



12 April 2024

Marc Morin
Secretary General
CRTC
Ottawa, ON K1A 0N2

Filed online

Dear Secretary General,

Re: *Call for comments – Framework under the Online News Act (formerly Bill C-18), Online News Notice of Consultation CRTC 2024-55 (Ottawa, 13 March 2024) – comments by the Forum for Research and Policy in Communications (FRPC)*

I. Introduction

- 1** The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.
- 2** In June 2023 Canada enacted new legislation concerning negotiations for financial compensation in Canada’s digital news sector: the *Online News Act*.¹ Section 4 of the *Online News Act* states that its purpose is

[Statute’s English-language version]

... to regulate digital news intermediaries with a view to enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability, including the sustainability of news businesses in Canada, in both the non-profit and for-profits sectors, including independent local ones.

[Statute’s French-language version]

...de régir les intermédiaires de nouvelles numériques en vue d’accroître l’équité au sein du marché canadien des nouvelles numériques et de contribuer à la viabilité de celui-ci, notamment en contribuant à la viabilité des entreprises de nouvelles au Canada, à la fois dans le secteur à but lucratif et le secteur sans but lucratif, y compris les entreprises locales et indépendantes.

- 3** In mid-March 2024 the CRTC set out 27 questions about three aspects of the *Online News Act*: bargaining processes; undue preference, discrimination and disadvantage, and “data collection requirements”.²

¹ Bill C-18, *An Act respecting online communications platforms that make news content available to persons in Canada*, received royal assent on 22 June 2023 (S.C., c. 23): [Parliament of Canada, LEGISinfo, C-18, 44th Parl. 1st Sess.](#)

² BNoC 2024-55, subheadings preceding paragraphs 10, 36 and 39.

- 4 Before responding to the questions in BNoC 2024-55, FRPC would like to address two preliminary matters with respect to evidence and clarity.

A. *Insufficient evidence*

- 5 First, the Commission’s notice explained that the CRTC “is seeking to gather the evidence that will allow it to make decisions and fulfill its mandate under the Online News Act and in light of the Regulations.”³ BNoC 2024-55 notes, for instance, that the CRTC prefers an initiation procedure that ‘avoids ***unnecessary*** delays in bargaining or disputes about procedures’.⁴ The consultation notices sets out the Commission’s position that “it would not be appropriate ***to fully define*** a schedule for the 90-day bargaining period ... leaving it up to parties to agree on the precise schedule and on any additional activities they would like to include.”⁵ BNoC 2024-55 adds that

... the Commission is of the preliminary view that mediation under the Online News Act should be conducted by Commission staff, using the mediation practices and procedures set out in Broadcasting and Telecom Information Bulletin 2019-184 as guidelines.⁶

- 6 What is missing from BNoC 2024-55 is relevant evidence from the CRTC itself regarding these and other points, despite the fact that the Commission has been involved with various forms of dispute resolution in broadcasting for at least a 25 years.⁷ While the CRTC’s 15 September 2022 response to access-to-information request A-2021-00078⁸ listed 210 cases related to the CRTC or its staff’s involvement in broadcast dispute-resolution matters, the CRTC’s website lists 42 decisions from 2001 to 2023 concerning complaints made under the *Broadcasting Act* involving undue advantage or disadvantage matters: see Appendix 1.
- 7 The absence of any objective evidence from the CRTC describing its experience with dispute-resolution processes imposes an undue burden on all participants in this proceeding in terms of evidence about the manner in which the CRTC’s current processes function. Even if interested participants used the CRTC’s search engine to

³ BNoC 2024-55, paragraph 8.

⁴ *Ibid.*, paragraph 11, bold font and italics added.

⁵ *Ibid.*, paragraph 12, bold font and italics added.

⁶ *Ibid.*, paragraph 18.

⁷ See e.g. *Complaint by Cogeco Radio-Télévision inc. concerning signal carriage by Star Choice Communications Inc.*, Broadcasting Decision CRTC 2001-609 (Ottawa, 28 September 2001), involving undue disadvantage and preference issues.

⁸ A-2021-00078 asked for a spreadsheet listing the CRTC’s formal and informal dispute resolution cases in broadcasting for each calendar year from 2016 to 2021 showing for each case, among other things, the date it was opened, the type of process used (ADR, FOA etc.), the parties involved and the date the case was closed (if any).

locate evidence about the CRTC’s decisions with respect to disputes between programmers and distributors, for example, the results may only identify 44 decisions: meanwhile, as mentioned above, the CRTC’s response to A-2021-00078 set out 210 occasions in which the Commission or its staff provided dispute-resolution services between programmers and distributors.

