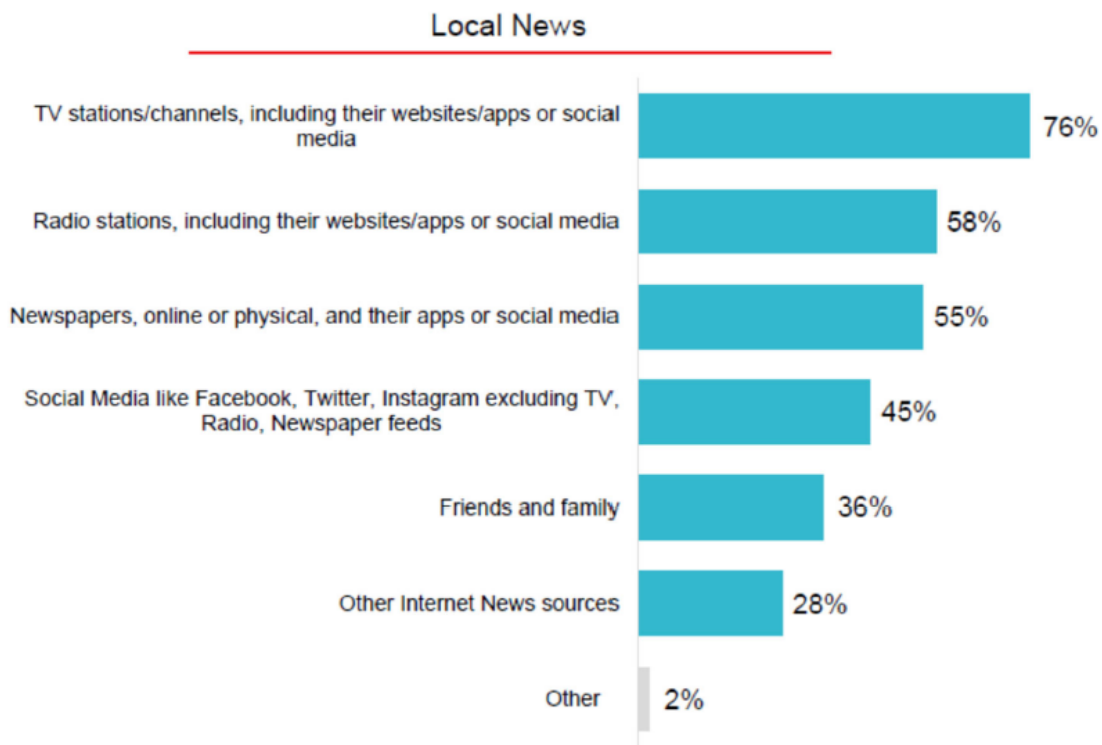
Ensuring private (for-profit) broadcasters cannot be scoped out

Although the Act and the preamble to the draft regulations speak of platforms having to make deals with a **diversity of news businesses** – including for-profit/not-for-profit, independent local news providers, and Indigenous and OLMC news businesses – nothing in the proposed Regulations specifically recognizes the need to make deals with private radio and television news businesses as a necessary precondition for exemption.

Before a digital platform can be exempt from the mandatory bargaining regime envisioned in the Act, it must come to voluntary agreements with a wide range of news businesses and contribute to the sustainability of the Canadian news marketplace. In our view, this means that platforms cannot be exempt until they have come to voluntary agreements with the most important contributors to the Canadian news ecosystem, namely private radio and television broadcasters.

According to a survey undertaken by Solutions Research Group in 2021, television (76%) and radio (58%) are Canadian’s most important sources for local news.

