

2023 OSLER LEGAL OUTLOOK

Online streaming and news laws advance federal government's digital agenda



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Authors: [John Salloum](#), [Maryna Polataiko](#)

Online platforms have been actively working to address compliance requirements arising out of two-thirds of the federal government's digital agenda that was passed this year in the form of [Bill C-11](#), the *Online Streaming Act* (OSA), and [Bill C-18](#), the *Online News Act* (ONA).

The OSA requires platforms to pay for and promote Canadian content, while the ONA introduces a mandatory bargaining framework requiring platforms to compensate news businesses for news content.

Despite undergoing several rounds of consultations, the final third of the agenda – a widely anticipated online safety bill – has yet to be tabled. However, given mounting pressure to table an online harms bill, we expect that one will be introduced in 2024.

Online streaming services subject to new regulations

The federal government has recently taken steps to modernize Canada's *Broadcasting Act* to tackle online streaming services. The OSA, formerly known as Bill C-11, received royal assent on April 27, 2023. The OSA brings online streaming services and social media platforms, which are considered to be "online undertakings" under the OSA, under the regulatory ambit of the Canadian Radio-television and Telecommunications Commission (CRTC).

The Minister of Canadian Heritage (the minister) released her final policy direction to the CRTC regarding the implementation of the OSA on November 14, 2023. The direction instructs the CRTC to make rules that are fair and adaptable as it implements the new legislation.

The OSA imposes new requirements on online undertakings, including requiring them to pay for and promote Canadian content on a similar basis to traditional broadcasters. Notably, the OSA permits the CRTC to make orders or regulations "respecting expenditures to be made by persons carrying on broadcasting undertakings" so long as these expenditures are made to support Canadian content, creators or broadcasters of exceptional importance. The policy directive issued by the minister indicates that any requirements the CRTC imposes on broadcasting undertakings must be equitable, taking into account the size and nature of the

undertaking, and equitable as between foreign online undertakings and Canadian broadcasting undertakings.

The OSA has also provided the CRTC with expanded order and regulation making powers, including broad discretion to determine the extent to which it will regulate content uploaded to social media platforms by users. The minister has clarified in her policy direction that the CRTC should not impose regulatory requirements on social media creators. The direction defines a social media creator as a person who creates programs that are primarily intended for online distribution as user-uploaded programs through social media. This will include podcasts and broadcasting undertakings in respect of the transmission of video games.

The CRTC may also impose new requirements on broadcasting undertakings. These could include compelling online undertakings to provide financial or commercial data to the CRTC and to make certain Canadian programs “discoverable” through algorithmic modifications. However, the minister’s policy direction instructs the CRTC to focus on regulations and conditions that minimize the need for broadcasting undertakings to alter their algorithms.

Finally, the OSA establishes an administrative monetary penalty scheme with a maximum penalty of \$10 million for a first violation and \$15 million for each subsequent violation. In the spring of 2023, the CRTC commenced a consultation process regarding the changes proposed under the OSA. The CRTC requested feedback on three matters. The first related to the contributions online services need to make to support Canadian and Indigenous content. The second related to which streaming services need to be registered with the CRTC. Finally, the third addressed exemption orders and conditions applicable to certain online streaming services.

The CRTC has issued decisions regarding two of the three consultations. The first decision determined that online streaming services are required to register with the CRTC by November 30, 2023. Online undertakings are not required to register if they have annual Canadian gross broadcasting revenues of less than \$10 million or if the undertaking’s single activity and purpose consists of providing either video game services or audiobook services.

The second decision sets out conditions of service to be imposed on online undertakings regarding information gathering, undue preference and undue disadvantage, as well as making content available over the Internet and filing financial information. Unlike the registration requirements, the condition respecting information gathering applies to all online undertakings, except those whose single activity and purpose consists of providing either video game services or audiobook services.

The condition of service related to undue preference and undue disadvantage prohibits online undertakings from giving undue preference or disadvantage to any person, including themselves. The CRTC has been granted the new power to conduct hearings in response to an undue preference or disadvantage complaint involving an online undertaking. The CRTC has indicated that it will hold consultations regarding a framework for such matters as they apply to online undertakings.

The consultation process regarding contributions to the Canadian broadcasting system is still ongoing. Public hearings commenced on November 20, 2023 and will run until December 8, 2023. Several additional consultations are planned for late 2023 and early 2024, including consultations about local markets access and competition, protecting Canadian consumers and defining Canadian and Indigenous content.

Organizations likely to be affected by these changes should continue to monitor the CRTC’s decisions and participate in relevant consultations. The CRTC is currently targeting late 2024 to implement its policy decisions.

