Internet Society
Canada Chapter

ISCC Policy
C-18: Online News Act

The stated purpose of the act (s. 4) is "*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 independent local news businesses*."

The act reflects the Government's belief that domestic news organizations do not get the appropriate recompense where the news that they produce reaches the public via digital platforms.

Basic Scheme of the Bill

Extortion by Legislation

The scheme of C-18 is to use the coercive power of the Canadian state to force what are called digital news intermediaries to bargain with and pay money to news organizations. The scheme does not rest upon the use or violation of any known rights held by news organizations. Indeed, virtually all news organizations facilitate the sharing of their copyright material on social media such as Facebook, and optimize their content for indexing by search engines such as Google.

The Supreme Court of Canada has already determined that the provision of a link to copyright material is not a violation of an author's copyright. News aggregators and social media sites direct interested readers (or viewers) back to the news organizations' websites. The small snippets of news content ("teasers") undoubtedly are covered by the fair use exception to copyright. News organizations benefit from the extra traffic generated by social media, news aggregators, and search engines.

In the real world, there would be little to bargain over: there is no violation of copyright, and news organizations have no legal grounds on which to demand that social media, news aggregators, or search engines share advertising revenues with news organizations. If anything, there is a

case to be made for such news intermediaries to charge news organizations for linking to the latter's news content.

In place of principled negotiations based on a consideration of the value of the rights enjoyed by news organizations, C-18 decrees that copyright limitations and exceptions do not apply to the bargaining process. In short, the bargaining process is to proceed as if news organizations had rights that are violated by news intermediaries. In the circumstances, it will be interesting to see how arbitrators will assign a value to non-existent rights.

The secret sauce is not the value of the rights held by the news organizations but the administrative monetary penalties that the CRTC can impose for any of a large number of violations of the act, in particular an unwillingness to bargain in good faith within a process whose sole purpose is to create a debt where none is owed. In short, C-18 represents a legislative shake-down scheme that has no basis in legal rights or obligations.

The scheme is modeled – very loosely – on the Australian legislation that introduced a similar scheme of statutory shakedown of search engines, social media, and news aggregators for the benefit of domestic news organizations.

The Government could, as an alternative to legislating and legitimating a shakedown scheme, have amended the copyright act to create a copyright interest in links to news organizations. Such rights might turn out to have little market value – but at least it would create a basis for good faith negotiations.

Overview of the Scheme

To force the funding of incumbent news organizations, the act contemplates a bargaining process between platforms called Digital News Intermediaries and news organizations called Eligible News Businesses.

The bargaining process is triggered by an eligible news business giving notice to a digital news intermediary that it seeks to bargain (s. 20). The bargaining process is limited to matters related to the making available, by the DNI in question, of news content produced by an ENB (s. 19(2)). The process will be conducted pursuant to a code of Conduct that the CRTC will issue (s. 49(1)).

It is assumed that the process commences with an ENB or (group of ENBs) notifying a DNI that it wants to bargain about news that it produces that is made available to the public by the DNI (The Act does not specify how the process is initiated, only who can initiate the process. How notice is to be given (e.g. by registered mail to a head office) is not clear). The DNI and ENB are obliged to bargain in good faith (s. 22).

There is then a three-step process:

(a) bargaining; if that fails,
(b) mediation; and if mediation fails,
(c) final offer arbitration.

The CRTC:

- manages the process: it determines when the parties must move from bargaining to mediation; when a bargaining process moves from mediation to final offer arbitration; furnishes a roster of arbitrators (from whom the parties may their panel – however, the Commission may appoint the panel if it believes the parties are taking too long to choose), provides secretarial assistance and advice to arbitrators and gets consulted before a final offer is accepted
- is given vast powers to ask for information (s. 53)
- is given powers to issue AMPs of up to $10M or $15M per violation ((s. 60)
- may provide exemption orders for DNI who have reached agreements that meet stated objectives (s. 11(1))
- will entertain and adjudicate on complaints by ENBs about undue preference and discrimination

Problematic provisions

While the overall scheme is a misuse of governmental powers, there are major problems with particular aspects of C-18, the most serious of which are examined in some detail.