Sources for local news, Canadians 12+, December 2020 - January 2021:

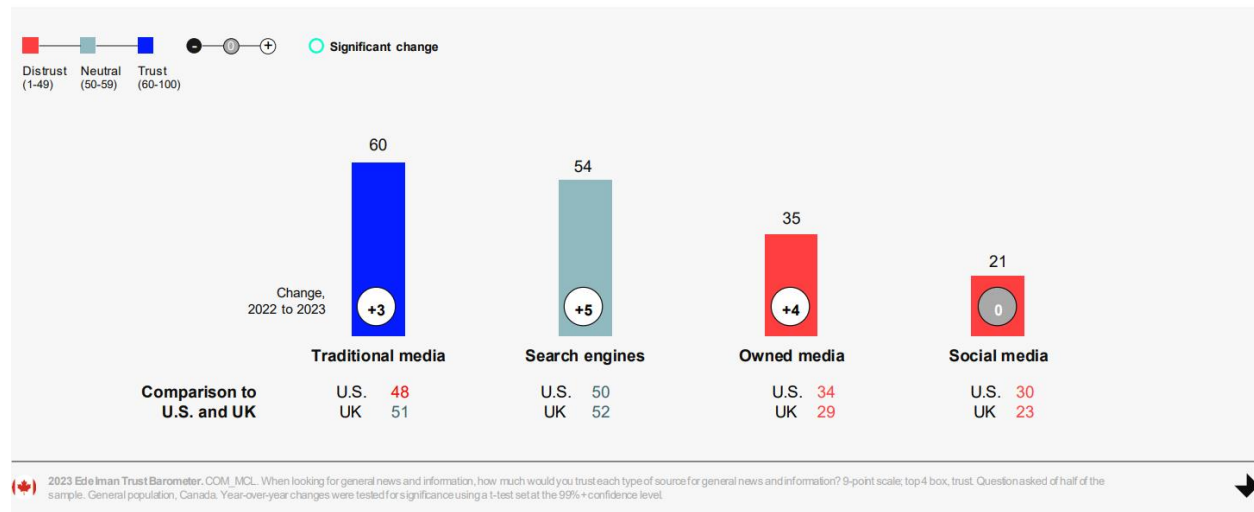


SOURCE: Solutions Research Group.

Traditional media are also the most trusted news source in Canada, as demonstrated in the [2023 Edelman Trust Barometer](#) and set out in the following chart:

Traditional Media Only Trusted News Source in Canada

Percent trust, in Canada



In terms of expenditures on news, research undertaken by Communications Management Inc. (attached as Appendix 2) demonstrates that private television broadcasters are the highest spenders on news, followed by newspapers. While private radio stations (as a group) may spend less than other news businesses, they are often the only source of local news in their markets, and many provide important local and community news and information services via the Internet.

While the proposed regulations provide a degree of certainty to independent (defined as a news business that operates five or fewer news outlets), Indigenous, and official language minority community news businesses through conditions requiring platforms to have reached agreement with any collective that contains a certain number of such businesses, no similar assurance is in place for private radio and television businesses or groups (collectives) that represent them.

Digital platforms cannot be exempt from mandatory bargaining until they have signed agreements with a range of private radio and television broadcasters, or a group (or groups) that represents them. Therefore, we recommend that a condition be added to ensure that the “checklist” for exemption explicitly includes private radio and television broadcasters, or at least ensures the value of their contributions to the news ecosystem cannot be ignored.

There are a number of different options for implementing this recommendation. The challenge is finding a metric that ensures the key providers of news in Canada are captured, without unintentionally excluding radio and television stations in smaller markets who are often the most important providers of news to those communities.

It is for this reason that the CAB intends to support its members who wish to bargain collectively as this appears to be the model favoured by the proposed Regulations, and the one most likely to be successful for the bulk of our membership.

Even so, the CAB believes there should be a specific clause to ensure that platforms sign deals with the most important providers of news in Canada before they can be exempt, and, therefore, the CAB recommends that platforms be required to sign voluntary agreements with every eligible news business or any collective bargaining group employing 100 or more journalists in Canada excluding Quebec and in Quebec, 25 or more journalists, with “journalists” defined as described below.

Requiring platforms to make agreements with the largest employers of journalists in the Canadian news marketplace will ensure the condition set out in subsection 11(1)(a)(vi) is met and that the most important providers of local news (including Canadian radio and television stations) are not scoped out before the platforms are exempt from mandatory bargaining.

Bargaining imbalance text

Under the proposed regulations, digital platforms that meet all of the following thresholds would be subject to the framework. This is referred to as the “bargaining imbalance test”:

- Earn a total global revenue of Can\$1 billion or more in a calendar year.
- Operate in a search engine or social media market involving the distribution and access of online news content in Canada.
- Operate in a strategic market identified above and has 20 million or more average monthly unique visitors in Canada or average monthly active users in Canada.

