Internet Society
Canada Chapter

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Submission to the Senate of Canada
Standing Committee on
Transportation and Communications

Online News Act – Bill C-18

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Executive Summary

1. As a result of advertising dollars moving from print and broadcast to online media, there is a crisis in news content creation in Canada. ISCC believes government action to assist the news industry is appropriate.
2. ISCC believes the coerced bargaining approach adopted in C-18 to be fundamentally flawed.
3. A superior solution would be for the government to create a fund to which all major advertising-supported search and social media platforms that provide links to news content would contribute. A fund would be a more elegant and fairer means of funding the creation of news content. It could be targeted to benefit journalism. It would also be a more appropriate means to allocate funds to communities of particular interest to the Government, such as Indigenous news outlets, community broadcasters, and news of relevance to racialized and disadvantaged communities.
4. C-18 is based on the premise that there is appropriation of the value of news content from news businesses toward the platforms. ISSC does not have an opinion as to whether that is true. ISCC does believe that the more consequential cause of the crisis in news production is the shift of advertising from legacy print and broadcast media to the internet.
5. While there are valid competition policy concerns with the structure of the advertising market, C-18 does nothing to remedy them. It creates a dependency by news businesses upon the continued excess profits due to the uncompetitive advertising marketplace.
6. **Platforms** The Act is meant to apply to Digital News Intermediaries (DNIs). In this submission, we refer to them as "platforms," as they are not mere intermediaries. As drafted, no platform can determine if it is a DNI. A platform must first determine if it is subject to the legislative authority of Parliament (a constitutional issue). It then must pass a test of market dominance. The specific criteria for determining if a platform is

market-dominant (such as amount of revenues, share of market, or the relevant market) is to be made by Cabinet in regulations. The uncertainty is harmful.

7. **News Businesses** The negotiating opposite of a platform is an Eligible News Business (ENB). In this submission, ISCC simply refers to them as “news businesses”. The number of potential eligible news businesses is unlimited, and some of those who are automatically eligible for designation produce no news and are not indexed by search engines. ISCC believes the pool of eligible news businesses is unrealistically large if the intent of C-18 is to direct meaningful amounts of money to professional news organizations.
8. **Bargaining Process** The negotiating process lacks detail (e.g. how is a negotiation initiated, to whom is notice to be given, and how the site and time of negotiations is to be determined). The Act specifies that copyright limitations and exceptions do not apply, singling out platforms from the rights enjoyed by all other persons dealing with copyrighted works.
9. **Mediation** is mandatory in the event bargaining fails to lead to an agreement. There are no provisions respecting how negotiations end, how a mediator is to be appointed or paid, the qualifications of mediators, or what happens if the parties do not agree on a mediator. It is left to CRTC regulations to flesh out the bargaining process. It is unclear why mediation is mandatory when bargaining fails. Why cannot sophisticated parties go directly to arbitration? Mediation can itself be both expensive and time-consuming.
10. **Arbitration** If all else fails, the parties are to submit to final offer arbitration (aka baseball arbitration). S.19 specifies that final offer arbitration is limited to monetary disputes. However, s. 38 and s. 39 require the arbitrators to judge a number of qualitative non-monetary factors. Arbitrators are being asked to look to public interest factors that are properly the domain of a regulator.
11. **Exemption** A platform that has concluded agreements with a number of news organizations can apply to the CRTC for an exemption. If, as the Government says, C-18 is motivated by the desire to ensure news businesses receive compensation for value appropriated by the platforms, that would be reflected in the exemption criteria. However, the exemption criteria are replete with socially desirable results that go far beyond simple compensation. This reveals C-18 to be a contribution program designed to further government objectives with respect to equity-seeking communities

and media. If this is the Government's goal, a fund is a better and more straightforward mechanism for achieving it. In addition, the exemption criteria require that platforms become the supervisors of Canadian news organizations and intervene in their internal functioning – a role that has serious implications for freedom of the press.

12. The exemption provisions, rather than ensuring some measure of finality for the platforms, hold the prospect of requiring that agreements and arbitral decisions be reopened and renegotiated after-the-fact. The fact that the Government can tie the hands of the CRTC on how the exemption criteria are to be interpreted and can add new conditions that an applicant must meet undermines the credibility of the process as well as the independence of the regulator. The arbitration process is further compromised by a provision that permits the CRTC to secretly provide to a panel confidential information that cannot be shared with the parties – thus corrupting the fairness of the arbitral process.

13. **Unjust Discrimination** C-18 incorporates from the law of common carriage the prohibition on unjust discrimination, undue prejudice, and unreasonable preference. However, the concepts have not been tailored to the role played by the platforms in internet communications. It remains impossible to say if the provisions are meant to be a corrective for unfairness in the design of algorithms or if they apply to individual ranking decisions. If the latter, then the provisions are clearly unworkable, as the platforms make millions of such decisions each day. The provisions place a reverse onus on platforms to prove they did not violate the prohibition – a burden that is very nearly impossible to meet. Platforms face administrative monetary penalties of up to $15M for each day of violation.

14. **Splinternet** The *Online News Act* risks imposing financial and management costs on the platforms that may exceed any value that the linking to or indexing of news for Canadians may potentially have. Meta has announced that if C-18 becomes law, it will disable the ability of its Canadian users to transmit links to news. Alphabet is openly exploring deindexing news sources for its Canadian users.

15. If the platforms do withdraw from the Canadian news market, it will have negative results for Canadian internet users. They will have a diminished user experience of the internet. The ability to link to or search for news will be degraded. Other, but more cumbersome, means will continue to permit Canadians to access news and information – but their experience will have

been profoundly changed. A withdrawal of platforms from the Canadian news market will diminish traffic to Canadian news sources – compounding the crisis they are experiencing. It also will affect user choice – posing a risk of misinformation and disinformation as authoritative news becomes more difficult for the general public to reach.

16. **Conclusion** C-18 is flawed both in its original form and as modified in study in the House of Commons. Its excesses threaten the withdrawal of the dominant internet social media and search engines from linking, indexing, and ranking news sources for Canadians. This is a direct threat to the information ecosystem available to Canadians and can only deepen the crisis in the Canadian new industry.

17. ISCC believes that C-18 should be withdrawn. If it is not withdrawn, it should be defeated.

Submission

Who we are

1. The Internet Society Canada Chapter (ISCC) is a not-for-profit corporation that engages in internet legal and policy issues to advocate for an open, accessible, and affordable internet for Canadians. An open internet means one in which ideas and expression can be communicated and received except where limits have been imposed by law. An accessible internet is one where all persons and all interests can freely access websites that span all legal forms of expression. An affordable internet is one by which all Canadians can access internet services at a reasonable price.

