

12-1-2019

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Recommended Citation

Michael Karanicolas, "Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News"" (2019) 17:2 CJLT 200.

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Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News"

Michael Karanicolas*

1. INTRODUCTION

Nearly a decade after the first Twitter and Facebook revolutions, the early narratives pointing to social media as a great agent of democratization¹ have given way to a more nuanced understanding of the impact of the Internet on our political discourse. While there is no question that Internet access provides tremendous expressive benefits,² scholars are increasingly questioning whether this information diet is ultimately healthy for society. An analogy to sugars, fats and salts has emerged, where just as an appetite for rich foods served our species well when resources were scarce, but have become a liability in an age of plenty, our natural curiosity and hunger for new ideas has led to problems in an online world teeming with misinformation and extremism.³ The potential for mischief was illustrated in stark terms in 2016, when well documented campaigns of foreign interference, including social media manipulation, impacted both the Brexit referendum and the United States presidential race.⁴

In response to these, and other high profile cases of the Internet being used as a vector to distribute manipulative content,⁵ many countries around the world are re-examining their approach to regulating online speech, as well as their specific posture on election speech.⁶ However, while there is no question that the Internet has created a raft of new regulatory challenges, it is important not to

* Michael Karanicolas, Wikimedia Fellow, Information Society Project, Yale Law School. Sincere thanks to David Lepofsky, Matthew Marinett, and Jack Enman-Beech, all of whom offered very helpful feedback in revising this paper.

¹ See e.g. Philip N. Howard & Muzammil M. Hussain, "The Upheavals in Egypt and Tunisia: The Role of Digital Media" (2011) 22:3 J. Democracy 35.

² See e.g. Michael Karanicolas, "Understanding the Internet as a Human Right" (2012) 10:2 C.J.L.T. 129.

³ Zeynep Tufekci, "YouTube, the Great Radicalizer" *New York Times* (10 March 2018), online: < www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html > .

⁴ Ewan McGaughey, "Could Brexit be Void?" (2018) 29:3 King's LJ 331. Jens David Ohlin, "Did Russian Cyber Interference in the 2016 Election Violate International Law?" (2017) 95:7 Tex. L. Rev. 1579.

⁵ Samantha Bradshaw & Philip N. Howard, "Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation" Computational Propaganda Research Project Working Paper (20 July 2018), online: < comprop.oii.ox.ac.uk/research/cybertroops2018/ > .

lose sight of the foundational importance of freedom of expression to an effective democracy. Solutions which attempt to address the challenges posed by online speech, but which do this by undermining core freedom of expression principles, are ultimately destined to be counter-productive. Any victory against forces that threaten our democracy will be hollow if it comes at the cost of the human rights principles which undergird our democratic system.

This paper considers Canada's responses to the spread of online misinformation in an electoral context, particularly through updated provisions in the *Canada Elections Act*,⁷ and through a recent push to "jawbone"⁸ online platforms into taking proactive measures to stem the flow of problematic speech, arguing that both of these raise substantial freedom of expression concerns, and that efforts to sidestep key constitutional questions around the appropriate scope of restrictions on political speech may ultimately pose a greater threat to Canadian democracy than online misinformation.

The paper begins by introducing the political impact of the Internet, both as a force for democratization, and ultimately as a vector for the spread of harmful speech and misinformation. It will then discuss the reforms in the *Elections Modernization Act*, which target misinformation,⁹ placing these changes in the context of relevant Supreme Court jurisprudence to argue that the new provisions raise serious constitutional questions, which the government has declined to properly address. The paper will then discuss the latest attempts by the federal government, in collaboration with other countries, to push private platforms into acting aggressively against constitutionally protected speech, an approach which evades constitutional questions around the appropriate limits of regulation in this space. The paper ultimately argues that, although the threats from harmful online speech are real enough, solutions which sidestep core Charter questions are far more problematic from the perspective of Canadian democracy, and that the public would be best served by a return to core legal and constitutional approaches to regulating speech.

2. THE INTERNET'S IMPACT ON THE POLITICAL DISCOURSE

A. The Internet as a Force for Democratic Engagement

The Internet has substantially transformed the right to freedom of expression, and in many countries, is in the process of transforming democracy itself. This potential was noted as early as 1999 by the Inter-

⁶ See e.g. Michael Head, "Australia's Anti-Democratic 'Foreign Interference' Bills" (2018) 43:3 *Alternative L.J.* 160.

⁷ *Canada Elections Act*, S.C. 2000, c. 9, s. 91.

⁸ Derek E. Bambauer, "Against Jawboning" (2015) 100 *Minn. L. Rev.* 51 at 57.

⁹ Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess., 42nd Parl., 2018, s. 61.

American Commission on Human Rights, in words which, over the following decades, have proven prescient:

[The Internet] is a mechanism capable of strengthening the democratic system, contributing towards the economic development of the countries of the region, and strengthening the full exercise of freedom of expression. Internet is an unprecedented technology in the history of communications that facilitates rapid transmission and access to a multiple and varied universal data network, maximizes the active participation of citizens through Internet use, contributes to the full political, social, cultural and economic development of nations, thereby strengthening democratic society.¹⁰

In considering the impact of the Internet on democracy, it is useful to consider three main changes that have accompanied the spread of Internet access. First, the Internet has changed our relationship to information, by placing almost the entirety of human knowledge at our fingertips to access, immediately and wherever we happen to be. While there are debates as to whether or not access to this knowledge actually makes us smarter,¹¹ it has led to substantial changes in our attitude towards information, and an emerging expectation that information of public relevance should be available and accessible.¹² It is telling that the notion of a public right of access to government information spread around the world at the same time as the rise of the Internet. 114 of the 127 countries in the world which passed right to information or access to information legislation did so after 1990 (90%), and 95 of them (75%) were passed after 2000.¹³ From the perspective of political engagement, the fact that people have access to such enormous volumes of information is a good thing. Democracies rely on citizens to guide public decision making on key issues, which in turn assumes a baseline level of awareness of the background and context behind these decisions. A better-informed electorate creates a healthier democracy.