1. Payment for Links

The Bill applies to any platform that makes news content available to Canadians (s. 2(1)), including merely facilitating access to news "by any means, including an index, aggregation or ranking of news content" (s. 2(2)), and requires DNIs to negotiate payments for this activity (ss. 19(2), 11(1)(a)(i)). This clearly includes linking, i.e. DNIs are required to pay for linking.

Further, the Bill expressly strips DNIs of any copyright limitation and exceptions (s. 24). This includes fair dealing, which is what allows platforms and publishers of all kinds to include short snippets and quotes in publications, and provisions limiting the liability of information location tools (i.e. search engines) and hosting services.

The Supreme Court of Canada has ruled that copyright limitations and exceptions are "user rights" integral to the balance of copyright law. By expressly stripping DNIs of all copyright limitations and exceptions, the Bill denies DNIs access to basic rights under copyright.

The ability to freely link is foundational to the open web. It's what enables journalists to link to others' content and quotes without obtaining permission. Everyone can link to websites, and no one is required to be paid for the privilege. The Bill suspends this basic right for DNIs and requires them to pay for something that no one else is required to pay for. This sets a worrisome precedent and could open the door to undermining net neutrality.

This provision is most likely in violation of the USMCA and likely will provoke a strong response from USTR.

There is no international precedent for such link payment. The Australian model referred to by the Canadian minister refers to bargaining over covered news content of a Registered News Business (Australian term for ENB) made available by the designated digital platform service.

2. Definition of Digital News Intermediary (DNI)

A fundamental series of issues are raised in any effort to determine if a particular online communications platform is a digital news intermediary to which the act applies. This is critical to the scheme of the legislation, as an online communications platform that meets both the definition of digital news intermediary and the criteria set forth in s. 6 must register with the CRTC (s. 7) and each day a digital new intermediary fails to register with the CRTC constitutes (s. 60(1)(a)) a separate violation (s. 60(3)) of the act that can be penalized with administrative monetary penalties.

As is outlined below, the determination of who is – and who is not – a digital news intermediary is one fraught with interpretive landmines.

Constitutional Issue

A digital news intermediary is defined as follows:

> ***digital news intermediary*** means an online communications platform, including a search engine or social media service, that is subject to the legislative authority of Parliament and that makes news content produced by news outlets available to persons in Canada. It does not include an online communications platform that is a messaging service the primary purpose of which is to allow persons to communicate with each other privately. (s. 2(1))

Under the existing constitutional jurisprudence, it is doubtful that any digital platforms come under the legislative authority of Parliament. Just as with the proposed regulation of streaming services under C-11, both Facebook and Google – the assumed targets of C-18 – are in a position to contest its constitutionality should C-18 become law. C-18 invites years of litigation just

to determine if Parliament has the power to legislate with respect to C-18's subject matter: digital platforms.

Who is a Digital News Intermediary?

Under the Australian legislation, which has served as a model for the Canadian legislation, a digital new intermediary (called a "designated digital platform" or "designated digital platform corporation") is specifically named by the relevant Minister) and only a designated platform or corporation is subject to the legislation.
By contrast, under C-18, a platform must self-identify as a digital news intermediary within the parameters set out in s. 6:

> **6.** This Act applies in respect of a digital news intermediary if, having regard to the following factors, there is a significant bargaining power imbalance between its operator and news businesses:
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> (a) the size of the intermediary or the operator;
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> (b) whether the market for the intermediary gives the operator a strategic advantage over news businesses; and
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> (c) whether the intermediary occupies a prominent market position

'Significant bargaining power imbalance' is a term without real content. Both Bell Media and Meta have significant bargaining power. Is there an objective point where it can be said that there exists a significant imbalance between the bargaining powers of Bell and Meta?

'size' is, again, used without any objective criteria. Critical size thresholds are set out in the mergers provisions of the Competition Act and in the review criteria under the Investment Canada Act. It should be possible to determine a threshold for size below which it is safe to assume there is no significant bargaining power imbalance between a digital news intermediary and a news organization.

