
Political Affairs

Can a Mandatory Bargaining Code Solve Canada's Journalism Issues?

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Introduction

The Canadian journalism industry has been struggling to survive in a digital market; since 2013, 250 Canadian newspapers have closed operations including fifty since the beginning of the pandemic. As the Canadian news media industry has struggled, the digital monopolies of Google and Facebook have dominated online advertising. This sentiment is not limited to Canada, rather the impact of Google and Facebook on journalism is a pervasive issue around the globe; an investigation into competition in digital markets conducted by the U.S. House Subcommittee on Antitrust concluded that both companies have an outsized influence on both the monetization and distribution of quality journalism online (pg. 17 – 18). Policy makers in Australia have responded to the issue by developing novel legislation – the News Media Bargaining Code. The NMBC provides remedies of mandatory arbitration between designated digital platform corporations like Facebook and Google and Australia's news media businesses. This article will analyze the novel legislation to evaluate its efficacy in a Canadian context and to address Canadian market inefficiencies. This article will do so

through a documentary analysis of the News Media Bargaining Code, which was recently passed into law, and evaluated through a framework established in the New Generation

of Internet Regulations (Winseck, 2020). This framework recommends beneficial policy tools that have a demonstrated track record of economically beneficial outcomes such as structural separations, line of business restrictions, and public alternatives. This article will examine whether the News Media Bargaining Code contains any of these policy tools and if it would be beneficial applied in the Canadian context. This article will conclude with a discussion of the flaws of the legislation and the outsized corporate impact on the provisions of legislation.

Context

The decade following the 2008 financial crisis (2010 – 2019) participated a startling trend in advertising spending in relation to Canadian newspapers. In 2010, Canadian newspapers represented 20% of net advertising spending – which equalled approximately \$2.3 billion. A decade later in 2019, the industry's share of net advertising

spending decline to just over 5% or \$993 million. During this period, spending on Internet advertising has increased exponentially; in 2010 the internet share of advertising volume in Canada was similar to that of newspapers, at 19.9%. By the end of the decade, the total share of internet advertising volume in Canada was over 58%, or \$8.7 billion in 2019. The seemingly inverse correlation in advertising spending between the Internet and traditional newspapers has resulted in policy makers and academics alike to propose solutions to mitigate the decline in journalism (Drohan, 2016; Winseck, 2020; Klobuchar, et al., 2021). Figure 1 outlines the disparity in where Canadian advertising dollars are being spent.

Figure 1:

Source: Winseck, D. (2020). *Media and Internet Concentration in Canada, 1984–2019*. [CMCRP 2019 Data Sheets](#) (see “Ad\$ All Media sheet”).

The decline in revenues in the journalism industry has resulted in consolidation of firms and copious job losses. Most recently, BuzzFeed news’ acquisition of HuffPost Canada resulted in their entire staff being laid off. Furthermore, domestic giants such as *Bell Media* has been forced to cut staff despite being the recipient of government subsidies meant to combat job losses related to the COVID-19 pandemic. Correspondingly, the pandemic has only exacerbated the trends experienced in the Canadian journalism industry. Since the beginning of the pandemic, over 3000 editorial and non-editorial jobs have been

cut either permanently or temporarily; forty Canadian media outlets have closed which include twenty-nine community newspapers, five radio stations, for online outlets, and two television stations (Wechsler, 2021).

It is at this juncture that the role of Facebook and Google can no longer be ignored; in 2018, Google’s advertising revenue in Canada was in excess of \$4.4 billion dollars – an increase of \$3 billion since 2011. Google uses its monopoly in search – wherein it has and 88% market share – to derive 83% of its total revenue (see [Alphabet Annual Report, 2019](#), p. 29). Furthermore, Google’s dominance over the internet’s advertising ecosystem in relation to search is complemented by its proprietary online advertising exchange. Moreover, Google’s propensity for vertical integration into the Ad-Tech stack further entrenches their market dominance as evidenced by their acquisitions of DoubleClick (2007), AdMob (2010), and AdMeld (2011). These actions created what Winseck (2020) describes as a ‘walled garden’ around its own services, audience data, and online advertising system. Stacking their advertising business on top of their popular search engine has allowed Google to experience skyrocketing profits over the previous decade.