Second, the Internet has dramatically enhanced the power of what ordinary people are able to say, including their ability to communicate their ideas widely without spending much money or even leaving their home. Unlike previous forms of mass communication, such as broadcasting, which only facilitated the

¹⁰ OAS, Inter-American Commission on Human Rights, 104th Sess., Report for the Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106 (2000), online: < www.summit-americas.org/Human%20Rights/Freedom-Expression-1999.htm > .

¹¹ See e.g. Nicholas G. Carr, *The Shallows: What the Internet Is Doing to Our Brains* (New York: W. W. Norton & Company, 2010).

¹² One manifestation of this is the rise of the open data movement: Timothy H. Parker, Shinichi Nakagawa and Jessica Gurevtich, "Open Data: Towards Full Transparency" (2016) 538:7626 *Nature* 459; Judie Attard et al., "A Systematic Review of Open Government Data Initiatives" (2015) 32:4 *Government Information Q.* 399.

¹³ As charted on the Global Right to Information Rating: Centre for Law and Democracy and Access Info Europe, Country Data, online: < www.rti-rating.org/country-data/ > .

ability of an influential few to communicate widely, the Internet gives everybody a platform, and potentially a global audience.¹⁴ In addition to empowering ordinary users, this change has had an impact on information flows, as decentralized person-to-person networks are displacing the traditional hub-and-spoke model, where the population depended on a relatively small number of media outlets to gather and distribute the news. Although journalists remain an influential and important part of the news ecosystem, their industry has come under intense pressure as a result of the spread of the Internet. In 1990, approximately 455,000 people worked in the news business in the United States.¹⁵ By 2016 that number shrunk by more than half to 183,200 employees.¹⁶

A third major impact to consider relates to how we engage with one another. It has been widely recognized that the Internet has a strong disinhibiting effect, enabling people to say things online that they would never express in a personal interaction.¹⁷ There are well-documented toxic aspects of this, including the propagation of hate speech, threats and abuse.¹⁸ However, there are also positive aspects to this disinhibition, particularly from the perspective of political engagement, as it allows people to express unpopular or controversial views without fear of social pressure, something that is of fundamental value in a democracy. In particular, online speech allows people to challenge powerful leaders directly in a way that would have been unimaginable before the Internet.¹⁹ At least in part, this is facilitated by the facelessness and anonymity that accompanies digital communication. As a result, the nexus between anonymity and freedom of expression is becoming increasingly recognized, including by the Council of Europe²⁰ and by the United Nations Special Rapporteur on Freedom of Expression.²¹

¹⁴ Michael Karanicolas et al., *Stand Up for Digital Rights: Recommendations for Responsible Tech* (Halifax: Centre for Law and Democracy, 2016) at 26, online: < responsible-tech.org/wp-content/uploads/2016/06/Intermediaries-Print.pdf > .

¹⁵ U.S., Department of Labor, *The Economics Daily, Employment trends in newspaper publishing and other media, 1990-2016* (2 June 2016), online: < www.bls.gov/opub/ted/2016/employment-trends-in-newspaper-publishing-and-other-media-1990-2016.htm > .

¹⁶ *Ibid.*

¹⁷ John Suler, “The Online Disinhibition Effect” (2005) 2:2 *Intl. J. Applied Psychoanalytic Stud.* 184.

¹⁸ James Banks, “Regulating Hate Speech Online” (2010) 24:3 *Intl. Rev. L. Comp. & Tech.* 233.

¹⁹ See e.g. Chelsea Bailey, “Woman’s Epic Anti-Trump Twitter Rant Goes Viral” *NBC News* (4 December 2016), online: < www.nbcnews.com/news/us-news/woman-s-epic-anti-trump-twitter-rant-goes-viral-n691736 > .

²⁰ Council of Europe, Committee of Ministers, 840th meeting of the Ministers’ Deputies, *Declaration on freedom of communication on the Internet* (2003), online: Organization for Security and Co-operation in Europe < www.osce.org/fom/31507?download=true > .

²¹ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNHRC, 23rd Sess., U.N. Doc. A/HRC/23/40 (2013) at para. 79,

B. The Internet as a Challenge to Democracy

The flipside of these expressive benefits are the challenges which the Internet, and in particular social media, can pose to the electoral process. One prominent aspect of this, which was referenced by the Supreme Court of Canada in *R. v. Bryan*, is the growing difficulty enforcing laws governing digital speech.²² There are a number of factors for this, including the transnational nature of the Internet, which leads to jurisdictional challenges in enforcement, as well as difficulties tying online speech to a person's offline identity.²³

A second challenge comes from the transmission of misinformation, particularly as a result of social media's tendency to spread more salacious or inflammatory material faster than more mundane facts.²⁴ This is partly attributed to our own biases, but is also a consequence of how major social media platforms, like Twitter and Facebook, structure their algorithms, rewarding and promoting engagement and entertainment value rather than accuracy.²⁵ Jonathan Swift's old adage that, "Falsehood flies, and the truth comes limping after it," has now been coded directly into the systems that guide our political discourse.²⁶

Both of these factors contribute to the Internet's potential as a vector for foreign election interference. The anonymity that is inherent in the online discourse, along with the ease of creating fake digital "speakers," facilitates mass infiltration into a country's domestic political dialogue.²⁷ The tendency of social media platforms to create "echo chambers" of likeminded users, who may be particularly predisposed to believing a rumour which corresponds to their political biases, further facilitates the deliberate spreading of misinformation.²⁸

One other challenge which flows from the nature of online communications, as well as their potential for advanced data gathering, is the rise of microtargeting which, in a political context, translates to micro-campaigning, where politicians can personalize their message to particular demographics, and

online: < www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf > .

²² *R. v. Bryan*, 2007 SCC 12, 2007 CarswellBC 533, 2007 CarswellBC 534 (S.C.C.).

²³ Alex Mills, "The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in 'Facebookistan'?" (2015) 7:1 J. Media L. 1.

²⁴ Soroush Vosoughi, Deb Roy & Sinan Aral, "The sSpread of True and False News Online" (2018) 359:6380 Science 1146.