"market" is a meaningless term without careful definition. What is the market meant here? Is it the market for advertising? The market for

subscriptions? The market for talent? The market for eyeballs and attention? The market for Canadian domestic news? Foreign news? Cartoons? A cursory examination of competition law reveals the degree of contestation that can be inserted in any attempt to bring a good or service within any potential market. In this case, the Government has not even hinted at which market is of interest in the application of this criterion. It will be for the CRTC, in its infinite wisdom, to determine, in any particular case, to which market the law applies.

'strategic advantage' Putting aside the absence of a definition of market, what is a strategic advantage, and how does it differ from a bargaining power advantage? What strategy is in contemplation? How does an advantage transition from tactical to strategic advantage?

'prominent market position' is a slippery concept at best. What are the criteria for determining a prominent market position? We all suppose that Alphabet and Meta through Google and Facebook occupy prominent market positions (again, ignoring what market is meant to be captured), but what about Twitter? Instagram? Ground News? Each of these entities carries links to news content. Each has some prominence. Are they in a prominent market position? How is either the intermediary or the CRTC to make a determination?

There are no objective criteria that inform how these terms are meant to apply. There is no statutory guidance that permits a digital news intermediary to determine if its operations meet the criteria that require it to notify the CRTC.

There is also the unaddressed issue of the size of the news organization. There is a significant difference in the relative bargaining power of say, Postmedia, and other news organizations that can be as small as having two employees? Would a digital news intermediary be able to notify only as regards small players but not with respect to the larger news organizations? C-18 does not answer that question. It would appear that, once it notifies the CRTC, an organization is all in – even if it does not

enjoy a bargaining power advantage vis a vis the larger (and most imperiled) news organization.

C-18, if enacted, provides neither the entities who must notify the CRTC under threat of stiff monetary penalties, nor the CRTC, with guidance as to the foundational issue of to whom the act is meant to apply.

The CRTC is given a wide and unpredictable discretion to determine to whom the act applies. The criteria to be applied are vague and incompatible with the standards applied in competition analysis. These criteria borrow terms from competition law but are divorced from the precision demanded by economic or legal analysis. The CRTC has no experience or expertise in competitive market analysis. It is impossible to predict who will be considered a digital news intermediary to whom the act applies.

3. Notification and Information Requirements

The operator of an online communications platform that might be a digital news intermediary is required to self-assess whether it meets the criteria set out in the definition of an intermediary and in s. 6. If it concludes that it meets the criteria, it must proactively notify the CRTC (s. 7(1)). As noted above, the operator must address questions of both constitutional law and its perceived economic power in deciding if it must register with the CRTC. Failure to notify is a violation of the Bill and subject to administrative monetary penalties. Even if there is a good faith error, or an operator was not aware of its obligation to notify, it is subject to sanction.

To ensure that the targeted digital news intermediaries do give notice, the CRTC is empowered to demand any information it requires to verify compliance with self-assessment and notification (s. 7(2)):

Information required

> **(2)** An individual or entity that operates an online communications platform must, at the request of the Commission and within the time and in the manner that it specifies, provide the Commission with any information that it requires for the purpose of verifying compliance with subsection (1) or preventing non-compliance with it.

An operator of a communications platform is defined as "an individual or entity that, through any means, operates a digital news intermediary". This definition is so broad that it effectively gives the CRTC authority to demand for the purpose of "verifying" whether it is subject to the notice requirements of the act, any information from any company that operates any Internet product or service.

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4. Definition of Eligible News Business

Bill C-18 requires that the CRTC designate an eligible news organization:

> **27 (1)** At the request of a news business, the Commission must, by order, designate the business as eligible if it
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> **(a)** is a *qualified Canadian journalism organization* as defined in subsection 248(1) of the *Income Tax Act*; or
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> **(b)** produces news content that is primarily focused on matters of general interest and reports of current events, including coverage of democratic institutions and processes, and
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> **(i)** regularly employs two or more journalists in Canada,
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> **(ii)** operates in Canada, including having content edited and designed in Canada, and
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> **(iii)** produces news content that is not primarily focused on a particular topic such as industry-specific news, sports, recreation, arts, lifestyle, or entertainment.

Commission's initiative
(2) The Commission may make an order under subsection (1) on its own initiative.