Part 1
Introductory Overview

C-18: The Face of Failure

2. Developments of the last few weeks have demonstrated that C-18 will likely cause more problems than it solves. It was hoped that C-18 would lead to agreements between the dominant internet platforms and Canadian news organizations that would help the latter thrive. However, C-18, both in original conception and as modified in the legislative process, has undermined that objective.

3. Meta has announced that, if C-18 comes into force, it will cease to act as an intermediary between Canadians and news sources. Google has tested methods to remove Canadian news search results from Canadian users. Both are a direct result of C-18. If C-18 is enacted, it may utterly backfire. Canadian news organizations would no longer be able to reach their audiences through the two dominant internet platforms. Canadian internet users face the prospect of being denied, with respect to news sources, some of the features, such as linking to news content, that are nearly universally used on the internet. While Canadians would still be able to access news by other means, their information environment would be the poorer, and authoritative news sources harder to reach.

4. The withdrawal of the most significant platforms would not only harm users and legacy media – it would pose challenges to the establishment and flourishing of new models of news production and dissemination. Canada may lose the benefits of a competitive and innovative news environment.

5. In this submission, we highlight the many areas where C-18 presents a platform with disincentives not merely to agreements with Canadian news organizations – but to participation in the Canadian news ecosystem.

About this Submission

6. This submission first looks at the crisis in the news industry and the policy challenges its poses. It reviews the broad policy approaches that could have been taken to address the declining revenues of news businesses in Canada.

7. In the following sections, we examine the key provisions of the Bill C-18 in the logical order in which the process will be followed. The sequence is: who is a platform subject to the Act; which news businesses can participate in bargaining; how the bargaining process (especially arbitration) works; the exemption criteria and the process of obtaining an exemption; the provisions respecting unjust discrimination; the threat that C-18 could undermine security and confidentiality online and may lead to a splinternet; and finally some overall conclusions of this analysis.

8. Bill C-18 contains other significant, and perhaps fatal, flaws that are beyond the scope of this submission, which concentrates on the internal logic of C-18. In particular, we would highlight the following issues that merit further analysis:

1. C-18 is arguably beyond the legislative competence of Parliament as set out in the *Constitution Act 1867*.
2. C-18 may result in an infringement of the *Charter*'s guarantees of freedom of expression.
3. C-18 may well violate Canada's international obligations, both under North American trade agreements and under the Berne Convention on copyright.

Terminology

9. The Act uses the terms Eligible News Businesses and Digital New Intermediaries. Depending on the context, we refer to "platforms" in preference to Digital News Intermediaries. Platform describes better the multi-functional role of search engines and social media platforms. Similarly, we normally replace Eligible News Business with "news business."

C-18: Legislative Drafting

10. ISCC is compelled to observe that C-18 is both poorly drafted and organized. In this submission, ISCC has chosen not to address basic drafting errors and inconsistencies. This submission will concentrate on provisions that contain serious policy anomalies, and ambiguities, which lead to perverse policy outcomes or that undermine attaining the basic purposes of the Act.

The News Industry Crisis

11. ISCC is mindful that the news industry – universally – is in turmoil as a result of the revolutionary impact of the internet on the business models of legacy news organizations. However, in Canada, the crisis is not solely because of the internet. A long process of acquisitions consolidated the ownership of much of local and regional newspapers and broadcasters in the hands of a few dominant corporations. Those corporations pursued strategies that reduced local content (including news coverage) while harvesting advertising revenues – in particular from classified and local advertising. The combination of consolidation of ownership, newsroom reductions, and profit maximization through reliance on advertising revenues rendered the industry particularly vulnerable to shifts in the targeting of advertising expenditures.

12. The crisis in the news business did not arrive with the emergence of the mega platforms (Google as an indexer and ranker of news, and Facebook that permits users to share links to news articles). The crisis arrived when

classified advertising and local advertisers moved from newspapers and local broadcasters to Kijiji and other online marketplaces. Even obituaries, a steady source of income, have moved from newspapers to funeral home websites. Advertisers moved their dollars online: online advertising marketplaces proved cheaper and more effective at matching buyers with sellers.

13. News organizations have not been passive. They responded aggressively to the ubiquity of powerful web search engines and the rise of social media. News organizations adapted their presentation of news in ways that would maximize their indexation by search engines. They established comprehensive websites – often offering unique material in addition to their broadcast or print editions.

14. Legacy news organizations also sought to harness the technology that created the threat to their business models. Essentially all media have an extensive Facebook and social media presence. The websites of virtually every newspaper, magazine, or newscast facilitate (indeed encourage) user sharing on social media. (For example, the *National Post* offers 5 sharing options for each article on its website: email, Facebook, Twitter, LinkedIn, and one that allows the subscriber to share in any other manner the subscriber chooses.)

15. While some news publishers have succeeded in winning new subscribers and revenues, by and large legacy media – particularly print media – have lost ground, as advertising revenue has drained away from legacy media toward online advertising and promotion. This trend seems inexorable. At play here is the triumph of a superior vehicle for delivering advertising to their target audiences. While competition and anti-trust issues arising from certain -platforms' market dominance have drawn attention from governments and competition authorities in other countries, Canada has not followed suit. To the extent that such concerns may underlie C-18, C-18 is a highly problematic, and potentially counterproductive response, as this submission will demonstrate.

16. In response to the continued decline of legacy news businesses, the Government has established programs of tax credits and subsidies. Despite these programs, the decline of legacy news businesses has continued virtually unabated.

Options to Support News

17. Leading up to the introduction of C-18, the Government conducted broad consultations on how best to address the crisis in news generation in Canada. Those consultations resulted in the emergence of two broad approaches for governmental action:

    1. The creation of a fund, administered independently of government, to which internet intermediaries would contribute and from which news organizations would receive payments based on criteria established by the fund manager after industry consultation.

    2. The creation of a legislated bargaining regime to equalize the bargaining power between news organizations and internet news intermediaries (inspired by the Australian approach); and,

18. The Government, apparently in the belief that a bargaining regime could be implemented faster and with fewer complications, opted to mimic the Australian model. Both C-18 and the Australian precedent apply to dominant firms rather than to all digital news intermediaries. Both regimes represent legislative shakedowns of the online news intermediaries. However, C-18 introduces a number of "enhancements," which complicate the regime, places broad discretionary powers in the CRTC as regulator, and reserves critical functions (such as basic definition of who is to be subject to the regime) to Cabinet regulation.

19. None of the outstanding issues promises to be of simple or timely resolution. Worse still, C-18 will create a direct, and potentially intrusive, relationship of dependency between Canadian news organizations and foreign online mega-platforms which will unavoidably complicate and inhibit Canada's ability to address competition and anti-trust issues.