Facebook too has experienced incredible growth over the past decade as a result of an increase and internet advertising spending. In 2011, Facebook’s advertising revenue in Canada was approximately \$181 million – in 2018 that skyrocketed to over \$2.5 billion (Winseck, 2020). Almost all of Facebook’s revenues come from its ad

business (see Facebook Annual Report, 2019, p. 56) which is supplemented by its monopoly in social media. Their most notable acquisitions of Instagram and WhatsApp further entrenched Facebook's position as the dominant player in social media. Facebook is responsible for more than half of all social media visits in Canada (Tankovska, 2021). It is also the site most commonly used by Canadians to receive their news (Watson, 2020). This is troubling when put in the context of the online Ad-Stack; instead of news content being consumed on the publisher's website, it stays on Facebook, allowing them to retain all consumer data as to solidify their dominant position in social media advertising. This is evidenced by Facebook's mobile in-app browser that allows users to view external links without leaving the mobile app. While this provides quicker load times for users and arguably an improved user experience, it is at the detriment to the journalism advertising industry. Facebook doesn't need users to be actively using their site to collect audience data, browser cookies such as *Facebook Pixel* allow the company to identify individuals for marketing purposes on separate websites.

Ultimately, a lack of data privacy protections on behalf of Canadians and the ability to micro target advertising has allowed Google and Facebook to retain their digital duopoly. The information that Facebook and Google are able to collect through their dominant social media platform and search engine, gives a competitive advantage in their ability to microtarget advertisements. The lack of data privacy in respect to Facebook is

increasingly startling when juxtaposed with their most recent announced data breach; wherein the personal information of 500 million users was compromised. A majority of the web traffic that flows to news sources passes through either Facebook or Google, with 44% of Canadians using social media from majority of their news consumption, and 59% who use the internet to search for news daily (Watson, 2019).

Methodology

The News Media Bargaining Code was evaluated through the lens of a qualitative documentary analysis. In so doing, four areas of interest were identified: background, context, content, and post-passage amendments. This analysis provides sufficient information to evaluate the potential efficacy of similar legislation in a Canadian context.

The framework for evaluating the potential efficacy of Canadian legislation which is modeled after the New Media Bargaining Code, is based off the proposals for a New Generation of Internet Regulation: Structural separations, line of business restrictions, and public alternatives (Winseck, 2020). This framework is heavily influenced by antitrust policy remedies whereas, both structural separations and line of business restrictions have been used historically in the United States to reign in monopolies (Khan, 2017; Khan 2019; Philips Sawyer, 2019; Nadler et al., 2020). *Line of business restrictions* are behavioural policy remedies meant to reduce the potential harm by monopolistic corporations. Limiting the conduct of designated companies can range from

restricting the scope of a firm's discriminatory practices to preventing organization between a firm's peripheral businesses. This policy tool is seen as a less invasive form of government intervention from a market perspective, as it does not require any divestiture. *Structural separations* prescribe specific business structures for companies in designated industries to prohibit harmful business practices. Whereas business restrictions prohibit specific conduct by companies (i.e. a behavioural restriction), structural separations eliminate the incentives that would make such harmful conduct possible (Khan, 2019). The final measurement tool relates to the implementation of *public alternatives*. Winseck (2020) bifurcates these public alternatives into a modest proposal that calls for an elimination of advertising from the CBC, and a radical proposal that would see the Canada Post, CBC, National Film Board, and Library of Canada merge into one entity. For the purposes on this framework however, only the spirit of the modest proposal will be taken into consideration for evaluating the efficacy of the NMBC. Elimination of advertising from the CBC would require it to be adequately funded fully by taxpayers, therefore, public alternatives in this context would relate to an increase in public funding to journalistic organizations.