The criteria for who must be designated is broad, and includes any outlet that is "primarily focused on matters of general interest and reports of current events", which encompasses opinion and commentary. There is no requirement to adhere to accepted journalistic standards to qualify. Any outlet qualifies provided it opines on current events, operates in Canada, and employs two or more "journalists" in Canada, even if the operators and journalists are not Canadian.

Under these criteria, the CRTC will be required, for example, to designate news organizations that are fronts for foreign intelligence services. The law, in effect, will require Facebook to subsidize the operations of news organizations whose sole purpose is to promote the interests of countries or entities that undermine democratic institutions.

The Government chose not to limit designation to the criteria for Qualified Canadian Journalism Organization that is already in use for other media support programs. The extended definition in paragraph (b) of the bill seemingly allows foreign state media and any opinion blog that employs a few content producers to qualify. At the same time, it denies designation to struggling news startups that may be active in news, but have fewer than two employees.

The definition does not exclude government or overt political actors from qualifying. Consequently, news intermediaries could be compelled to financially support content from these sources and treat them equally as content from authoritative news sources.

Surprisingly there is no requirement for news businesses to disclose their ownership structure, revenue information, and revenue sources in order to be designated.

5. Definition of News Content

The definition of “news content” is extremely broad.

> ***news content*** means content — in any format, including an audio or audiovisual format — that reports on, investigates, or explains current issues or events of public interest. (s. 2(1))

This means that the concept of digital news intermediaries is not limited to search engines, news aggregators, and social media, but also includes podcasting services (Apple, Google, Spotify, etc), voice assistants (Alexa, Siri, Cortina, etc), and potentially even app stores (App Store, Play Store, etc) as well as Cloud providers.

6. Collective Bargaining

The whole collective bargaining process will be in accordance with a Code of Conduct to be issued by the CRTC for the purpose of supporting fairness and transparency in bargaining in relation to news content. Such code will have to deal with the minutiae of the process such as notice requirements, information provision, time periods, etc.

Eligible news businesses will be exempted from prohibitions on “collusion” and “conspiracy” under the provisions of the Competition Act. As a consequence, they will be able to engage in collective bargaining with digital news intermediaries.

The CRTC has the power to make regulations “respecting the manner in which groups of eligible news businesses are to be structured and the manner in which they are to exercise their rights or privileges and carry out their obligations;” (s. 85(f)).

It is doubtful that this authority could be stretched to cover rules governing the collective, including their internal governance and voting rights. Without a process by which news businesses can form a bargaining unit, and minimum governance standards of collectives, small and

independent news businesses will be at a disadvantage in negotiations – especially as the deals made by large news organizations with digital intermediaries are not required to be made public.

A legislative scheme that sought to further the interests of small and innovative digital-first news organizations might have contemplated some process to create a tariff-like agreement that extended benefits to all eligible news businesses or required the publication of agreements in order that smaller players benefit from the bargaining power of large and well-resourced news organizations.

7. Final Offer Arbitration

The Final Offer arbitration provisions are not designed to ensure a fair outcome as between the parties to the bargaining. Rather, the governmental thumb is put on the scales in a manner that both creates an unfairness to digital news intermediaries and undermines the objectivity and independence of the arbitration panels.

In considering a final offer, s. 38 requires an arbitration panel, in weighing the final offer, to consider the "value added, monetary and otherwise, to the news content in question by each party, as assessed in terms of their investments, expenditures and other actions in relation to that content". S. 38 does not permit the panel to consider equivalent "investments, expenditures, and other actions" by the digital intermediary in making news content available.

The panel is required to dismiss offers it does not consider in the public interest (s. 39(1)(b)) or that do not "enhance fairness" or "contribute to sustainability" of Canadian news (s. 39(1)(a) and (c)).

These criteria are unbalanced, and in most cases will force a panel to reject the lower offer.

The Final Offer arbitration rules also require the arbitration panel to consult with the CRTC before dismissing an offer (s. 39(2)). Why this is considered necessary is a mystery. The point of arbitration is to arrive at an expert final decision. It would appear logical that the CRTC can only bring in new factors that were not

raised by the parties to the arbitration, and thus undermine the credibility of the arbitration process as well as the independence of the arbitration panel.