A Fund is a Better Solution

20. ISCC believes that the creation of a fund to which all online news intermediaries of a defined size would contribute would have been the simpler and fairer option. C-18 creates new regulatory powers, requires extensive further regulations and regulatory decision-making, and focuses narrowly on mega platforms rather than the broader news intermediary ecosystem, most of whose participants are competing with legacy news media for advertising revenues.

21. A fund could be tailored to meet broader governmental objectives such as support for news production by equity-seeking groups, community news, innovative business models, and Indigenous news outlets.

22. A regulated bargaining process and arbitration cannot be tailored to meet the very different needs of so many diverse interests in addition to those of legacy news media.

Advertising Revenues – Not News – is the Subject of C-18

23. C-18, the *Online News Act* is said to be about news but, of course, it is not about news: it is about advertising dollars. It is about transferring advertising dollars from the online platforms to the legacy media that have been unable to maintain their historic share of advertising expenditures. There can be no question that the online platforms (and websites generally) have absorbed the lion's share of advertising expenditures that once supported not only news but broader elements of print and broadcasting content creation and dissemination. The success of the platforms does not alone prove that the platforms have enjoyed an unfair position in the Canadian news ecosystem.

C-18 is Deeply Flawed

24. While ISCC considers that the overall approach taken by C-18 is contrary to the interests of Canada and Canadians, we believe that the policy and legal choices reflected in C-18 are in themselves flawed and, if adopted in their present form, will work unfairness and lead to anomalous results. In the following paragraphs, we will deal with a number of the most problematic issues.

Part 2

Bargaining and Arbitration

Scheme of the Act

25. The scheme of C-18 is simple enough.

    1. A platform having market power is required to identify itself to the CRTC. The CRTC will add the platform to a public list.
    2. A news business designated by the CRTC can then commence a negotiation with the platform to seek payments for the platform

having facilitated access to the news content created by the news business.

3. If negotiations fail to produce results, the process moves to mediation.

4. Should mediation fail, then final offer arbitration is imposed to determine the amount a platform must pay to the news business.

5. Failure by a platform to self-identify or to negotiate in good faith are violations that are subject to administrative monetary penalties of up to $15M per day for every day during which the violation continues.

6. A platform that has concluded a sufficient number of agreements or arbitrated settlements can apply to the CRTC for an exemption – which would relieve the platform from having to go through further bargaining with news businesses for a period of up to 5 years.

Digital News Intermediary and Self-identification

26. In the Australian precedent, it was the responsibility of the appropriate Minister to designate the news intermediaries to whom the Act was to apply. In C-18, it is the news intermediary who must self-identify to the CRTC based on its own analysis of multifactored criteria. There is no provision for the CRTC to determine that a particular platform is a digital news intermediary to which the Act applies: the CRTC's only recourse is to issue a notice of violation and impose administrative monetary penalties to coerce a non-compliant platform to self-identify.

27. In order for an online platform to conclude that it is a platform that must notify the CRTC, a platform must determine that:

    1. It is an online communications platform;

    2. It is subject to the legislative authority of Parliament (something which is contentious and far from self-evident);

    3. That it makes news content (regardless of the origin of the news) available to persons in Canada; and,

    4. That there is a significant power imbalance between it and news businesses having regard to:

        i. The size of the platform or its owner;

        ii. The market for the platform gives its operator a strategic advantage over news businesses; and

iii. Whether the platform occupies a prominent market position.

[**definition in s. 2 and factors listed in s. 6**]

The Bill leaves it for the Government to make regulations respecting the factors in s. 6 of the Act (s.84(a)).

28. As it stands, the factors mentioned in section 6 leave it to the imagination as to what is meant. It has echoes of competition law concepts and terminology, but is opaque as to what the relevant markets are, what prominence may mean in this context, or how the size of the platform or its parent is to be determined. The combination of the definition of a platform and the factors in s. 6(1) invite years of litigation and accompanying uncertainty and delay in implementation of what is meant to be a timely remedy to a crisis in the new industry in Canada.

29. We note, as well, that C-18 does not provide a mechanism for a platform to cease to be a digital news intermediary – as may be the case as a business evolves.

Eligible News Businesses

30. C-18, as introduced in Parliament, required the CRTC to designate news businesses of two categories:

    1. those that already qualified under s. 248(1) of the *Income Tax Act*; and
    2. a virtually unlimited class news businesses who produce some news of general interest.

31. In the course of study in the House of Commons, the first category was expanded to include broadcasting licensees in the campus, community, and native station categories: even if they do not produce news content or content of general interest they must be designated upon request. This creates a new pool of potential bargaining partners with whom a platform otherwise may have no connection. In effect, a candidate for contribution funding is transformed into a bargaining counterparty – to what avail?

32. The second class of news business has been expanded to include small news organizations in which the journalists may be part owners of, or not at arm's length from, the news business. The category is somewhat limited by a requirement that the news business either be subject to a third-party code of journalistic ethics or have its own internal code.

33. The House of Commons added a third category of news business – Indigenous news outlets. A definition of Indigenous news outlet was added to s. 2. It relies on the news outlet – which can be part of another undertaking – being operated by a person who belongs to an Indigenous group, community, or people and reports on Indigenous issues such as land claims and treaty matters.

34. ISCC perceives two principled concerns with the eligibility criteria set out in s. 27(1):

    1. Collectively, the number of entities who must be designated by the CRTC as a news business has expanded exponentially. The CRTC has been given no crisp criteria by which to determine which entities are news businesses within the meaning of the Act. This poses challenges for the CRTC in terms of developing criteria for designation. It poses challenges for aspiring news businesses that must determine if they meet the criteria required to participate in the bargaining process. It also poses challenges for platforms, who do not wish to face potentially endless claims to bargaining rights the timing and expense of which they cannot control. The C-18 bargaining process may collapse of its own weight. This takes on an added significance when the criteria for exemption require that the applicant have concluded agreements with a broad range of news outlets;

    2. A further concern is that there is nothing to prevent agents of foreign states, foreign-owned news businesses, or click farms from being designated as news businesses and hence benefitting from the bargaining process. When authentic domestic news content creators increasingly face bankruptcy, it is perverse that agents of foreign states may be funded in competition with domestic news creators. C-18 provides a mechanism that may subsidize the subversion of foreign influence on public opinion and the professionalism of the Canadian news ecosystem. This is a major flaw in the edifice of C-18.

Bargaining and Final Offer Arbitration

Bargaining Process

35. We have little to say about the initial bargaining process as the Act says virtually nothing about it, apart from setting out a time frame for the bargaining process ((s. 19(1)) and specifying that an eligible news business

can commence the bargaining process (s. 20). It does not say how, or within what time frame, or what must be in a notice to bargain. All that is left to regulations to be made by the CRTC (s. 85(b)).