At the moment, this definition would currently include only Meta and Google even though there are other platforms that benefit from the distribution of news content and are negatively impacting news businesses in Canada. For example, Apple provides a news aggregator app for free with its products and a paid subscription-based service Apple News+ which provides access to magazines, newspapers and digital publishers. Services like Apple News+ are neither search nor social and would thus be scoped out even before considering their global revenue or monthly reach. The CAB believes that such services should be scoped into the framework, rather than excluded up front.

As a result, the CAB recommends a slight amendment to the criteria, as follows:

- Earn a total global revenue of Can\$1 billion or more in a calendar year.
- Operate in a search engine or social media market involving the distribution and access of online news content in Canada, **or otherwise aggregate online news content.**
- Operate in a strategic market identified above and has 20 million or more average monthly unique visitors in Canada or average monthly active users in Canada.

Fair compensation and the definition of “journalist”

Under the proposed Regulations, to be considered fair, compensation would have to be within 20% of the average relative compensation of all agreements, with average relative compensation defined as *“the ratio of compensation relative to the number of full-time equivalent journalists paid by a news business or group of news businesses, as the case may be, in the previous calendar year.”*

While the CAB understands that the objective is to find a reasonable proxy for determining whether agreements are fair, we note that there are a variety of definitions of journalist, none of which properly encompass the very real costs associated with the production of *audio and audiovisual* news content, which also include camera operators, sound technicians, audio and/or video editors, and so on.¹

As a result, we believe that any consideration of fair compensation must take into consideration a broader definition of journalist.

Starting with the definition used for the purposes of the *Canadian journalism tax credit* as a model, the CAB proposes the following definition of journalist:

A full-time employee or a full-time equivalent employee of a eligible news business or its subcontractors, where the eligible news business adheres to Canadian journalistic codes and standards, that spends at least 75% of their time engaged in the production of original news content, including researching, collecting information, verifying facts, conducting interviews, photographing, filming, recording, writing, editing, video-editing, audio-editing, designing, assembling, and otherwise preparing, delivering and/or presenting original news content.

Sustainability test

Under the proposed Regulations, the CRTC would apply a test to determine whether voluntary agreements sufficiently contribute to the sustainability of the Canadian news marketplace. This test takes the global revenues of the digital platform/intermediary, multiplies it by Canada's relative share of world GDP and then by 4% (deemed to be reasonable compensation).

The CAB is of the view that 4% is a reasonable rate. Our only concern is whether the proxy for Canadian revenue would completely capture the actual revenue that digital platforms receive from Canada. On that note, we understand that the proposed *Digital Services Tax* legislation does not include a definition of Canadian revenue.

We recommend that platforms be deemed to have achieved a reasonable compensation level if the total value of their voluntary agreements is the greater of the formula proposed in the proposed Regulations or 4% of their *actual* Canadian revenue. CAB has also proposed amendments to the wording in the proposed Regulations (at Appendix 1) to ensure that the calculation of global revenue properly encompasses the platform's total revenue, including any related or affiliated companies.

¹ Statistics Canada's [National Occupation Classification](#), for example, separates editors from journalists, and does not include the actual range of personnel involved in broadcast journalism.

Mandatory review period

Given the rapid pace of change in the industry, and the importance of these regulations in determining whether platforms must negotiate with Canadian news businesses, the CAB urges the Government to institute a formal revenue period of three years from the date of the regulations coming into effect.

All of which is respectfully submitted.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Desjardins', with a stylized flourish at the end.

Kevin Desjardins
President
Canadian Association of Broadcasters

Appendix 1 – Proposed amendments to the draft Regulations

Regulations Respecting the Application of the Online News Act, the Duty to Notify and the Request for Exemptions

Definitions

1 The following definitions apply in these Regulations.

Act

means the *Online News Act*. (*Loi*)

compensation

means the dollar value of the monetary and non-monetary consideration provided to a news business or group of news businesses, as the case may be, under the agreement between the operator and the news business or group of news businesses. It does not include any value assigned to merely making news available online. (*indemnisation*)

Imbalance — Factors

2 For the purposes of section 6 of the Act, there is a significant bargaining power imbalance between the operator and news businesses only if

(a) with respect to the factor set out in paragraph 6(a) of the Act, the operator's total revenue from all sources in the previous calendar year is greater than \$1 billion;

(b) with respect to the factor set out in paragraph 6(b) of the Act, the digital news intermediary offers one of the following online news **communications** platforms that make news content produced by news outlets available to persons in Canada:

(i) a search engine that aggregates news content and pathways to the content of the news outlets corresponding to search queries made by visitors; and

(ii) a social media service that facilitates interactions between users and news content through a social network; and

(iii) an aggregator of news content; and

Proposed new clause to capture services that aggregate news content from news businesses.