Under s. 40, an arbitration panel is empowered (encouraged?) to solicit oral or written submissions from the CRTC and the Commissioner of Competition. How that is to relate to the arbitration process is unclear? Will these be presented at a hearing stage or only when proceedings are closed and while the panel's decision is under consideration? Will the submissions be available to the parties? Will they be public? Will the parties be able to respond? It is highly unusual for public authorities to be thrust into the adjudication of what is, after all, a purely private bargaining process.

These provisions undermine the independence of the panel in making its determinations and will certainly discourage high-quality arbitrators from applying to become members of the CRTC arbitration rosters.

8. Exemption Criteria

C-18 creates a rather convoluted scheme that permits a digital news intermediary to apply for an exemption from the mandatory obligation to bargain. It would appear that if a digital intermediary has paid off a good slice of Canadian news organizations, then it can be relieved of the need to negotiate with every new news organization that is recognized by the CRTC.

The exemption is mandatory on the part of the CRTC, and an entity seeking an exemption must meet all the criteria set forth in s. 11(1)(a), and any additional criteria set out by the Governor in Council (s. 11(1)(b)), and any additional conditions imposed by the CRTC (s. 11(3)).

> **11 (1)** The Commission must make an exemption order in relation to a digital news intermediary if its operator requests the exemption and the following conditions are met:
>
> > **(a)** the operator has entered into agreements with news businesses that operate news outlets that produce news content primarily for the Canadian news marketplace and

the Commission is of the opinion that, taken as a whole, the agreements satisfy the following criteria:

(i) they provide for fair compensation to the news businesses for the news content that is made available by the intermediary,

(ii) they ensure that an appropriate portion of the compensation will be used by the news businesses to support the production of local, regional, and national news content,

(iii) they do not allow corporate influence to undermine the freedom of expression and journalistic independence enjoyed by news outlets,

(iv) they contribute to the sustainability of the Canadian news marketplace,

(v) they ensure a significant portion of independent local news businesses benefit from them, they contribute to the sustainability of those businesses and they encourage innovative business models in the Canadian news marketplace, and

(vi) they involve a range of news outlets that reflect the diversity of the Canadian news marketplace, including diversity with respect to language, racialized groups, Indigenous communities, local news, and business models; and

(b) any condition set out in regulations made by the Governor in Council.

Effect of order

(2) The order exempts the operator, in relation to the intermediary, from the application of

(a) section 21 and any provision of any regulations made under section 85 that is in relation to section 21; and

(b) any other provision of this Act and any provision of any regulations made under subsection 81(1) or section 85 that is specified by the Commission, in its discretion, in the order.

Conditions
(3) The order may contain any conditions the Commission considers appropriate.

It may be easier for a camel to pass through the eye of the needle than for a digital news intermediary to obtain an exemption.

Given that the whole scheme is a fabrication of value where none exists, it is virtually impossible to imagine what "fair compensation" would consist of. While the bargaining scheme has little to say about the contents of agreements between digital intermediaries and news organizations, an exemption is conditional on the digital intermediary to explicitly take oversight of how a news organization allocates the revenues received from the intermediary. In effect, the digital news intermediary becomes the regulator of the recipient news organization. Rather than having the CRTC exercise supervision over the conduct of a news organization, the CRTC does so in retrospect through an examination of the conduct of the digital intermediary in policing the recipient organization.

The digital intermediary is to ensure (s. 11(1)(a)(iii) that the corporate side of an organization is not to interfere with the independence of its newsroom. By what measure is Facebook to determine whether the bad guys in corporate exercise too much influence in the newsroom? And what knowledge and skills does Facebook bring to the policing of the internal affairs of a news organization?

At the same time as an exemption is conditional on a digital intermediary policing the conduct of news organizations, the exemption criteria do not account for any value or benefit provided to the Canadian news ecosystem outside the context of negotiated agreements, such as training and support programs, products, and funding programs. The CRTC cannot take account of the value and benefit news organizations derive directly from the digital intermediaries.

The vagueness of the exemption criteria will make it impossible for any digital intermediary to know what it needs to do to satisfy the criteria, or if its voluntary agreements and support programs are sufficient, until the CRTC issues a ruling. In short, it is not clear how a digital intermediary

would satisfy these criteria, which is a significant disincentive to enter into voluntary agreements.