Scope of Bargaining Process

36. S. 19(2)) is one of two provisions that addresses the scope of the bargaining process:

> **(2)** The bargaining process is limited to matters related to the making available, by the digital news intermediary in question, of news content produced by a news outlet that is identified under section 30 as a subject of the bargaining process…

It is fair to observe that the scope of bargaining is vague and provides little guidance for negotiation (and later mediation and arbitration).

37. The scope of the bargaining process is expanded by s. 24, which requires that the bargaining process ignore the legality of the use by platforms of copyright material:

> **Limitations and exceptions**
> **24** For greater certainty, limitations and exceptions to copyright under the *Copyright Act* do not limit the scope of the bargaining process.

In short, for the purposes of the negotiations between the platforms and news businesses (including any subsequent arbitration), the platforms are to be treated as if they are routinely violating copyright – even though all evidence is that in their treatment of copyrighted material, the platforms have generally been compliant with the law. This lends an air of unreality to the bargaining process.

Mandatory Mediation

38. S. 19(1)(b) mandates mediation where negotiations fail to produce an agreement. Mediation can often be a waste of time and resources. In our view, the parties to a negotiation should be able to go immediately to final offer arbitration if the bargaining process has narrowed the issues sufficiently that the matter could be put to arbitration. Mediation can be helpful, but it inevitably incurs costs and delay for both parties. The parties should be able to make these decisions for themselves – they are in a better position than

legislators or the CRTC to know which path will most swiftly and efficiently lead to a successful resolution.

39. Again, the legislation does not spell out the mediation process or how mediators are appointed, or what their mandates may be: that is all left to regulations to be developed by the CRTC.

Final Offer Arbitration

40. The failsafe of the contemplated bargaining process is final offer arbitration (also called "baseball arbitration"). Final offer arbitration is intended to be quick and simple. Each party to the arbitration makes a final offer. The arbitration panel must choose what it considers the best offer. It is not open to the panel to construct what it thinks is the best solution: it can only choose one offer or the other.

41. It is abundantly clear that, in singling out the platforms, the Government believes it is correcting the power imbalance between them and news organizations. In doing so it is superimposing professional-athlete-versus-owner negotiating processes to solve what is fundamentally a competition law and policy issue. A fundamental problem is that there are metrics to help determine the value of a batsman to a baseball team. It is pretty hard to determine the value of linking to or indexing of news articles to either the news industry or to the platforms. In consequence, C-18 resorts to vague and untested concepts that complicate the final offer arbitration model.

42. Given the centrality of a credible arbitration process to the scheme of C-19, it might have been hoped that the Act would set out a simple, clean, and unimpeachable scheme of arbitration. Not so.

Arbitration Roster

43. We note that only arbitrators from a CRTC-selected roster can arbitrate between the bargaining parties – an unnecessary limitation on the freedom of the negotiating parties. There is no reason why sophisticated news organizations cannot choose their arbitrators. It is unclear why sophisticated parties cannot choose to have a sole arbitrator if that is their preference. The mandatory imposition of a roster selected by the CRTC constitutes an unwarranted extension of the CRTC into the arbitration process.

44. Of greater concern are further provisions that undermine both the simplicity of the process and the fairness of the arbitration process.

Factors in Adjudicating Final Offers

45. S. 19(3) restricts final arbitration to monetary issues. However, s. 38 requires the arbitration panel to consider non-monetary value added (s. 38(1)(a), and non-monetary benefits that the parties receive from making news content available (s. 38(1)(b)). How is a panel whose role is to determine a monetary issue to consider such non-monetary, qualitative issues for which there are no known metrics? The Act lacks a coherence between the simplicity of a monetary issue and the complexity of criteria that must be accounted for. It is unclear if this is a drafting or a policy error.

46. It is to be noted that a panel must take into account the three listed factors in s. 38(1). These include the value added to the news content contributed by the parties. It is not clear why the panel is not required to examine the investments and value-added that platform brings to the making available of news content to the public. Platforms assist news businesses in a number of ways that permit them to maximize their potential to reach news audiences. Why are these expenditures excluded from the scope of values adjudicated by the panel? One senses a thumb being put on the scales.

47. A panel is also required to take into account the discrepancy in bargaining power between the parties (s. 38(1)(c)). Final offer arbitration eliminates the impact of superior bargaining power. Before an arbitration panel, the parties are equals. They are no longer bargaining – they are making a case for their final offer as being the more appropriate to be chosen by the panel. This factor should be removed from the Act.

Rejection of Final Offers

48. S. 39 requires that a panel reject a final offer on the qualitative grounds that the offer:

> **(a)** allows a party to exercise undue influence over the amount of compensation to be paid or received;
>
> **(b)** is not in the public interest because the offer would be highly likely to result in serious detriment to the provision of news content to persons in Canada; or
>
> **(c)** is inconsistent with the purposes of enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability.

49. It appears that an arbitration panel, rather than selecting the most appropriate final monetary offer, is being asked to judge a series of qualitative factors that deviate from the mission of adjudicating monetary issues. S. 19(3) requires:

> **Scope of final offer arbitration**
>
> **(3)** Any final offer arbitration under the bargaining process is limited to monetary disputes.

50. The task of adjudicating monetary issues is entirely subverted by bringing in extraneous factors that, by the clear wording of s. 19(3), are beyond the scope of final offer arbitration. This is another example of the incoherence of the legislative drafting. In order for the parties to justify their offers, they must adduce evidence that could lead to rejection of a final offer on grounds that have nothing to do with the monetary offers that have been put before the arbitration panel. C-18 entirely subverts the purpose of final offer arbitration. It threatens to turn arbitration proceedings into regulatory hearings.

Commission Interference

51. S. 38 is the most extraordinary provision to find in a bill establishing an adjudicative process:

> **Commission assistance**
>
> **36** The Commission may, at the request of an arbitration panel, provide administrative and technical assistance to the panel and *may, on any terms that the Commission considers necessary, disclose to the panel any confidential information in the Commission's possession that, in the Commission's opinion, is necessary for a balanced and informed decision-making process, on the condition that the Commission ensures that the arbitration panel or each individual arbitrator that presides over the final offer arbitration, do not further disclose any such confidential information and under any further terms that the Commission considers necessary*.

The provision does not require that the arbitration panel have sought confidential information from the Commission. The Commission can, of its own initiative, provide information to the panel. There are no safeguards for the panel or for the parties to the arbitration.

52. Put simply, the italicized words would see a panel consider and rely on information that has not been disclosed to the parties before it. An arbitration would become a Star Chamber proceeding. This would constitute an irreparable

breach of natural justice and would delegitimize any decision rendered by the panel. The highlighted text should be expunged from the bill.