B. Lack of clarity regarding concepts such as duration

- 8 FRPC's second preliminary issue has to do with timing. The Online News Act sets specific deadlines for bargaining, mediation and final-offer arbitration: 90, 120 and 45 days, respectively for a total of 255 days.
- 9 Objective evidence from the Commission which may be relevant to BNoC 2024-55 would include data about the beginning and conclusion of alternative dispute resolutions involving the CRTC’s staff, especially given the CRTC’s preliminary determinations in BNoC 2024-55 regarding staff-assisted mediation.
- 10 The CRTC’s published decisions about complaints alleging undue disadvantage or preference in broadcasting, for example, tend to include the date when the complaints were made as well as the date of the CRTC’s determination about these complaints. This makes it possible to calculate the average days from initiation to conclusion by year, whether for CRTC determinations about undue disadvantage or staff-assisted medication. The following table shows that from 2015 to 2021 staff-assisted mediations took an average of 233 days to complete, although the average exceeded the 255-day *Online News Act* limit in 2015 and 2020:

Year	CRTC decisions on undue disadvantage		Staff-assisted mediation		% difference between Staff ADR and CRTC decisions
	#	Avg days	#	Avg days	
2015	1	153.0	10	255.7	67%
2016	2	143.0	35	238.0	66%
2017			38	209.3	
2018	1	143.0	17	214.3	50%
2019	2	267.5	52	209.7	-22%
2020	1	256.0	28	334.5	31%
2021	3	483.7	30	186.0	-62%
Total	11	282.4	210	233.0	-17%

- 11 Some of the staff-assisted mediation processes noted above were suspended as they proceeded and subsequently resumed, however – making the ‘true’ duration of the process unclear. As the *Online News Act* does not explicitly provide for the 255-day mediation process to be temporarily suspended, the CRTC should clarify that the deadlines it enforces include suspensions of process. This may help to ensure that

mediation involving parties of disparate financial capacity is not artificially prolonged: while large distribution platforms can easily withstand delays in process caused by suspensions, smaller news organizations cannot: the CRTC must ensure that smaller news organizations' acceptance of mediation terms does not flow simply from a financial imperative to acquiesce to terms such organizations would otherwise refuse.

II. CRTC questions

12 The Forum's answers to a number of the CRTC's questions are set out below. The Forum may address other questions in reply.

A. *90-day bargaining period*

Q1. Do you agree with the Commission's preliminary view? If not, please propose an alternative, with justification.

13 The Forum generally agrees with Commission's preliminary view. That said, when BNoC 2024-55 refers to "responses (including reasons) to the proposals from each party" at paragraph 13, FRPC recommends that this wording be clarified to require the provision of objective facts: "responses (including empirical evidence and reasons) to proposals from each party". Without this change a risk exists that parties' "reasons" may consist largely of subjective declarations that cannot support evidence-based conclusions – potentially leading to unnecessary delays that will unnecessarily prolong the entire process to the disadvantage of smaller parties.

(b) Are other procedures required to efficiently administer the 90-day bargaining period? If so, please explain.

14 The CRTC should adopt a transparent approach to the negotiations addressed by the *Online News Act*. More specifically, the CRTC should report anonymized information about the bargaining process showing its duration, the degree to which parties are observing the CRTC's criteria for the package of information (at paragraph 13 of BNoC 2024-55) and – importantly – whether the parties (identified broadly as platforms or news organizations) believe the process was fair.

B. *120-day mediation period*

Q3. Do you agree with the preliminary view that mediation should be facilitated by Commission staff based on the practices and procedures outlined in [Broadcasting and Telecom Information Bulletin 2019-184](#)?

- 15 BNoC 2024-55 notes the CRTC’s “preliminary view that mediation under the Online News Act should be conducted by Commission staff”,⁹ and refers to “the mediation practices and procedures set out in Broadcasting and Telecom Information Bulletin 2019-184 as guidelines”.
- 16 Yet neither BNoC 2024-55 nor BTIB 2019-184 describes the mediation qualifications of the CRTC’s staff and it is unclear whether its staff are either “impartial”¹⁰ or are “neutral” persons who help “disputants settle their dispute”¹¹ as others suggest. The basis of the CRTC’s preliminary view is therefore unknown; similarly, it is unknown why the Commission considers that trained mediators who do not work for the Commission or the parties involved in the *Online News Act* processes are less preferable than its staff.¹²
- 17 One concern may arise if the CRTC staff mediators tend to be the same people. While repeated reliance on the same individuals enables such persons to develop mediation experience, a risk also exists that repeated encounters with the same parties across a range of mediations may reduce rather than maintain their impartiality or neutrality. The CRTC’s response to A-2021-00078 shows that at least 36 different CRTC staff members participated in 210 dispute resolution matters from 2015 to 2021 – and that four staff participated in the majority of these matters (154 or ~73%):