(c) with respect to the factor set out in paragraph 6(c) of the Act, the digital news intermediary had, during the previous calendar year, an average of

(i) at least 20 million unique visitors in Canada per month to the search engine referred to in subparagraph (b)(i), or

(ii) at least 20 million active users in Canada per month to the social media service referred to in subparagraph (b)(ii).

Notification — Commission

3 An operator that is required to notify the Commission under subsection 7(1) of the Act must do so within 30 calendar days of the day on which the Act begins to apply to the digital news intermediary.

Conditions

4 For the purposes of paragraph 11(1)(b) of the Act, the following are conditions:

(a) the agreements referred to in paragraph 11(1)(a) of the Act were reached following an open call process in which:

(i) the digital news intermediary made a public open call notice available on their online communications platforms for a period of at least 60 days and requested that the Commission make the notice available on the Commission's website for that same period, and

(ii) the digital news intermediary gave a period of at least 60 days for news businesses, or groups of news businesses, to respond to the open call notice;

(b) the operator has provided the Commission with any information in respect of the open call process, relevant to the making of the exemption order, including a list of the news businesses and the groups of news businesses who responded to the open call notice within the period set out in that notice and, if applicable, the number of journalists referred to in subsection 6(2); and

(c) the agreements referred to in paragraph 11(1)(a) of the Act, set out the value, in dollars, of any non-monetary consideration provided to a news business or group of news businesses, as the case may be.

Prior agreement

5 Any agreement to which section 13 of the Act applies is deemed to have been reached following the open call process referred to in paragraph 4(a).

Interpretation — fair compensation

6 (1) For the purposes of subparagraph 11(1)(a)(i) of the Act, if the relative compensation provided for in each of the agreements, submitted by the operator with its request for an exemption, is within 20% of the average relative compensation of all of the agreements submitted with that request, the Commission must interpret the agreements as providing for “fair compensation”.

Definition of *relative compensation*

(2) For the purposes of subsection (1), *relative compensation* means the ratio of compensation relative to the number of full-time equivalent journalists paid by a news business or group of news businesses, as the case may be, in the previous calendar year.

Definition of *journalist*

(3) For the purposes of subsection (1), *journalist* means A full-time employee or a full-time equivalent employee of an eligible news business or its subcontractors, where the eligible news business adheres to Canadian journalistic codes and standards, that spends at least 75% of their time engaged in the production of original news content, including researching, collecting information, verifying facts, conducting interviews, photographing, filming, recording, writing, editing, video-editing, audio-editing, designing, assembling, and otherwise preparing, delivering and/or presenting original news content.

A clause to ensure that any count of journalists includes the full range of personnel required for broadcast journalism.

Interpretation — appropriate portion

7 For the purposes of subparagraph 11(1)(a)(ii) of the Act, if the agreements submitted by the operator with its request for an exemption include a commitment by the news businesses or group of news businesses, as the case may be, that are party to the agreements to use some or all of the compensation provided under the agreements for the production of local, regional and national news content, the Commission must interpret the agreements as providing that an “appropriate portion of the compensation will be used for the production of local, regional and national news content”.

Interpretation — freedom and independence

8 For the purposes of subparagraph 11(1)(a)(iii) of the Act, if the agreements submitted by the operator with its request for an exemption include a commitment that the operator, directly or through its digital news intermediary, will not take actions that undermine freedom of expression and journalistic independence, the Commission must interpret that “they do not allow corporate influence to undermine the freedom of expression and journalistic independence”. The agreement must prohibit at least the following:

- (a) taking retaliatory action in response to an editorial decision of a news business;
- (b) restricting actions a news business may take to protect journalistic independence; and
- (c) intervening in a news business’s editorial process.