53. C-18 sets out an arbitration process that is subverted by the requirement that the panel consider matters extraneous to the arbitration process. It doesn't ensure that the value added by platforms is taken into account by the panel in assessing what, if anything, the platform may owe to a news business. By enabling the CRTC to pass information to the panel through a backdoor process, it undermines the legitimacy and credibility of the arbitration process.

Part 3

Exemptions

The Role of Exemptions

54. In the scheme of C-18, an exemption order by the CRTC excusing a platform from further bargaining is touted as the reward for compliance with the Act (as administrative monetary penalties are meant to be a disincentive to non-compliance). The Australian precursor legislation did not have a similar provision, so the prospect of an exemption might have been a significant inducement to compliance with the Act. That proves to have been wishful thinking. Seeking an exemption will be fraught with complexities, uncertainty, delay, the potential exposure of business confidential agreements, and the possible reopening of concluded agreements and arbitral awards. A platform will find seeking an exemption more arduous than any benefit to be gained from it.

55. While the opening language of s. 11(1) suggests that the granting of an exemption by the CRTC is mandatory, but this is not so. The CRTC is given vast discretion as to whether to issue an exemption, and any eventual exemption order can be made conditional upon the platform fulfilling further – potentially onerous and expensive – conditions.

Exemption Criteria

56. As a first step, the CRTC must be satisfied that the agreements entered into between a platform and news businesses as a whole, meet seven criteria set out in the legislation (11(1)(1)(i)-(vii). These criteria are not limited to the adequacy of the compensation flowing from platforms to news businesses, They require extremely qualitative judgments about the journalism profession and the internal functioning of news businesses themselves.

Platforms to Oversee News Operations

57. Subparagraphs 11910(a)((ii) and (iii) states that a platform, through the agreements it makes with news businesses, are required:

    1. To assume the role of assuring that the money supports national, regional, and local news gathering; and
    2. To ensure that the business side of the news business does not intrude on the journalistic independence of the news production of the business.

58. It is difficult to conceive of how this is a good thing. The wording suggests that foreign-owned platforms will have to include provisions in their agreements whereby the platforms will exercise oversight sufficient to ensure these outcomes. How can this mandated intrusion into the internal functioning of the news and business functions of the news organizations be justified? How can this be consistent with the independence of journalism and the creation of news content? This is absurd.

59. These clauses place the determination of the independence of news businesses squarely within the hands of the platforms, which is a contradiction in terms.

60. It raises the question of how the platforms would be required to police the news organizations. Are the platforms expected to sue for damages if the corporate side of a news business interferes with the journalistic side? Would it have to seek injunctions or specific performance? C-18 renders the foreign platforms the guardians of press independence. Why?

61. As a matter of first principles, it is unclear whether Parliament has the constitutional power to regulate – even indirectly – the internal workings of news organizations. The federal government is not in this case exercising the power of the purse – it is attempting to indirectly regulate the internal affairs of news outlets.

62. It must be added that the extent of regulation contemplated by the exemption criteria raises serious questions respecting freedom of the press as protected by the Canadian Charter of Rights and Freedoms – an analysis that is beyond the scope of this submission.

63. The role that C-18 demands the platforms to perform are those that in other jurisdictions may be regulated by press councils. C-18 devolves the role of a press council onto the shoulders of the platforms. This is a dangerous and incongruous development – one which should be rejected out of hand.

Other Qualitative Criteria

64. The criteria (s. 11(1)(a)(iv)-(vii) also require that the platform's agreements, taken as a whole:

    1. Sustain the Canadian news marketplace;
    2. Ensure a significant portion of independent local news businesses benefit from them;
    3. Encourage innovative business models;
    4. Involve a range of for-profit and not-for-profit sectors;
    5. Be entered into with businesses that reflect:
        i. a diversity of business models;
        ii. that provide services to all markets; and
        iii. diverse populations (local and regional markets, anglophone and francophone communities, official language communities, Black and racialized communities); and
    6. ensure that a significant portion of Indigenous news outlets benefit from the agreements and the agreements contribute to the sustainability of news to Indigenous communities.

65. When considered as a whole, it is clear that the C-18 agreements are not in fact designed to compensate news businesses for the alleged transfer of value to the platform of linked or indexed news. Rather, it constitutes a program of contribution agreements whereby the platforms are expected to pay untold sums, and extract commitments from news organizations to achieve governmental objectives. The criteria are reminiscent of the objectives to the Broadcasting Act – but cast as objectives to be attained through the bargaining power of the platforms. This would perpetuate any imbalance of bargaining power between the platforms and news businesses and attempt to convert a vice into a virtue.

66. C-18 co-opts foreign mega-platforms, with CRTC oversight, into an unprecedented role intervention into Canada's news marketplace. Just how profit-making platforms, which have no expertise in delivering news, are expected to manage their affairs to achieve these objectives is unclear. C-18 does not merely impose a financial obligation on the mega-platforms – it expects those platforms to assume a supervisory role over the Canadian

news marketplace, and to manage that market through the agreements into which they enter.

67. ISCC does not believe that platforms should be expected to take on that role. Nor do we believe that it is in the public interest for them to do so.

68. The *Online News Act* will make news organizations dependent on direct cash-flows from online platforms; it will give those platforms, under CRTC supervision, intrusive oversight powers over news organizations' business operations; it will undermine journalistic independence; and it will undermine Canada's ability to take timely and effective competition and anti-trust action against online platforms if and when that is considered necessary.

Public Consultations

69. The CRTC is not merely expected to examine the agreements and arrive at a conclusion respecting the desirability of issuing an exemption order. Rather, s. 11(a.1) requires that the CRTC hold a public consultation with respect to the exemption application. It is entirely unclear how that consultation would be conducted, but it must be observed that a public consultation would be of little value if the public were denied pertinent information, which suggests that the agreements themselves, or significant details of them, will be made public. One can understand that neither the platforms nor legacy news businesses would want the contents of commercially sensitive agreements made public and be subject to public scrutiny. C-18 is silent both as to making the agreements public, and as to how the CRTC is to resolve the tension between confidentiality and the need for meaningful public consultation.

70. The public exposure of the agreements or the key elements of them will not only affect the exemption process – it will have an impact on the bargaining process itself. The prospect of public scrutiny will encourage the adoption of maximalist positions – especially for news businesses. This, in turn, is likely to decrease the possibility of agreements being concluded outside the formal – and more expensive – mediation and arbitration processes. This, in turn, raises the costs of compliance for platforms, and disincentivizes continued participation in the Canadian news market.