Results

Background

In February 2020, the Australian Government directed the Australian Competition & Consumer Commission

(ACCC) to develop a mandatory code of conduct for bargaining between news companies and dominant digital platforms; specifically Facebook and Google. This was followed by a 33-page concepts paper that was presented for public consideration and response. While the report did not include a definition of 'news', it did however provide a definition of public interest journalism:

journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.

In addressing monetization of news by dominant platforms, the concepts paper sought to develop an effective bargaining framework to allow for revenue sharing with news companies. The first was a bilateral negotiation, mediation and arbitration framework. The idea of this concept is that would allow for digital platforms and news media businesses to have the support of independent arbitration should the original good faith negotiations failed to produce an acceptable outcome. The second framework that was proposed in the concept paper was one of collective bargaining. This potential solution acknowledged the power imbalance between larger media Giants and smaller independent publishers. This framework also included third party mediation and arbitration, similar to that of the previous suggestion. The third suggestion was one of the collective boycott on behalf of Australia's news media businesses. In the view of the concepts paper, a collective

boycott of the digital platforms could increase the leverage for negotiating remuneration for content. However, the paper acknowledges net collective boycott would not only hurt digital platforms but also news media businesses, as they would see a significant decline in web traffic. The final potential framework proposed it was one of collective licensing for news content similar. In response to the concept paper, all interested parties were invited to submit their responses to the proposed frameworks which were publicly released alongside the exposure draft legislation on July 31st, 2020. Over the following month, submissions to the exposure draft were accepted from organizations all around the world ranging from the U.S. Chamber of Commerce, to the Daily Mail. A final version of the bill passed both houses of the Australian legislature February 25th, 2021 and received Royal Assent on March 2nd of the same year.

Content

The News Media Bargaining Code (NMBC) amends Australia's Treasury Laws to establish a code of conduct to address the power imbalance between digital platforms and Australian news media businesses. This code institutes a process of bargaining between *registered news business corporations* and *responsible digital platforms* that if not solved, is required to participate in compulsory pendulum arbitration. For news businesses to qualify under the NMBC, they must be considered news source or a combination of news sources by the Australian Communications and Media Authority. The AMCA would make this determination if a news business'

covered news content was determined to be either (a) *core news content* or (b) content that investigates or explains current events in the public interest. More this definition becomes even more convoluted isn't the determination of core news content which is defined as content that reports, investigates or explains:

(a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or

(b) current issues or events of public significance for Australians at a local, regional or national level.

Should a news business qualify under these provisions, it would be allowed to register as a registered news business – as so long as it met the subsequent requirements to be discussed in further detail. The designation of digital platform corporations and designated digital platform services is much more subjective; the minister of Treasury at any point, can make the determination in writing that a company or service provided by a company is subject to the provisions of the NMBC. Before this determination is to be made, the Minister must give 30 days notice to the corporation in question, and determine whether there is a present and significant bargaining power imbalance between Australian news businesses in the after mentioned Corporation. Should it be determined that the corporation in question has made “significant contribution to the sustainability of the Australian news industry”, it may not be designated a digital platform Corporation or digital platform service under the NMBC.

As previously mentioned, there are several tests that a news company must pass to qualify for bargaining under the NMBC. The *Revenue Test* requires applying news company must have annual revenues in excess of \$150,000 for at least three of the previous five years. Individual journalists cannot qualify for bargaining under the NMBC – an aspect that will be discussed in further detail in subsequent sections. The *Audience Test* requires an applicant to be operating predominantly in Australia serving predominantly Australian audiences. Finally, the *Professional Standards Test* mandates that applying news companies abide by industry-relevant ethics code; it also requires that every news source retains editorial independence from the subjects of its news coverage.

The News Media Bargaining Code establishes minimum operation standards for designated digital platform services. This includes provisions that require designated digital platform services to notify news companies of potential changes to their algorithms; in respect to content distribution. If a designated digital platform service intends to make alterations to algorithms that distribute content, 28 days' notice given before such a change can go into effect. This warning is only required in cases where the proposed alterations would have a *significant effect* on the distribution of news content by the designated digital platform service. Significant effect is defined by a change that would it causes significant variation in the amount of covered news content made available by the digital platform service. Changes made to an algorithm as a result of routine maintenance

are not subject to disclosures under the NMBC, nor are changes with the dominant purpose of increasing algorithmic efficiency.