²⁵ Zeynep Tufekci, "The Real Bias Built In at Facebook" *New York Times* (19 May 2016), online: < www.nytimes.com/2016/05/19/opinion/the-real-bias-built-in-at-facebook.html > .

²⁶ Jonathan Swift, "Political Lying" *The Examiner No. XIV*. (November 9, 1710), online: < www.bartleby.com/209/633.html > .

²⁷ Chengcheng Shao et al., "The Spread of Low-Credibility Content by Social Bots" (2018) 9:4787 Nature Communications 1.

²⁸ Michela Del Vicario et al., "The Spreading of Misinformation Online" (2016) 113:3 Proceedings of the National Academy of Sciences 554.

even say contradictory things to different groups. For example, a politician might assume anti-abortion positions in ads shown to religious voters, while understating or even reversing that position in ads that are being delivered to secular voters. In a pre-Internet age, a politician offering contradictory messages in different television or radio ads, or at different campaign rallies, would be easy to track and to publicly call out. In the social media space, a candidate's messaging is far more difficult to follow, given that thousands of ads may be generated to show to different precise demographics, with only the platform having access to the totality of any candidate's message.

3. THE CANADA ELECTIONS ACT AND MISINFORMATION

In a democratic society, political speech, and in particular speech around elections, cuts to the core of freedom of expression guarantees.²⁹ This is true not only as an established matter of Canadian jurisprudence, but in line with global human rights standards, which hold that the highest level of protection must be accorded to the communication of information and ideas about political issues.³⁰ None of this is to suggest that elections should be a free-fire zone, where all limits or regulations impacting speech are abrogated. Indeed, it is not unusual for elections to give rise to additional speech restrictions, such as limits around how much money a particular entity may spend on advertising connected to the ongoing political process.³¹ But in general, restrictions on election speech bear a significant burden of justification, including demonstrating that they are appropriately targeted and proportional.

Recent years have seen a number of calls to modernize our election laws, including as a result of documented online interferences elsewhere.³² Canada's Chief Electoral Officer issued a report with a number of recommendations in 2016,³³ which fed into a Senate report on the subject in 2017.³⁴ Both of these documents ultimately contributed to the development of the *Elections Modernization Act*, which received Royal Assent on 13 December 2018, and

²⁹ See e.g. *Harper v. Canada (Attorney General)*, 2004 SCC 33, 2004 CarswellAlta 646, 2004 CarswellAlta 647 (S.C.C.) at paras. 1, 66.

³⁰ *General Comment No. 34: Article 19 (Freedoms of opinion and expression)*, U.N.H.R.C., 102nd Sess., U.N. Doc. CCPR/C/GC/34 (2011) at para. 20.

³¹ *Canada Elections Act*, *supra* note 7 at s. 350.

³² See e.g. Henry Farrell & Bruce Schneier, "Common-Knowledge Attacks on Democracy" (17 November 2018), 2018:7 Berkman Klein Center for Internet & Society, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3273111> .

³³ Canada, Office of the Chief Electoral Officer, *An Electoral Framework for the 21st Century* (Ottawa: OCEO, 2016), online: <www.elections.ca/res/rep/off/rec_2016/rec2016_e.pdf> .

³⁴ Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Controlling Foreign Influence in Canadian Elections*, 1st Sess., 42nd Parl. (June 2017), online: <sencanada.ca/content/sen/committee/421/LCJC/reports/Election_Report_FINALE_e.pdf> .

which includes substantial revisions to Canada's approach to election speech.³⁵ Although a narrative has developed which paints these changes as relatively cautious,³⁶ there are serious constitutional questions arising from the reforms related to misinformation (or "fake news") which have, thus far, flown under the public and academic radar.³⁷ In particular, the reforms strip away important procedural safeguards, including any requirement that the speaker needs to know that their statement is false in order to be charged with an offence.

The previous iteration of the *Canada Elections Act* included language which barred people from making "any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate," knowingly and with the intention of affecting the results of an election.³⁸ A citation search via Westlaw suggests that nobody has ever been charged under this provision. As a result of the *Elections Modernization Act*, the *Canada Elections Act* has been modified to read as follows:

91(1) No person or entity shall, with the intention of affecting the results of an election, make or publish, during the election period,

(a) a false statement that a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party has committed an offence under an Act of Parliament or a regulation made under such an Act — or under an Act of the legislature of a province or a regulation made under such an Act — or has been charged with or is under investigation for such an offence; or

(b) a false statement about the citizenship, place of birth, education, professional qualifications or membership in a group or association of a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party.

(2) Subsection (1) applies regardless of the place where the election is held or the place where the false statement is made or published.³⁹

In addition to removing the requirement that false statements be made "knowingly," the revised language expands the class of persons protected from

³⁵ Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42nd Parl, 2018.

³⁶ Michael Pal, of the University of Ottawa Faculty of Law, is one prominent voice supporting this perspective, as quoted in Aaron Wherry, "Could the Liberals' Election Law Reform Throw a Leash on the 'Permanent Campaign?'" *CBC News* (5 May 2018), online: < www.cbc.ca/news/politics/liberals-election-campaign-c76-analysis-wherry-1.4647180 > .

³⁷ After this Article completed peer review, a Calgary-based NGO, the Canadian Constitution Foundation, announced that it was launching a Charter challenge against the revised provisions.

³⁸ *Canada Elections Act*, *supra* note 7 at ss. 91-92, 281(a).

³⁹ Bill C-76, *supra* note 9 at s. 61.

such false statements to include leaders of political parties and public figures associated with a political party, in addition to candidates and prospective candidates. This is potentially an extremely broad category of persons, depending on how “associated with” is interpreted.