Nor does the retrospective adjudication of agreements strengthen the arbitration process. Arbitrators are given criteria for accepting an offer (s. 38) and for rejecting an offer (s. 39(1)). Those criteria do not match up with the criteria for exemption. In effect, the exemption power lets the CRTC look over the shoulder of both the bargaining parties and adjudicators and, in effect, judge their agreements by criteria that are retrospective only. Why are these criteria not applicable to the initial agreements rather than only to the exercise of the exemption power?

Among the questions that arise and are not answered by C-18 is what is the duration of an exemption? Is it permanent or time-limited? How will it reflect changes in the news landscape? Will there be a mechanism for compensating new and innovative news organizations? How does the exemption power encourage making agreements? And why must an exemption order, which is mandatory if the CRTC finds the criteria met, have to be approved by the Treasury Board?

In effect, the exemption power is nothing more than an elaborate backdoor regulation of newsrooms by the Government, granted on subjective criteria, and rife with opportunities for applying vague criteria in hindsight.

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9. Undue Preference

The Bill prohibits “unjust discrimination” or “undue or unreasonable disadvantage” against
any eligible news business, as well as giving any entity an “undue preference” (s. 51). The breadth of this prohibition renders any digital news intermediary potentially liable for any ranking or moderation decision that has any negative impact on a news organization. An aggrieved news organization can bring the matter before the CRTC.

This is coupled with reverse onus provisions providing that the digital intermediary who is alleged to have engaged in the behaviour “has the

burden of establishing that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable".

As a result, for each complaint, the operator will be required to prove that the impact of the ranking or recommendation or any other action that is alleged to have negatively impacted any news organization is not unjust, undue, or material. This requires a platform to prove a negative, for each complaint, which could lead to most allegations of preference or disadvantage to be determined to be "undue".

Given that news intermediaries make billions of ranking decisions per day, and send over 5 billion clicks to Canadian news publishers each year, each of these decisions could be subject to a potential complaint by a news organization that is displeased with their ranking. News intermediaries also routinely raise authoritative information from non-news sources. For instance, news intermediaries typically draw COVID-19 information from recognized government sources rather than news sites. Every instance where this occurs could be subject to a potential complaint by an ENB.

Any violation of the Bill attracts potential penalties of up to $15M per day per violation. Given the scale on which digital intermediaries operate, and the ease with which ordinary digital intermediary activities could be held to violate this provision, digital intermediaries could be at risk of billions of dollars in penalties.

This provision shows a complete misunderstanding of the activities of DNIs. It is considered a game killer by DNIs and has produced their most robust opposition.

ISOC Position

The basic concept of C-18 is flawed. It uses the power of statute to run an extortion scheme that seeks to preserve a legacy business model whose economic rationale has been overtaken by new and more effective means of disseminating information to the public. It seeks to impute value where none can be found. It uses the threats of crippling penalties to extort digital intermediaries to prop up failing businesses. It gives extraordinary powers

over news organizations both to the CRTC and to the very digital intermediaries who are the perceived bad guys in the demise of the legacy news business.

The key provisions are poorly drafted. Implementation of the bill will be lengthy. Given the vagueness of language, its implementation will be contested at every stage.

C-18 betrays a complete lack of understanding of the internet and the functions of the news intermediary platforms.

Concerned platforms have suggested two alternatives, either one of which ISCC believes would be worthy of serious consideration and certainly better than C-18.

Alternative 1
A fund could be established on the known model of the Canadian Media Fund, with news intermediaries of a given size contributing a proportion of news-related revenues to an independent fund. That fund would disburse funds to eligible news businesses in accordance with objective criteria. To ensure that benefits would flow to small, independent, and diverse news publishers, a percentage of the fund could be allocated exclusively to that class of news organizations as appropriate

Alternative 2
The Government could adopt a hybrid code/fund model. Each digital news intermediary would have to negotiate a contribution agreement with a single, collective entity. That entity would be governed by a Code of Conduct and disburse funds in accordance with objective criteria to eligible news organizations.

ISCC rejects C-18 as being contrary to the basic principles of the internet and public morality. ISCC suggests that the government might rethink its pursuit of the passage of C-18 by adopting an approach along the lines of one of the models put forward by concerned digital news intermediaries.