To address potential concerns of favouritism, the News Media Bargaining Code establishes provisions that prohibit differentiation in distribution of digital services in relation to registered news businesses. The NMBC prohibits three main types of differentiation vis-à-vis distribution of news content; firstly, the code prohibits differentiation between registered news businesses. Secondly, the code prohibits digital platform corporations from differentiating between registered news businesses and news businesses that aren't registered under the ACMA. This prevents digital platform corporations from preferentially distributing content of registered news businesses over news businesses that may lack the minimum revenue standards set out by the code.

Bargaining under the NMBC is meant to be done in good faith between all parties involved. The NMBC allows for representatives bargaining on behalf of news businesses to represent multiple parties. In essence these provisions provide a type of collective bargaining meant to address the power imbalance in between the bargaining parties. Notification of the bargaining process is to be initiated by the represented news business in writing and should detail all issues to be discussed during the bargaining process. Should the bargaining process not reach a suitable agreement after three months, both parties are subject to mandatory arbitration as set out by the code.

Issues relating to remuneration are subject to arbitration as set out by Division 7 of the News Media Bargaining Code. The style of arbitration is referred to as pendulum arbitration or baseball arbitration, where each party presents their offer to an arbitration board established by the ACMA. The arbitration then considers all available information and passes a ruling on remuneration that all parties are bound to. The code requires the ACMA to establish a registered list of bargaining code arbitrators that are experienced in legal economic or industry related matters. The bargaining parties are permitted to agree upon a panel of arbitrators from the established list; if both parties are unable to come to an agreement, the Commission shall make the appointments. Furthermore, the cost of the arbitration panel is to be determined by each individual member and is to be paid equally by both the digital platform Corporation and registered news business. The final offer from both parties cannot be in excess of 30 pages and must present an offer of suggested remuneration expressed in a lump sum payment over a two-year period. The arbitration panel will deliver a decision no later than 35 business days after receiving final offers from both parties.

Response from Dominant Firms

As of April 2021, the Australian minister of Treasury has yet to designate any Corporation it does need digital platform Corporation or designated digital platform service under the NMBC. Both Google and Facebook contributed to the stakeholder consultation processes by the ACCC through their submissions to concepts

paper and submissions to the exposure draft legislation. In both cases, the submissions provided by both Google and Facebook dwarfed that of the responding Australian news businesses. Groups such as the Australian Press Council, Star News Groups, Bauer Media Group, as well as a consortium of 88 regional state and national publishers responded to the concepts paper in documents that were five to eight pages in length. Facebook and Google's response on the other hand, spanned over 60 pages each. This disparity but demonstrating the capacity for these organizations to deliberate public policy measures and influence possible legislation. Nevertheless, the provisions of the final bill were too restrictive for Facebook to continue its operations in the country; on February 17th, 2021, Facebook restricted access to its services for Australian publishers to share their content. their actions also prohibited Australians from viewing or sharing news – international or domestic – on its site. The stalemate was short lived however, as Facebook's February 22nd announcement proclaimed that the law was sufficiently changed and would resume allowing Australian users to post news content on their platform. The sudden change of heart on behalf of Facebook is likely due to the provisions found in section 52E subsection (2)[b] which pertains to the Minister of Treasury determination in designating digital platforms in respect to the corporations' agreements of remuneration for Australian news content.

Discussion

The section will evaluate the legislative tools established in the News Media Bargaining Code against the framework established using the New Generation of Internet Regulations (Winseck, 2020). This framework evaluates legislation against three potential policy tools: structural separations, line of business restrictions, and public alternatives.