New requirements for dominant platforms to pay for news content

The ONA, formerly known as Bill C-18, establishes a mandatory bargaining process under the jurisdiction of the CRTC. It received royal assent on June 22, 2023 and will come into force on December 19, 2023. This new legislation applies to “digital news intermediaries,” defined to mean online communications platforms such as search engines or social media services that make available news content produced by Canadian news outlets.

The ONA requires such intermediaries to negotiate agreements with Canadian news outlets, pursuant to which regulated platforms will make Canadian news content available. The ONA “aims to ensure that dominant platforms compensate news businesses when their content is made available on their services.”

The ONA applies to digital news intermediaries if there is a “significant bargaining power imbalance” between them and news businesses, as defined under the framework. If a digital news intermediary believes it falls under the purview of the statute, it must notify the CRTC.

Eligible news businesses can initiate the bargaining process with a digital news intermediary. News businesses can obtain an eligibility designation from the CRTC if they meet prescribed requirements such that they qualify as a “qualified Canadian journalism organization” under the *Income Tax Act*.

The structured bargaining process under the ONA begins with a 90-day negotiation or bargaining period, followed by a 120-day mediation period if an agreement is not reached. If an agreement is not reached, one of the parties may initiate a mandatory 45-day final arbitration.

Digital news intermediaries can seek a CRTC exemption from the mandatory bargaining process. The CRTC must grant an exemption where certain requirements are satisfied. The intermediary must have entered into agreements with news businesses operating news outlets that produce news content primarily for the Canadian news marketplace. The CRTC must also be of the opinion that the agreement satisfies prescribed requirements, including providing fair compensation to the news businesses for the news content that is made available by the intermediary.

The CRTC has the authority to make regulations on a number of matters, including requests for eligibility designations, requests for exemption orders, the bargaining process and the establishment of a code of conduct governing the bargaining process. Failure to comply with the ONA will expose entities to administrative monetary penalties of up to \$10 million, and up to \$15 million for each subsequent violation.

On August 24, 2023, the CRTC issued its ONA implementation plan. The CRTC intends to hold a public consultation to help build the bargaining framework in the fall of 2023. Feedback will be sought regarding how the bargaining and arbitration process will work, a code of conduct for negotiations and the eligibility process for news organizations. The CRTC has indicated that it plans to publish the framework and code of conduct in summer 2024. Mandatory bargaining can begin in late 2024 or early 2025 once eligible news organizations and arbitrators are in place. At the time of writing, the consultation process has not yet begun.

On September 2, 2023, the Department of Canadian Heritage published draft regulations in the *Canada Gazette* and announced a 30-day consultation period. The draft regulations outline factors used to determine whether the ONA applies to an intermediary, the

timeframe within which intermediaries must notify the CRTC that they are subject to the statute and additional details relating to the criteria the CRTC must consider when determining whether to issue an exemption order. Comments on the regulations are viewable in the [*Canada Gazette*](#).

After assessing comments provided during the consultation period, Canadian Heritage will prepare final regulations for the Governor in Council's approval. Subject to approval, the final regulations will be published and will come into force on the date prescribed by the regulations.

Mounting pressure for online safety framework

The Department of Canadian Heritage published a [report](#) on its latest round of consultations on a proposed online safety framework on January 23, 2023. The July to November 2022 consultation process consisted of 19 roundtable discussions on key elements of an online safety regime. Stakeholders were also invited to comment on input from the [Expert Advisory Group on Online Safety](#) whose meetings came to a close in early June.

According to the report, stakeholders expressed a need for legislation governing online safety, agreed that online platforms should be "held accountable for the harms occurring on their platforms" and felt that greater transparency was necessary regarding content moderation. A key concern was youth safety, including inappropriate sharing of intimate images, online luring, disinformation and harms to mental health. Participants voiced support for age-appropriate design and greater parental controls, echoing the Expert Advisory Group's view that "platforms should have a special duty to protect children due to their vulnerability to the risks of the online space."

Other areas of discussion included demands for education relating to online safety and digital literacy and debate over the role of law enforcement in addressing online safety. No legislation has been tabled to date. Following the federal cabinet shuffle in July 2023, the online safety file is being transitioned to the Department of Justice due to its interactions with the *Criminal Code*. The Department of Heritage will remain in a supporting capacity. This is allegedly contributing to delays. When asked about the status of new legislation in mid-October, the Minister of Justice indicated that a bill was forthcoming, but did not provide a timeline. However, given mounting pressure to introduce an online harms bill, we should expect its introduction in 2024.