The revised language appears to be less open-ended in terms of the subject matter of the statements, since it introduces a set of factual categories, such as misstatements about the subject’s professional qualifications or citizenship. However, some of these categories are quite nebulous. For example, it is unclear whether “professional qualifications” is limited to formal accreditations, such as one’s membership status in a relevant Barristers’ Society or Law Society, or more general qualifications for elected office. The subjectivity of the latter category means that it could include biographical details like how long the candidate has lived in the riding, or their broader personal achievements. Similarly, “membership in a group or association” is also open to interpretation. A narrow view would restrict this to formally incorporated entities, such as, for example, erroneously claiming that a candidate was a member of the Hells Angels Motorcycle Club. However, a broader interpretation could include everything from claiming a candidate is a member of a particular religious denomination, to claiming they are a part of some loosely defined political movement (like calling someone a socialist or a member of the alt-right), to saying they are a vegetarian. Clarity and specificity are of cardinal importance for any regulation impacting freedom of expression, and international standards hold that this kind of flexibility in interpreting the scope of prohibited speech can be problematic.⁴⁰

The changes also extend the ambit of s. 91 to cover entities that make statements, in addition to individuals, and it now applies without regard to where the false statement is made or published. However, it also only applies during the election period, which narrows the potential scope of prohibited conduct significantly.

In addition to reforms related to misinformation, the *Elections Modernization Act* contains a number of other provisions aimed at boosting election integrity, including new transparency requirements. In particular, platforms which sell advertising space to “political actors,” as defined under the law, will now be required to publish a full registry of the advertising messages posted by these actors during the election and pre-election periods, making it easier to obtain a global understanding of the nature of messaging being pushed by various political actors.⁴¹

⁴⁰ *General Comment No. 34: Article 19 (Freedoms of opinion and expression)*, *supra* note 30 at para. 25.

⁴¹ Bill C-76, *supra* note 9 at s. 208.1.

4. RELEVANT CASE LAW

A. *Zundel* and Criminalizing Misinformation

The fact that nobody has ever been charged under s. 91 of the *Canada Elections Act* makes it difficult to definitively assess the scope and constitutionality of the reforms. However, leading jurisprudence on the issue of misinformation generally suggests that the government would have a difficult time defending the provisions, as amended.

The most relevant case in dealing with misinformation, *R. v. Zundel*, was decided in 1992.⁴² Here, the Supreme Court of Canada struck down a misinformation provision in the *Criminal Code*, which prohibited the wilful publication of a statement or news that the person knows is false and that “causes or is likely to cause injury or mischief to a public interest.”⁴³ In finding that the provision violated s. 2(b) of the Charter, the majority focused on the breadth of the prohibition, which could potentially apply beyond matters of “pure fact,” and that the phrase “injury or mischief to a public interest” was problematically vague. The majority also pointed to the lack of a modern social problem or pressing concern which it was meant to address, noting that the Law Reform Commission of Canada had labelled the provision “anachronistic.”⁴⁴ The Supreme Court also noted that no other free and democratic country had similar legislation in force.⁴⁵

The dissent, by contrast, focused on the substantial intent requirement to find that it was a justifiable limitation in line with s. 1, since an offender would have to publish a statement knowing that it was false, a high evidentiary hurdle to overcome. They also read “public interest” as being confined to Charter rights, though they focused on racism as the harm to be combated, and the notion that s. 181 was necessary to protect vulnerable minority groups, drawing from the fact that the defendant in this case had been charged as a result of distributing material which denied the Holocaust.

B. Other Decisions on Regulating Content During Elections

Although *Zundel* is the most thematically relevant case in considering the misinformation provisions in the *Canada Elections Act*, it is also instructive to consider two other cases, which help to flesh out the Supreme Court’s approach to regulating speech during elections. In *R. v. Bryan*, the Court followed a strongly egalitarian model of election fairness to uphold the constitutionality of a law that prohibited the transmission of election results between one electoral district and another before polls had closed in the latter.⁴⁶ This provision was

⁴² *R. v. Zundel*, 1992 CarswellOnt 109, 1992 CarswellOnt 995, [1992] 2 S.C.R. 731 (S.C.C.).

⁴³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 181.

⁴⁴ *Zundel*, *supra* note 42.

⁴⁵ *Ibid.*

⁴⁶ *Bryan*, *supra* note 22.

deliberately challenged during the 2000 federal election by the defendant, who posted the results from Atlantic Canada online.⁴⁷

The majority, which consisted of two concurring opinions by Justice Bastarache and Justice Fish, upheld the constitutionality of the law, mainly on the basis of the need to promote informational equality across the country, since it would be unfair for voters in western Canada to have access to information that was unavailable to voters in the Atlantic provinces.⁴⁸ Public perceptions of electoral fairness played a key role, with Justice Bastarache noting that this was “a vital element in the value of the system.”⁴⁹

The dissent, on the other hand, while accepting “unequivocally” that public perceptions of fairness were a pressing and substantial objective,⁵⁰ focused in part on the fact that the publication ban had been “rendered obsolete” as a result of advances in technology.⁵¹ This, they reasoned, impacted the balancing by undermining any actual useful effects from the publication ban itself. The majority was split on the principle that obsolescence was a significant factor for consideration. Justice Bastarache explicitly rejected this line of thinking, stating that “perfect enforcement is not a requirement of a law’s validity,” though he also noted that the prohibition was still fulfilling its objective by reducing the availability of this information, even if it did not block access to it altogether.⁵² Justice Fish, on the other hand, did not explicitly reject the relevance of obsolescence to the balancing analysis, instead disagreeing with the degree to which the prohibition had in fact been rendered ineffective, since it “does, at the very least, curb widespread dissemination of this information and it contributes materially in this way to its objective.”⁵³

In another leading Supreme Court case on content regulation around elections, *Thomson Newspapers Co. v. Canada (Attorney General)*, the majority adopted a substantially different approach.⁵⁴ This case involved a challenge to s. 322.1 of the *Canada Elections Act* which, at the time, prohibited the broadcasting, publication or dissemination of opinion survey results during the final three days of a federal election campaign, on the grounds that inaccurate polls published so close to the election would have the potential to mislead

⁴⁷ *Ibid.* at para. 2. It is worth noting that these election night blackout provisions were ultimately repealed with Bill C-23, *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts* (the “*Fair Elections Act*”), 2nd Sess., 41st Parl., 2014.