Structural Separations

The News Media Bargaining Code does not prescribe any structural separations. As previously mentioned, structural separations would target specific companies to be broken up, however this law does not require this. Separation regimes have been an effective policy tool for lawmakers in the United States for over a century. In the early twentieth century, six firms controlled 90% of all anthracite coal resources in the United States, which resulted in uniform price hikes and outlandish profits for railroad companies. Railroad companies, in controlling the means of production along with the means of transport, were able to participate in discriminatory conduct that had been supposedly prohibited through the Interstate Commerce Act (Khan 2019). In response, the federal government passed the Hepburn Act (1906) which separated the function of ownership over goods and the function of transportation. Under this act, the federal government filed suit against any railroad company that had not divested its anthracite coal Holdings. The ‘commodities clause’ prohibited railroads from carrying any article or commodity that it had

manufactured, mined, or produced itself; essentially forbidding railroads from transporting any product it may have an interest in, directly or indirectly. Similar structural tools have been used by policy makers in respect to banking and commerce. In *Merchs. National Bank of Cincinnati v. Wehrmann*, 202 U.S. 295, 301 (1906) the Supreme Court held that national banking entities could not hold stock in corporations. Separation regimes have also been undertaken in the telecommunications industry with the divestiture of Bell labs from AT&T. In all of the previous cases, a crucial objective for policy makers was eliminating harmful conflicts of interest that were persistent in highly concentrated industries. With an emphasis on concentrated markets, the potential use of structural separations in respect to advertising potential advantageous tool for policy makers. Using the Herfindahl-Hirschman Index (HHI) for calculating market concentration, Canada's advertising industry as a whole scores 1271 for 2019. For context, the U.S. Department of Justice considers moderate market concentration at levels between 1,500 and 2,500, the rate at which the market as a whole has increased in consolidation should be worrying. Since 2017, market concentration has increased by 35% – with Facebook and Google's share of advertising dollars increasing from 36% to 45%. Therefore, structural separations are beneficial policy instrument to combat markets that become increasingly concentrated overtime however are not present in the News Media Bargaining Code.

Line of Business Restrictions

Line of business restrictions limit specific types of activities corporations can operate; these can be as previously described, structural in nature (like breaking businesses up) or they can take the form of behavioral restrictions. Several aspects of the News Media Bargaining Code could be considered behavioral in nature and therefore will be discussed in this section. The most obvious example behavioral restriction is in relation to the non-differentiation in services that companies must provide if they are designated digital platform services and/or digital platform corporations. While the News Media Bargaining Code does outline what could be described as behavioral restrictions, in practice these restrictions are not enforceable. As there have yet to be any companies designated a digital platform service/corporation under the NMBC, the provisions in respect to non-differentiation are not enforceable in respect to the conduct of Facebook and Google. Secondary line of business restriction in respect the NMBC is in relation to the requirement on behalf of designated digital platform services to notify registered news media businesses of changes to content distribution algorithms. Content on Facebook for instance, is primarily distributed on user's *news feeds* using proprietary algorithms; while users have the option to view content in chronological order, the default content distribution setting is based off engagement algorithms. The NMBC would require companies like Facebook and Google, if properly designated, to notify relevant parties of changes to these algorithms in respect to

the distribution of news content that is subject to the code. A notable change in Facebook's *news feed* product is there a recent push away from algorithmics based content; in a recent interview, Facebook's VP Global Affairs and former Deputy Prime Minister of the United Kingdom Nick Clegg outlined new features that that allows Facebook users do curate their own feeds. A significant line of business restriction that is absent from the news media bargaining code however is any data privacy provisions. Google and Facebook have been able to leverage their monopolies in search and social media respectively, to collect customer data that supplements their advertising businesses; thus, further entrenching their position as a digital duopoly in advertising.