Interpretation — sustainability

9 (1) For the purposes of subparagraph 11(1)(a)(iv) of the Act, if the compensation provided for in the agreements submitted by the operator with its request for an exemption exceeds the amount determined by the following formula, the Commission must interpret that “they contribute to the sustainability of the Canadian news market”:

$$A \times B \times 4\%$$

where

A is the digital news intermediary’s global revenue from all sources [including subsidiaries and/or associates, if any](#), in the previous calendar year, in the currency in which they typically reports; and

A small addition to ensure that the revenues of platforms are fully and appropriately captured in determining if they contribute to the sustainability of the Canadian news market.

B is the quotient obtained by dividing Canada’s gross domestic product, in current US dollars, by the World gross domestic product, in current US dollars, using the most recent data from the World Bank.

Conversion

(2) The result of the calculation in subsection (1) must be converted into Canadian dollars using the average exchange rate for the calendar year prior to the calendar year in which the exemption is requested, published by the Bank of Canada for that currency.

For greater certainty

(3) For greater certainty, as long as the compensation provided to the news businesses or group of news businesses, as the case may be, is equal to or greater than the value of the compensation set out in the agreements, the Commission must continue to interpret that the agreements “contribute to the sustainability of the Canadian news market” for the duration of the exemption order for which the agreements were submitted.

Interpretation — significant portion

10 (1) For the purposes of subparagraph 11(1)(a)(v) of the Act, if the agreements submitted by the operator with its request for exemption do not exclude any group **that includes of** 10 or more independent news businesses operating local news outlets, the Commission must interpret the agreements as providing that a “significant portion of independent local news businesses benefit from them”.

A minor amendment to ensure that groups that also include 10 or more independent news businesses are not excluded.

Definition of *independent*

(2) For the purposes of subsection (1), *independent* means, with respect to a news business, one that operates five or fewer news outlets.

Interpretation — significant portion

11(1) For the purposes of subparagraph 11(1)(a)(vi), if the agreements submitted by the operator do not exclude any group of Canadian eligible news business or group of news businesses hiring more than 100 journalists in Canada, excluding Quebec and any Quebec-based eligible news business or group of news businesses hiring more than 25 journalists in Quebec, the Commission must interpret the agreements as providing that “a significant portion of news outlets benefit from them.”

To ensure that platforms cannot be exempt from mandatory bargaining before they have concluded agreements with private Canadian radio and television broadcasters.

Definition of *journalist*

(2) For the purposes of subsection (1), *journalist* means A full-time employee or a full-time equivalent employee of an eligible news business or its subcontractors, where the eligible news business adheres to Canadian journalistic codes and standards, that spends at least 75% of their time engaged in the production of original news content, including researching, collecting information, verifying facts, conducting interviews, photographing, filming, recording, writing, editing, video-editing, audio-editing, designing, assembling, and otherwise preparing, delivering and/or presenting original news content.

12 For the purposes of subparagraph 11(1)(a)(vii) of the Act, if the agreements submitted by the operator with its request for an exemption do not exclude any group **that includes of** five or more indigenous news outlets, the Commission must interpret the agreements as providing that a “significant portion of Indigenous news outlets benefit from them”.

A minor amendment to ensure that groups that also include 5 or more indigenous news outlets are not excluded.

Interpretation — significant portion

13 For the purposes of subparagraph 11(1)(a)(viii) of the Act, if the agreements submitted by the operator with its request for an exemption do not exclude any group **that includes of** 10 or more official language minority community news outlets, the Commission must interpret the agreements as providing that a “significant portion of official language minority community news outlets benefit from them”.

A minor amendment to ensure that groups that also include 10 or more OLMC news outlets are not excluded.

For greater certainty

14 For greater certainty, when evaluating whether a news business or group of news businesses is excluded for the purposes of sections 10 to 12, the Commission is only required to take into account the news businesses and groups of news businesses that respond to the notice referred to in subparagraph 4(a)(i) within the period set out in that notice.

Coming into Force

15 These Regulations come into force 180 days after the day on which the Act received royal assent.

Appendix 2 – CMI - By the Numbers: Media Spending on the News

Filed under separate cover.