⁴⁸ *Bryan, supra* note 22 at paras. 35, 62.

⁴⁹ *Ibid.* at para. 62. Justice Fish, in his concurring opinion, expressed a similar sentiment at para. 25.

⁵⁰ *Ibid.* at para. 118.

⁵¹ *Ibid.* at para. 123.

⁵² *Ibid.* at para. 40.

⁵³ *Ibid.* at para. 79.

⁵⁴ *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CarswellOnt 1981, 1998 CarswellOnt 1982, [1998] 1 S.C.R. 877 (S.C.C.).

voters, since there would be no time to correct the record before people voted. The majority opted to strike down the legislation mainly due to skepticism as to the likelihood of harm from inaccurate polling,⁵⁵ though they also took issue with Parliament's decision to prohibit publishing polls altogether, arguing that requiring the publication of methodological information alongside polls would have been less intrusive and more effective.⁵⁶

In arriving at these findings, the majority placed significant stock in the "maturity and intelligence"⁵⁷ of Canadian voters: "The presumption in this Court should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information."⁵⁸ The majority also rejected arguments, presented by the government, that other democratic countries had passed similar prohibitions, holding that the varying social and legal contexts meant that these arguments should not be accorded great weight in the absence of "some consensus in the international context, or of evidence explaining why the provisions adopted in some other free and democratic countries are compelling given the situation in Canada."⁵⁹ In distinguishing this case from rules around election spending, the majority pointed out that paid political advertising was, by design, manipulative, whereas pollsters had an incentive to maintain a reputation for nonpartisan accuracy.⁶⁰

The dissent adopted a more deferential stance, arguing that "Parliament is not bound to find the least intrusive nor the best means."⁶¹ The dissent also adopted a more explicitly egalitarian tone: "the democratic process cares about each voter and should not tolerate the fact that, in the polling booth, some voters would express themselves on the basis of misleading, or potentially misleading, information that is de facto immunized from scrutiny and criticism."⁶² This heavy focus on egalitarianism is consistent with the approach in *Harper v. Canada (Attorney General)*, Canada's leading case on election spending limits, in which the Supreme Court focused on the ability of citizens to meaningfully participate, backed by legislative controls appropriate to guarantee this participation.⁶³

However, in contrast to the decisions in *Harper* and *Bryan*, which emphasized the importance of political speech to freedom of expression, and the concomitant general interest in a light regulatory touch, the dissent in

⁵⁵ *Ibid.* at paras. 108, 113.

⁵⁶ *Ibid.* at para. 119.

⁵⁷ *Ibid.* at para. 101.

⁵⁸ *Ibid.* at para. 112.

⁵⁹ *Ibid.* at para. 121.

⁶⁰ *Ibid.* at para. 114.

⁶¹ *Ibid.* at para. 43.

⁶² *Ibid.* at para. 40.

⁶³ *Harper*, *supra* note 29 at para. 107.

Thomson seemed to imply that the importance of elections might actually justify a stronger regulatory hand:

[Canada's restrictions on election speech] are strong evidence that elections constitute, in our society, a unique event which calls for special treatment in order to promote voter autonomy and rational choice. Modern Canadian electoral law has sought to curb the excesses, enhance the democratic process and enable the voter to make a rational choice.⁶⁴

5. CONSTITUTIONAL CHALLENGES TO REGULATING MISINFORMATION DURING ELECTIONS

In assessing the constitutional status of the revised s. 91 of the *Canada Elections Act*, there are a few factors that might point in the government's favour. First, a central concern of the Court in *Zundel* was the fact that the provision could apply beyond matters of pure fact, which does not apply to the misinformation provisions in the *Elections Modernization Act*. It might also be helpful that s. 91 is directly targeted towards the harm of misleading the public during an election, as compared to the impugned Criminal Code provisions which protected against the vaguely defined "injury or mischief to a public interest."⁶⁵ The targeted harm is further magnified by the potential for manipulation. This was a key point in *Thomson Newspapers Co.*, where the majority noted that journalists and polling firms do not overtly seek to manipulate public sentiment.⁶⁶ Clearly, with online disinformation campaigns, there is a different dynamic at work. There is a wealth of data that has been published over the past two years on the harms and potential for manipulation flowing from disinformation online.⁶⁷ This threat is further exacerbated by the potential for microtargeting that accompanies digital advertising, and the ability to tailor disinformation in a manner which specifically strikes at the latent biases or concerns of individual recipients.

While these factors may help to support a stronger regulatory standard, particularly against organized disinformation campaigns, the *Canada Elections Act*, as revised, makes no distinction between an organized disinformation campaign and a journalist, or even a casual social media user, making an honest mistake. A key aspect of *Zundel*, which the dissent cited in arguing that s. 181 was justified, was the substantial intent component, which required the defendant to know that the statement they were making was false. As noted earlier, the *Canada Elections Act* no longer requires this. Although it does require the statement to be made "with the intention of affecting the results of an

⁶⁴ *Thomson Newspapers*, *supra* note 54 at para. 18.

⁶⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 181.

⁶⁶ *Thomson Newspapers*, *supra* note 54 at para. 114.

⁶⁷ See e.g. David M. J. Lazer et al., "The Science of Fake News" (2018) 359:6380 *Science* 1094.

election,” this is potentially a much lower standard, since every public statement about a candidate made in the course of an election might be said to be an attempt to influence the results, even if made in a non-partisan way.

An additional troubling aspect of the revised language in s. 91 is that it does not incorporate any possible defence for responsible journalism, as was read into the defamation laws in *Grant v. Torstar Corp.*⁶⁸ There is also no exception for satire or parody. The fact that these exceptions are built into the revised s. 481(1) of the *Canada Elections Act*, which prohibits impersonating certain officials and candidates, suggests that this was a deliberate choice, rather than merely an oversight.⁶⁹

Another important aspect to consider is the degree to which s. 91 has any serious potential to be effective in combating organized disinformation threats, especially of the type which took place in the United States and the United Kingdom in 2016. Presumably, the amendments in s. 91(2), which extend the law to apply cross-jurisdictionally, are a nod to the international nature of these attacks. However, it is incredibly unlikely that this law could, in practical terms, be used to apprehend, or even meaningfully deter, State-sponsored actors, who would be unlikely to stray within the jurisdiction of Canadian law enforcement. An indictment in the United States of Russian intelligence officers in connection with the 2016 election interference was controversial among the legal community, partly because there is a very low likelihood that it will actually result in a prosecution.⁷⁰ Given the broader challenges in enforcing content restrictions online, the fact that the principal actors in organized disinformation campaigns are likely beyond the reach of this law could also work against it in a constitutional challenge.