Role of Cabinet

71. One of the truly remarkable – and little commented – properties of the exemption provisions is the extent to which the federal cabinet will have the

capacity to tie the hands of the CRTC in assessing whether to grant an exemption. The Cabinet is empowered (s. 84(b)) to make regulations on how the CRTC is to interpret the exemption criteria contained in s. 11(1)(a)(i)-(vi). This is an extraordinary reach into the deliberative processes of an independent regulatory body that is acting in its capacity as an independent and expert tribunal that is meant to regulate in the public interest.

72. Not only can the Cabinet shape how the CRTC interprets the legislative criteria, Cabinet is further empowered (s. 11(1)(a) and s. 84(c)) to set conditions for the granting of an exemption, quite apart from the criteria set out in the statute. There are no restraints on the conditions Cabinet may impose. The power to set further conditions to the granting of exemptions provides the Government a further means of indirect intervention in the conduct of news organizations in Canada – as well as to pick winners and losers.

Effect of Orders

73. The granting of an exemption order is not the end of the process.

74. First, the exemption only applies to relieve the platform from the obligation to negotiate further agreements for a maximum of 5 years (but may be renewed). The CRTC could grant an order for a shorter period of time.

75. Second, the exemption may be made conditional. There is no hint in the Act as to what kinds of conditions the CRTC might impose. A platform might fear that the order may be limited to certain classes of news businesses (thus obliging the platform to continue negotiation process with other classes of new businesses), or on the fulfillment of some other performance requirements.

Interim Exemption Orders

76. It is clear from a reading of ss. 11 and 12 that the process of seeking an exemption is particularly complex, fraught, and multi-faceted. The CRTC may, at the end of its deliberative process, either at the request of a platform, or of its own initiative, grant an interim exemption order. The interim order cannot be for a period greater than one year.

The bill is explicit as to what the interim order is really all about: extracting further concessions from the platform. The following paragraphs (s. 12(1)(c) and (d) make clear that an interim order is only available when:

> (c) the Commission is unable to make the exemption order because it is of the opinion that, taken as a whole, the agreements do not satisfy the criteria set out in subparagraphs 11(1)(a)(i) to (vi); and
>
> (d) the Commission is of the opinion that it will be able to change its opinion because the operator is, in good faith, taking measures that will permit the criteria to be satisfied within a reasonable period, which period must not be longer than one year.

In short, the interim order can be used as a device to force a platform to take further efforts to please the CRTC, including potentially reopening agreements reached through good faith negotiations or through an arbitration decision.

77. As with exemption orders, the CRTC may impose conditions on the grant of an interim order. S. 12(2) provides:

> **Conditions**
>
> **(2)** The interim order must contain conditions respecting the measures being taken by the operator and may contain any other condition the Commission considers appropriate, including a condition requiring that public consultations be held at a time and place in Canada to be fixed by the Commission.

It is possible that the authors of C-18 believed, in good faith, that an interim order could provide a means of saving marginal cases for exemption. It is equally possible to view the interim order as creating more hurdles over which a platform must leap in order to get respite from an otherwise open-ended obligation to conduct negotiations with ever more marginal players in the Canadian news marketplace.

Review

78. To complete the picture, the CRTC is empowered (s.13) to review an exemption order or an interim order at any time. In other words, the regulatory process may never end. A platform granted an exemption order, while it may forestall the initiation of further bargaining, offers no respite from regulatory processes of unpredictable scope and duration.

Repeal

79. The CRTC is given the explicit power to repeal an exemption or interim order if the CRTC is "of the opinion that the operator of digital news intermediary is acting in a manner that is inconsistent with this Act" or for breach of a condition of an exemption or interim order.

80. No procedural safeguards for the exercise of this power are specified. No right to be confronted with the case to be met, nor right to a hearing, is spelled out. Perhaps administrative law principles would require some procedural fairness in any case, but it is normal that a statute set out at least a minimal level of protection for a party who may lose the benefit of an important protection.

Conclusions on Exemptions

81. The primary scheme of the *Online News Act* is to encourage private agreements between platforms and news organizations. In Australia, the threat of applying its act was sufficient to coerce platforms to conclude agreements outside its strict provisions. Encouraging voluntary agreements outside the formal provision of the Act should be the desirable outcome of C-18. ISCC doubts that C-18 is compatible with that outcome.

82. If concluded agreements are the currency of the bargaining process, then the exemption power is the means of debasing the value of that currency. Instead of making the exemption power an enticement to negotiated settlements, the exemption power and its processes devalue and undermine those settlements and the negotiation process leading to them.

83. Given the number of criteria by which an application for exemption is to be judged, a platform could be forgiven if it believes that the CRTC's role in the exemption process is that of Lucy holding the football while the platform's assigned role is to be the Charlie Brown.

84. Many factors militate against an exemption being granted: the complexity of the criteria for exemption, the vagueness of those criteria, the granularity with which agreements must be made, and the unpredictability of Cabinet regulation respecting the interpretation of the criteria and its ability to set further conditions to exemption. Several things drain them of value once they are granted: the power to condition the exemption or interim order, the power of subsequent review, and the power to repeal them.

85. The exemption power of C-18 is a disincentive to participate in the bargaining process and to a platform's willingness to facilitate the making of news content available to Canadians.

Part 4

Discrimination, Preference, and Disadvantage

86. C-18 includes a prohibition on unjust discrimination by a platform against a news business in the following terms:

> **Prohibition**
>
> **51** In the course of making available news content that is produced primarily for the Canadian news marketplace by news outlets operated by eligible news businesses, the operator of a digital news intermediary must not act in any way that
>
> **(a)** unjustly discriminates against an eligible news business;
>
> **(b)** gives undue or unreasonable preference to any individual or entity, including itself; or
>
> **(c)** subjects an eligible news business to an undue or unreasonable disadvantage.

87. The language of the prohibition draws from precedents in the law of common carriage, such as by railroads and telecommunications carriers. In the late 19th century railroads colluded with major customers to disadvantage competitors of those customers and to give preference in both the price charged for carriage and other forms of preference – such as the timing of shipments and deliveries. In response, legislation was adopted to prohibit such practices. The principles adopted were eventually applied to other commodity industries such as trucking, telecommunications, and pipelines.

88. Unjust discrimination provisions applied to commodities with shared properties: oil, wheat, telecommunications signals, freight cars of goods.

89. The news business is not one of commodity traffic. Each news item is distinct from another, and each news source is different from all others. Search and indexing platforms rank their results. They do so by complex algorithms that

consider the source of the item, the credibility of that source, the risk of misinformation (a major concern during the recent pandemic), the number of repetitions of the item (a Canadian Press or Reuters article may appear, variously edited, in dozens of newspapers or broadcasts) and whether news consumers appear to prefer one result over another. It appears perfectly reasonable that a ranking system will attempt to find results appropriate to the characteristics of the searcher as well as of the news sources.