Public Alternatives

The final evaluation metric is in relation to public alternatives as described by Winseck (2020). In this respect it could be argued but the news media bargaining code, in its efforts to establish collective bargaining and mandate forced arbitration between news media businesses and digital platforms has prescribed a form of public alternatives. In theory, the NMBC enshrines into law the ability for news media businesses to collectively bargain a fair market rate for the content they produce. In practice however this is certainly not the case as neither Facebook nor Google our subject to the provisions outlined for companies designated digital platform services or digital platform corporations. Facebook and Google have been able to operate in Australia without being designated a digital

platform service or digital platform corporation because the NMBC considers the deals and agreements made between perspective digital platform services and Australian news media businesses before making final designation. This allows Facebook to Google create the illusion of regulatory compliance through establishing agreements with institutional players such as *News Corp* without being subject to collective bargaining. What the News Media Bargaining Code does not do is provide any public funding to news media businesses. thus, it's applicability in a Canadian context is somewhat limited in relation to the framework of the New Generation of Internet Regulations (Winseck, 2020).

Conclusion

As of April 2021, the Australian treasure has yet to designate any digital platform corporations under the News Media Bargaining Code. Therefore, the provisions relating to forced arbitration and permitting collective bargaining are merely legislative theatre. Facebook and Google's influence on the language of the Australian NMBC demonstrates the power these two corporate monopolies wield. By leaving Australia for less than a week, Facebook was able to bend the Australian legislature to its will and force concessions that strike at the heart of the bill. Thus, allowing deals to be struck between news publishers and digital platforms outside of the bargaining constraints of the NMBC has allowed Google and Facebook to avoid being designated digital platform services. Hence why, while the bill has passed into law, there is no functional way to seek redress as a

news media company under the current framework established by the NMBC.

Despite the lack of implementation on behalf of the Australian Treasury Minister, if fully implemented the NMBC legislation further entrench traditional media players in Australia and failed to address changing market dynamics in the journalism industry. Collectives would have addressed the power imbalance between monopolistic digital platforms such as Facebook and Google and Australia's news businesses. In allowing these digital giants to strike deals outside of the NMBC as to not designated digital platform services by Minister Frydenberg, this bill will do very little to address the issues identified by previous ACCC inquiries. As neither Facebook nor Google have been designated digital platform services under the code, they are not subject to the non-differentiation provisions. this can allow preferential deals to be struck between large media players and digital giants; further entrenching traditional players while excluding new and independent forms of media. Shifting trends in journalism, as evidence by companies like Substack that empower individual journalists publish their content, are excluded from the bargaining provisions under the code.

Finally, at the core of the issue in journalism vis-a-vis advertising as a primary revenue source this bill encourages more invasive data collection in what Winseck (2020) describes as a race to the bottom. Rather than promoting new and innovative revenue structures for news businesses, the news media bargaining code further incentivizes a

dying business model. Personal income tax incentives like that in Canada promote the adoption of a subscription-based model that promotes corporate autonomy for media outlets. However, programs like these in Canada are underwhelming at best and despite public support on behalf of the federal government for the Canadian journalism industry, little has been done to stop the bleeding in respect to journalism jobs. Adopting a framework such as the News Media Bargaining Code in Canada would only further entrench big media players.

If the federal government is serious about the threat to democracy that the decline in journalism poses, they would not only introduce data protections for individuals as described above; but also institute behavioral remedies that create incentive structures for citizens to diversify the way Canadians consume news. This initiative would be done twofold: first by clarifying the definition for what can qualify as a Canadian journalism organization designated by the

CRA. Thereby acknowledging modern trends in journalism such as the rise of individual journalists using platforms such as Substack, and online-only media outfits would broaden the number of organizations that individuals could receive taxable benefits for. Second, the federal government should increase the rate at which the taxable benefit is calculated as to increase the lump sum for the individual applicants. The current calculation is determined by multiplying 15% (the lowest personal income tax rate) but an individual's total subscription expense up to \$500 – thus, the maximum benefit an individual could receive is \$75. An annual subscription to the Globe and Mail (\$335.52) billed monthly costs \$27.96, using the current calculation the expected benefit would be just \$50. Increasing the rate at which the benefit is calculated from 15% to 50% would provide a sufficient incentive to increase individual subscriptions and further incentivize market friendly business structure for Canadian journalism.

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