Nor can it be said that there is an “international consensus” in favour of regulating misinformation as a result of the growing international concern over disinformation attacks. In France, which struggled with its own foreign interferences in the 2017 presidential election,⁷¹ the parliament passed a law in November 2018 which, among other things, grants judges the power to order the removal of incorrect or misleading information which is likely to bias elections, and gives broadcasting authorities the power to suspend television channels under the influence of a foreign state if they deliberately spread false information likely to impact an election.⁷² However, France is an exception. Despite the

⁶⁸ 2009 SCC 61, 2009 CarswellOnt 7956, 2009 CarswellOnt 7957 (S.C.C.).

⁶⁹ Bill C-76, *supra* note 9 at s. 323.

⁷⁰ See e.g. Jack Goldsmith, “The Downsides of Mueller’s Russia Indictment” *Lawfare* (19 February 2018), online: <www.lawfareblog.com/downsides-muellers-russia-indictment> .

⁷¹ Jean-Baptiste Jeangène Vilmer et al., *Information Manipulation: A Challenge for Our Democracies* (Paris: Ministry for Europe and Foreign Affairs & Ministry of the Armed Forces, Republic of France, 2018), online: <www.diplomatie.gouv.fr/IMG/pdf/information_manipulation_rvb_cle838736.pdf> .

resurgent interest in this issue, comparatively few Western democracies have laws targeting misinformation.⁷³

In *Harper*, the Supreme Court held that the right to political participation “includes a citizen’s right to exercise his or her vote in an informed manner.”⁷⁴ In considering the constitutionality of s. 91, this principle needs to be assessed in the context of the core presumption of the Canadian electorate’s “maturity and intelligence,”⁷⁵ as the potential for voters to be led astray by misinformation, including deliberately manipulative falsehoods, is weighed against the right of Canadians to make their own judgments about the value of particular sources of information. The fact that the *Elections Modernization Act* includes parallel transparency provisions which aim to help the public to be more vigilant in assessing sources of information could further undermine the argument for why specific sanctions for false information are also necessary.

In *Thomson*, the majority expressed that their preferred solution was to allow late polls, but to require that they publish their data.⁷⁶ This is despite the challenges many Canadians would face in critically assessing these methodologies. Just as the old adage holds that “sunlight is the best disinfectant,” it seems more in line with the Court’s broader exhortations to respect the wisdom and maturity of the Canadian electorate to arm them with the tools to know the difference between truth and fiction, and let them decide for themselves what to believe.

None of this is to suggest that a constitutional challenge would be a foregone conclusion, particularly since there is a strong argument that, with the advent of organized online disinformation campaigns as a vector for foreign election interference, the threat that “fake news” poses has grown substantially since *Zundel*. However, given the fact that Canada’s leading misinformation case resulted in the legislation being invalidated, and the Court’s traditional resistance to parochial mechanisms of controlling the democratic process, it seems very curious that these issues were not prominently discussed during the rollout of the *Elections Modernization Act*. Indeed, the provisions impacting false information are not even mentioned in the “*Charter Statement*” prepared by the Ministry of Justice to accompany the legislative reform package.⁷⁷ This is not to suggest that the government was deliberately seeking to slip these changes in under the radar. But the decision to not address the constitutional questions around a provision

⁷² *Loi relative à la lutte contre la manipulation de l’information*, JO, 24 December 2018, no 0297.

⁷³ Sheldon Burshtein, “The True Story on Fake News” (2017) 29:3 I.P.J. 397.

⁷⁴ *Harper*, *supra* note 29 at para. 71.

⁷⁵ *Thomson Newspapers*, *supra* note 54 at para. 101.

⁷⁶ *Ibid.* at para. 119.

⁷⁷ Canada, Ministry of Justice, *Charter Statement - Bill C-76: An Act to amend the Canada Elections Act and Other Acts and to make certain consequential amendments* (Ottawa: Ministry of Justice, 2018), online: <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c76.html> .

directly regulating a matter as sensitive as election speech is nonetheless a curious one, which leaves substantial constitutional issues with the new legislation unresolved.

6. BEYOND LEGISLATION: JAWBONING AS A REGULATORY RESPONSE

A. Laundering Censorship

Among the most important distinguishing factors with regards to online speech is the role that private sector intermediaries, including platforms like Facebook and YouTube, play in providing access to, managing, facilitating and mediating online speech.⁷⁸ There are a number of factors underlying this, including the sophisticated technical and infrastructural requirements involved in communicating online, and the trans-national nature of online speech. The challenges inherent to promoting human rights in a context where private sector actors hold so much influence was raised in 2011 by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in a Report addressing freedom of expression on the Internet:

Given that Internet services are run and maintained by private companies, the private sector has gained unprecedented influence over individuals' right to freedom of expression and access to information. Generally, companies have played an extremely positive role in facilitating the exercise of the right to freedom of opinion and expression. At the same time, given the pressure exerted upon them by States, coupled with the fact that their primary motive is to generate profit rather than to respect human rights, preventing the private sector from assisting or being complicit in human rights violations of States is essential to guarantee the right to freedom of expression.⁷⁹

Beginning in the early days of the commercial Internet, policymakers realized that the commercial and social potential of this new medium could best be achieved if service providers were protected against direct liability for the words of their users. This idea led to the passage of legal protections, such as s. 230 of *Communications Decency Act* in the United States,⁸⁰ which in turn allowed the level of scalability achieved by giant online platforms. Canadian law is more complex with regard to intermediary liability. Although online service providers are granted immunity from liability for intellectual property infringing activities of their users as a result of their participation in the "Notice and Notice" procedure,⁸¹ some courts have been willing to find liability for third-party

⁷⁸ Michael Karanickolas et al., *supra* note 14 at 26.