90. ISCC believes that the incorporation into C-18 of language that applies to the equal treatment of commodities is both inappropriate and dangerous. What an unjust discrimination would constitute in this context is unclear. If it can be described, then the Act should say with clarity what the wrongful act consists of. Perhaps the section is meant to deal with the manipulation of algorithms in some nefarious way. If that is the case, the language of the Bill should reflect that. We observe that the Australian legislation deals directly and explicitly with the manipulation of algorithms (ss. 52S – 52-W).

91. As it stands, the s. 51 prohibition is unclear in terms of what is unjust discrimination, unreasonable preference, or unreasonable disadvantage, and its application to the dissemination of news is dangerous. It would effectively require a platform to place a source of misinformation alongside and on an equal footing with a credible news source.

92. A news business makes a complaint when it has reasonable grounds to believe that a platform has engaged in conduct that violates s. 51 (s. 52(1). The CRTC then adjudicates the complaint, in the course of which it can take into account any factors it chooses, but must take into account (s. 52(2)) whether the impugned conduct is:

> (a) in the normal course of business for the operator;
>
> (b) retaliatory in nature; or
>
> (c) consistent with the purposes of this Act.

93. It is possible that paragraph (a) is meant to address the algorithm and ranking issue – but the provision does not say so, and it is equally possible that the CRTC could give it an alternative meaning that would dramatically impede the operations of a platform.

94. While paragraph (b) is relatively clear, paragraph (c) is not. S. 4 sets out the purpose of the Act as follows:

> **Purpose**

> **4** The purpose of this Act 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 news businesses in Canada, in both the non-profit and for-profits sectors, including independent local ones.

95. It is difficult to discern what light a consideration of the purposes of the Act will shed on a complaint of unjust discrimination by a news business. It is hard to conceive of how a platform could rely on paragraph (c) in its defense.

96. The language of paragraph (c) is so opaque and so open to interpretation that the CRTC could find virtually any conduct contrary to the purposes of the Act or, on the contrary, find the same conduct consistent with the purpose of the Act.

97. Regardless of the rather open-ended criteria by which the CRTC is to adjudicate a claim of unjust discrimination, the whole process is rendered unfair by s. 68 that requires that a platform disprove a violation of s. 51:

> **Burden of proof**
>
> **68** In a proceeding in respect of a violation in respect of a contravention of section 51, the burden of establishing that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the individual or entity that is believed to have contravened that section.

98. A platform, particularly a search platform, will make billions of decisions each day by which they rank search results, weigh the value of the source, take account of user preferences, and deal with potential misinformation. These decisions are made algorithmically. It is unthinkable that a platform can reconstruct each ranking or indexing decision so as to demonstrate that the discrimination is not unjust. The mere inclusion of this provision evidences how little concept the authors of the Bill have of how the internet functions.

99. This is not a trivial matter. The imposition of an evidentiary reverse onus on a platform exposes it to enormous uncertainty and costs. A complaint costs very little for a claimant – the cost of defense of a claim can be staggering.

100. The reverse burden of proof penalizes a platform's participation in the Canadian news market: the opposite of what one would expect the Government to desire.

101. Ss. 51 and 52 were amended during Committee study in the House of Commons. Those changes brought some improvements. However, the provision remains inappropriate to the context of providing access to news content., the true subject matter of the prohibition remains unspecified. S. 51, like many of the provisions analyzed in this submission, acts as a disincentive to platforms to participate in the Canadian news marketplace and to make news content available to Canadians.

Part 5

Canadians Face a Splinternet

Payments Directed to Non-News

102. C-18 so enlarges the pool of news organizations eligible to enter into bargaining with the platforms. Some of those organizations produce no news. C-18 slips from the realm of commercial agreements into the realm of contributions and subsidies – a role normally reserved to governments and charities.

The Value Proposition

103. The underlying premise of C-18 is that linking to, or the indexing of, news content constitutes an appropriation of value from the news content creator by the platforms. Given that news organizations vigorously compete to appear at the top of search engine results and encourage their users to share their stories on social media, this is not an easy proposition to defend. And indeed, the platforms assert that the value flows in the opposite direction, to news organizations rather than from them.

104. Meta has announced that if C-18 passes in its current form, it will remove news sharing in Canada from its Facebook and Instagram platforms. Google has been running tests to help it determine whether, if C-18 passes, it may be in Google's interest to remove Canadian news sources from its search results.

105. If, as a result of C-18's passage, major platforms choose to remove Canadian news sources from their services, then C-18 will have backfired: it will not boost funding to the Canadian news industry, it may reduce traffic to Canadian news sites, and will reduce Canadians' access to news. It will force Canadians to use alternate search engines and apps to find news. They will have to visit websites to find content. They may become more dependent on foreign sources for their news and information.

106. As a simple matter of market reality, if the prospect of disgorging revenue to news businesses leads platforms to resile from linking to or indexing Canadian news articles and broadcasts, it would appear that the platforms place little value on that activity. The platforms will have said, contrary to the supporters of C-18, that news content is less valuable to them than the unpredictable and potentially exorbitant payments they might be required to make to news businesses. In this context, C-18 amounts to a game of legislative chicken.

107. The government is gambling that the platforms will choose to comply with the law by paying for links and indexing. It is equally likely (and perhaps even more likely) that the platforms will choose to comply by ceasing to link and index – thereby insulating themselves from any argument that they are appropriating value from Canadian news businesses.

108. ISCC observes that, no matter whether the platforms continue to link to or index news content in Canada, C-18 will do nothing to diminish the dominance of the platforms in the Canadian online advertising market. C-18 will give the Canadian government and the Canadian news industry a stake in the continued dominance of the platforms. In short, C-18 incentivizes anti-competitive tendencies in the advertising market by creating new financial dependencies upon the excess profits that depend on continued market dominance. The continued dominance will discourage the development of competing Canadian platforms, and any Canadian platform that in future reaches scale will be captured by the Act and forced to subsidize news businesses.

C-18 Risks a Splinternet

109. A withdrawal by the platforms from linking to Canadian news sources is not merely an inconvenience to Canadian internet users. Nor does it merely risk a reduction in traffic to Canadian news websites. Delinking and deindexing are immediate consequences of fragmentation of the internet for Canadian users. Canada's version of the internet will be separate from today's open and globally connected internet. The primary vehicle for the transfer of information between individuals on the internet is the sending of links – whether by way of social media, email, or SMS. If linking is curtailed on mega-platforms, then the internet will, to Canadians, function differently on different platforms and media.

110. A similar, and potentially more significant harm is represented by the deindexing of Canadian news websites: not only Canadians, but all internet users globally may be unable, through normal popular searching techniques, to access information critical to the conduct of informed debate on matters of public and private interest. At the same time, Canadian news media will have

more barriers placed on their ability to reach their audiences – a potentially crippling development.