CRTC staffperson*	Number of processes from 2015 to 2021)
‘A’	28
‘B’	23
‘C’	30
‘D’	73
Total	Approximately 154
* Initials replaced with letters of the alphabet to protect privacy	
Source: CRTC response to A-2021-00078	

- 18 The regular involvement of one or more CRTC staff raises no concerns, of course, provided the other parties in such proceedings have confidence both in the neutrality of the staff and their qualifications as mediators. This evidence could be obtained through post-mediation surveys conducted by third-party survey research experts. If the CRTC has undertaken such research to evaluate parties’ confidence in

⁹ BNoC 2024-55, paragraph 18.

¹⁰ In contrast Occupational Health and Safety Tribunal Canada’s [Fact Sheet on Mediation](#) emphasizes that the mediator is “an impartial third party”.

¹¹ Canadian Mediation Association, “[Mediation](#)” (accessed 12 April 2024).

¹² If the Commission’s goal is to provide news organizations with an inexpensive mediation mechanism, it should mention this point.

mediators' neutrality, it should publish the information in the context of this proceeding.

C. 45-day FOA period

Roster of qualified arbitrators

Q6. Please comment on whether the proposed list of qualifications set out in the appendix to this notice is suitable for determining that candidates are qualified to arbitrate disputes related to the Online News Act.

- 19 FRPC may respond to this question in greater detail in reply, but notes that while the CRTC says that arbitrators must “Be able to conduct an efficient and effective arbitration process” it does not provide clear definitions of either ‘efficient’ or ‘effective’.
- 20 More clarity would benefit all participants, especially given the *Online News Act’s* details about the maximum days permitted for each of the bargaining, mediation and final-offer stages. Does the CRTC consider, for instance, that an arbitration that concludes before the *Online News Act’s* deadlines is ‘efficient’? Similarly, what criteria would the CRTC use to determine whether the arbitration process is ‘effective’?
- 21 Moreover, as Parliament states in section 4 of the *Online News Act* that the statute’s purpose is to ‘enhance fairness’ and ‘contribute to the sustainability’ of the Canadian digital news sector, will the CRTC be measuring either the ‘fairness’ or the ‘sustainability’ of Canada’s digital news sector before any bargaining begins? Similarly, how will the Commission evaluate the ‘enhancement’ to ‘fairness’? Is this a concept that is susceptible to measurement through survey research, for example, or will the CRTC invite comments on this issue at a later date?

D. Undue preference, discrimination and disadvantage

Q21. Should the Commission provide guidance on specific types of undue preference, disadvantage or discrimination that would be prohibited? If so, should this guidance focus on remuneration for online news content or participation by an eligible news business in the bargaining, mediation and arbitration processes? What other conduct should be targeted specifically, if any?

- 22 While the Forum may address this question in more detail in reply, FRPC’s preliminary response is that the Commission should provide as much guidance as possible, as soon as possible. First, smaller news organizations and even large platforms may be unfamiliar with the CRTC’s approach to preference, advantage or



discrimination. Providing clear and detailed guidance – preferably including examples based on its own decisions over the past decades– will reduce parties’ uncertainty and the time they will need to make their case before the mediators or arbitrators.

E. Data collection requirements

Q23. Should all agreements between online platforms and news businesses regarding compensation for making news content available, entered into a process set out in the Online News Act or the Regulations, be automatically filed with the Commission?

- 23** The Forum’s preliminary position is that such agreements should be automatically filed – in confidence – with the CRTC.

The Forum looks forward to reviewing other participants’ comments.

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Appendix 1: Decisions listed by CRTC's search engine for arbitration mediation "final offer"

CRTC search engine results for 'arbitration mediation "final offer"'		
1. 2001-609	2. 2006-658	3. 2014-486
4. 2001-612	5. 2007-160	6. 2015-89
7. 2002-254	8. 2007-401	9. 2016-38
10. 2002-255	11. 2008-13	12. 2016-82
13. 2003-25	14. 2008-299	15. 2018-56
16. 2003-275	17. 2009-590	18. 2019-427
19. 2003-408	20. 2011-371	21. 2019-429
22. 2003-518	23. 2011-48	24. 2020-222
25. 2004-188	26. 2011-765	27. 2021-250
28. 2004-3	29. 2012-422	30. 2021-341
31. 2004-4	32. 2012-672	33. 2021-366
34. 2004-494	35. 2013-508	36. 2022-138
37. 2005-120	38. 2014-238	39. 2023-22
40. 2005-189	41. 2014-346	42. 2023-94

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