⁷⁹ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N.H.R.C., 17th Sess., U.N. Doc. A/HRC/17/27 (2011) at para. 44, online: < www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf > .

⁸⁰ 47 U.S.C. § 230 (1996).

material under other areas of law.⁸² However, where defamation is concerned, intermediaries are able to benefit from an “innocent dissemination” defence,⁸³ and more generally, enforcement actions for criminal conduct tend to focus on the party directly responsible for creating the material, rather than the intermediary, unless there is some evidence of intent or knowledge on the part of the latter.⁸⁴

In the aftermath of the 2016 election interference scandals, significant global attention focused on the role of the platforms, and particularly Facebook and Twitter, in disseminating online misinformation.⁸⁵ This new and unwanted attention further elevated intense pressure that platforms face from governments around the world to act against speech which is deemed objectionable,⁸⁶ from ISIS and al-Qaeda-related material⁸⁷ to “disrespectful” photos of the King of Thailand.⁸⁸ But while some of these restrictions have come in the form of new binding regulations,⁸⁹ or judicial orders mandating that particular content be removed, a parallel trend has been to pressure platforms to amend their own content policies to address speech which governments find problematic, shifting direct enforcement decisions over to these private sector actors.

This practice, sometimes referred to as “jawboning” or moral suasion, involves the application of pressure through informal threats of regulation as opposed to issuing formal and legally binding orders.⁹⁰ In other words, rather than ordering a platform to take action against a particular webpage or post,

⁸¹ *Copyright Act*, R.S.C. 1985, c. C-42, s. 31.1.

⁸² See e.g. *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, 2005 CarswellBC 1854 (B.C. C.A.).

⁸³ *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47, 2011 CarswellBC 2627, 2011 CarswellBC 2628 (S.C.C.).

⁸⁴ Corey Omer, “Intermediary Liability for Harmful Speech: Lessons from Abroad” (2014) 28:1 Harv. J.L. & Tech. 289 at 305-308.

⁸⁵ See e.g. Rob Faris et al., “Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election” Berkman Klein Center for Internet & Society Research Paper (16 August 2017), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3019414> .

⁸⁶ Kate Klonick, “The New Governors: The People, Rules, and Processes Governing Online Speech” (2019) 131:6 Harv. L. Rev. 1598 at 1623.

⁸⁷ U.K., Secretary of State for Digital, Culture, Media & Sport & the Secretary of State for the Home Department, *Online Harms White Paper* (April 2019), online: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf> .

⁸⁸ Andrew Griffin, “Facebook Blocks Video of Thailand’s King Wearing a Crop Top” *The Independent* (11 May 2017), online: <www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-thailand-king-thai-video-crop-top-bodindradebayavarangkun-maha-vajiralongkorn-a7729886.html> .

⁸⁹ See e.g. Germany, *The Network Enforcement Act*, 30 June 2017, in force of 1 October 2017, Federal Law Gazette 2017 I, No. 61, p 3352 ff.

⁹⁰ Bambauer, *supra* note 8 at 57.

senior government officials will make public statements expressing displeasure with a particular type of content emanating from platforms, and warn that, if nothing is done to address the problem voluntarily, they will pass costly and restrictive new laws to bring the companies to heel.

This approach can be highly effective, since it taps into platforms' desire to get ahead of potential government regulation, which is riskier and less predictable than an internally managed policy-shift.⁹¹ From the government's perspective, it also neatly sidesteps any potential legal or political challenges that might stand in the way of getting effective legislation through. Governments who face internal or public resistance to passing a particular kind of law, for example, might nonetheless be able to achieve their desired results by bluffing that new legislation is just over the horizon.

None of this is to suggest that jawboning is always a negative thing. The use of informal pressure to push companies into being more responsible is a well-established regulatory strategy, which has achieved varying levels of success across a number of different industries, and often to the public benefit.⁹² However, in the context of restrictions on speech, this tactic can be problematic, insofar as it removes any opportunity to question whether the new rules are consistent with bedrock freedom of expression principles, since traditional avenues of judicial appeal do not apply in the same way to private sector enforcement decisions. Similarly, if the new restrictions are unpopular, the public is denied a meaningful opportunity to express their displeasure at the ballot box. There is rarely a clear and visible line which connects private sector policy shifts to the government's complaints. While this dynamic is characteristic of all jawboning campaigns, since they present a fuzzier target for opposition than the passage of new legislation, the politically sensitive nature of restrictions on speech, and the centrality of freedom of expression to the political process, mean that it is particularly concerning in this context.

To understand why the dynamic of private sector enforcement is so problematic, consider the case of South Korea, where content decisions originate from the Korea Communications Standards Commission (KCSC), an administrative body whose members are appointed by the President.⁹³ The KCSC is notoriously heavy handed, and frequently targets sites which criticize politicians, or challenge sensitive policy areas.⁹⁴ Their decisions are issued to the

⁹¹ Daphne Keller, "Who Do You Sue? State and Platform Hybrid Power Over Online Speech" Aegis Series Paper No. 1902 (29 January 2019) at 2, online: < www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech > .

⁹² See e.g. Ronald W. Cotterill, "Jawboning Cereal: The Campaign to Lower Cereal Prices" (1999) 15:2 *Agribusiness* 197.

⁹³ Daeho Kim, "New Regulatory Institution for the Convergence of Broadcasting and Telecommunications: A Korean Case" (2011) 28:2 *Government Information Quarterly* 155.