111. A platform's withdrawal from participation in the Canadian news ecosystem will undermine the openness and universality of basic internet functioning. The threatened withdrawal of the platforms from Canadian news may be posturing – but it may equally be a rational and considered response to the costs of compliance, both financial and administrative, that will result from the adoption of C-18.

112. The need for platforms to track users' access to news content in order to document their negotiating positions with news businesses may lead to the unintended consequence that platforms will limit encryption in Canada. The privacy and confidentiality interests of users may be sacrificed in order to satisfy the rigours of the bargaining process.

113. To put it another way: C-18 represents a huge gamble by the Government, the eventual costs of which – an impoverished information ecosystem – will be borne by both Canadians individually and by society at large. C-18 represents a high-risk experiment in governance in which Canadians and Canadian society are to be the lab rats. C-18 risks fragmenting the internet – walling off Canadian content and users from the broader interwoven protocols that govern the functioning of the global internet. Canadians will be offered a "splinternet" – a diminished version of the internet – much as is found in China or Iran. The Canadian news system, rather than showered with riches, will be cut off from its domestic and foreign audiences – eroding further its attractiveness to both advertisers and subscribers.

C-18 Risks Canadians' Access to News

114. Canadians access news in many ways, including via radio and TV, and by going directly to publisher sites and apps. They also access news via sharing on social media, via search engines, and via news aggregators such as Google News and Apple News.

115. If Canadian news sources are removed from Google and Facebook properties as a result of C-18, not only will new money not flow into the news industry, but access to Canadian news itself will be reduced. Further, the bill could have the effect of advantaging international news sources (not affected by C-18) over Canadian ones.

116. Driving platforms from the Canadian news market will have the perverse effect of boosting the relative presence of poor-quality information,

misinformation, and disinformation, as compared with quality sources. Canadians who want to share news with their friends will not be able to share the links to the actual articles, leading to a greater proliferation of misinformation because the underlying authority can't be checked. The unintended consequences of C-18 proliferate, while its potential benefits to the Canadian information environment diminishes daily.

Part 6

Summary of Conclusions

117. In summary, ISSC concludes:

1. The Act does not deal with the primary problem – which is the collapse of the advertising market for Canadian news. That collapse is not due to the actions of the mega-platforms. That collapse reflects long-term trends in advertising expenditures, and the efficacy of online advertising in reaching targeted audiences. Canadian legacy news interests contributed to the crisis in news production through attempts to monopolize local newspapers and broadcasting outlets – reducing news staff and local content while milking local advertisers.

2. To the extent that there are legitimate concerns with the organization of the online market for advertising in Canada, those concerns would best be addressed through the abuse of dominance provisions of the *Competition Act*. By establishing ongoing relationships of dependency between Canadian news organizations and specific corporate online entities, and by engaging the government and the CRTC in the details of those relationships, C-18 risks undermining Canada's ability to take timely and effective measures that may otherwise be appropriate under competition law.

3. The Act does not make clear to whom it applies. Only with the imposition of regulations by the Cabinet will it be possible to discern to whom the Act is intended to apply. Even with the clarifications that may come through regulation, it is not clear that Parliament has the constitutional authority to regulate the platforms.

4. If the purpose of the legislation is to return to news organizations the value of news appropriated by the mega platforms, then the C-18 fails at the most basic level. The eligibility criteria for news businesses are extremely vague. Entities that produce no news, or news that is of no

value to the platforms. are eligible, and the exemption criteria requires a platform to ensure their agreements subsidize those entities. Peripheral news organizations can tie up the platforms in negotiations and arbitration processes that drain their financial and management resources.

5. The arbitration process is flawed. The criteria for rejecting a final offer require that a panel adjudicate the conditions of the news market rather than chose one of two final offers before it. Arbitrators are being asked to view the Canadian news ecosystem as a whole, rather than confine themselves to the offers before it. This demands that arbitrators be news industry regulators. An arbitrator who wants their decision to be effective will look not to the offers before them – they will look to the exemption criteria for a checklist of what must be in an agreement that will pass subsequent scrutiny by the CRTC. Additionally, the integrity of the arbitration process is compromised by the possibility that a panel may receive evidence from the CRTC that is to be withheld from the parties before it.

6. The provisions respecting exemption are too complex. Powers reserved to Cabinet tie the hands of the CRTC and may add further hurdles to the granting of exemption orders. To satisfy the existing criteria for exemption, platforms will have to act as managers of the Canadian news market and intervene in conflicts between the business interests of a news organization and its newsroom. The fact that the CRTC could require a platform to reopen and cure agreements already concluded is a disincentive to agreements. The fact that a decision of an arbitration panel could be retroactively opened at the direction of the CRTC negates the finality of an arbitral decision. It renders final offer arbitration tentative, conditional, and, ultimately, futile.

7. The provisions relating to unjust discrimination are inappropriate outside the context of a commodity market. The provision does not identify the real concerns that underly it and are not self-explanatory. The factors that the CRTC must address in adjudicating a claim of discrimination are such as to permit entirely subjective and results-oriented decision-making. The reverse onus imposed on platforms effectively renders a platform defenseless against a complaint from a news business.

8. C-18 is an extortion scheme that represents an abuse of state power. The overall effect of C-18 is not to address a potential appropriation of value by the platforms from news businesses: it is to create a contribution program to fund and sustain elements of the Canadian news market, some elements of which are not even indexed by search engines or included in news feeds. It is a subsidy program that is coerced by the threat of administrative monetary penalties.

9. C-18 forces foreign platforms, with the complicity of the CRTC, into an unprecedented state-directed intervention into Canada's news marketplace. It will give those entities, under CRTC supervision, intrusive oversight powers over news organizations' business operations; it will undermine journalistic independence. It will make news businesses dependent on direct cash flow from platforms.

10. If C-18 results in platforms complying with the new law by removing Canadian news sources from their products and services, the bill will have had the exact opposite of its intended effect. New money will not flow into the Canadian news industry. Canadians' access to Canadian news will be reduced. And rather than Canadians news publishers benefiting from this new law, the real beneficiaries may turn out to be those who take their place on social media and at the top of search engine results: international news publishers unaffected by C-18, and purveyors of low-quality information, misinformation, and disinformation.

11. ISCC believes that the Canadian news marketplace would have been better served by the creation of a fund to which all platforms of a defined size would contribute proportionally, that would be administered independently from the Government, and that would distribute funds in a manner that best ensured a healthy news ecosystem in Canada.

12. ISSC believes C-18 should be withdrawn. If it is not withdrawn, it should be rejected.

*******End of Document*******