⁹⁴ Kyung Sin Park, "Administrative Internet Censorship by Korea Communication Standards Commission" (2015) 33 *Soongsil L. Rev.* 91.

platforms, rather than to the users who post the material, and come in the form of non-binding requests for removal. Weak intermediary liability protections mean that, in practice, these requests are followed, virtually 100% of the time. However, the fact that the decisions are not formally binding means that, technically, enforcement originates from the platform, rather than the KCSC, which strips users of any procedural safeguards, such as a notification that their material is subject to removal. Crucially, it also takes away any right of appeal, or an ability to judicially challenge the removal, the way they might if the deletion had flowed directly from a government order. Constitutional questions are avoided since, technically, this is not a State enforcement action, but rather an autonomous decision being made by a private sector entity.

B. Canadian Jawboning

Jawboning as a regulatory strategy has become particularly commonplace in the realm of online speech.⁹⁵ However, in May 2019 two events took place which appeared to mark Canada's embrace of this as a mechanism for pushing for privatized content controls in the realm of online political speech. First, on May 21, Canada unveiled its "Digital Charter," a set of principles which are meant to guide the national approach to the digital and data economy.⁹⁶ Included among these principles is a statement that the government "will defend freedom of expression and protect against online threats and disinformation designed to undermine the integrity of elections and democratic institutions."⁹⁷ However, when one navigates to the Digital Charter's more specific action areas, including proposed legislative changes, the response to disinformation is listed under the heading "Expecting social media platforms to act."⁹⁸

The main component included under this heading is the "Canada Declaration on Electoral Integrity Online," which spells out a number of responsibilities that the government is attaching to social media platforms, such as removing fake accounts and "inauthentic content," intensifying efforts to combat disinformation, and assisting users "to better understand the sources of information they are seeing."⁹⁹

⁹⁵ See e.g. Liat Clark, "Facebook and Twitter Must Tackle Hate Speech or Face New Laws" *Wired* (5 December 2016), online: < www.wired.co.uk/article/us-tech-giants-must-tackle-hate-speech-or-face-legal-action > .

⁹⁶ Canada, Innovation, Science and Economic Development Canada, *Canada's Digital Charter: Trust in a Digital World* (Ottawa: ISED Canada, 2019), online: < www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html > .

⁹⁷ *Ibid.*

⁹⁸ Canada, Minister of Democratic Institutions, *Protecting Democracy* (Ottawa: Government of Canada, 2019), online: < www.canada.ca/en/democratic-institutions/services/protecting-democracy.html > .

⁹⁹ Canada, Minister of Democratic Institutions, *Canada Declaration on Electoral Integrity Online* (Ottawa: Government of Canada, 2019), online: < www.canada.ca/en/demo-

In typical jawboning fashion, while these “obligations” are not backed by any specific legal requirement or powers of enforcement, senior government officials, and particularly Prime Minister Justin Trudeau, were explicit in stating that platforms which failed to adequately take action along the specified lines would face “meaningful financial consequences.”¹⁰⁰ Driving the point home on Twitter, the Prime Minister’s announcement of the Digital Charter specifically singled out this aspect: “Social media platforms must be held accountable for the hate speech & disinformation we see online — and if they don’t step up, there will be consequences.”¹⁰¹

A week after the Digital Charter was unveiled, from May 27-29, the House of Commons Standing Committee on Access to Information, Privacy and Ethics hosted the “International Grand Committee on Big Data, Privacy and Democracy.”¹⁰² The meeting included delegates from the United Kingdom, Singapore, Ireland, Germany, Estonia, Mexico, Morocco, Ecuador, Costa Rica, and Saint Lucia. It also included witnesses representing various stakeholders, including from a number of prominent tech companies.

Media coverage of the meetings focused largely on the failure of Mark Zuckerberg and Sheryl Sandberg to appear, and the subsequent decision by Canadian MPs to issue a summons for the two executives.¹⁰³ But while the legislators’ opprobrium over the perceived snub is somewhat understandable, the broader tone of the conversations, and the apparent willingness of Canadian lawmakers to consider far more intrusive actions to bring the tech companies to heel, is vastly more significant from a policy perspective. Particularly concerning was the fact that, immediately preceding the meeting with representatives from the platforms, discussions with individual witnesses that had been invited by the Committee included a strong focus on imposing blanket shutdowns on social media, with Sri Lanka’s decision to block all social media in the aftermath of a series of church bombings¹⁰⁴ being pointed to as an example to follow:

cratic-institutions/services/protecting-democracy/declaration-electoral-integrity.html > .

¹⁰⁰ “Trudeau warns of ‘meaningful financial consequences’ for social media giants that don’t combat hate speech” *Canadian Press* (16 May 2019), online: *CBC* < www.cbc.ca/news/politics/digital-charter-trudeau-1.5138194 > .

¹⁰¹ Justin Trudeau, “Social media platforms must be held accountable for the hate speech & disinformation we see online — and if they don’t step up, there will be consequences. We launched Canada’s new Digital Charter today to guide our decisions, learn more about it here: bit.ly/2YGiTuu” (21 May 2019 at 16:08), online: *Twitter* < twitter.com/JustinTrudeau/status/1130913223178432518 > .

¹⁰² See House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Sess., 42nd Parl., Nos. 151-155 (27-29 May 2019).

¹⁰³ Alexander Panetta & Nancy Scola, “Facebook’s Zuckerberg Faces Summons After Snubbing Canada” *Politico* (5 May 2019), online: < www.politico.com/story/2019/05/28/canada-facebook-mark-zuckerberg-1475782 > .

¹⁰⁴ Hannah Ellis-Petersen, “Social Media Shut Down in Sri Lanka in Bid to Stem Misinformation” *The Guardian* (22 April 2019), online: < www.theguardian.com/

At the end of the day, though, the most effective path to reform would be to shut down the platforms at least temporarily, as Sri Lanka did. Any country can go first. The platforms have left you no choice. The time has come to call their bluff. Companies with responsible business models will emerge overnight to fill the void.¹⁰⁵

Social media shutdowns, of the kind being advocated here, are internationally recognized as a gross violation of the right to freedom of expression.¹⁰⁶ But although the idea of imposing a blanket social media ban received some pushback, particularly from European representatives on the Grand Committee,¹⁰⁷ it was eagerly embraced by representatives from Singapore,¹⁰⁸ which recently passed its own extremely repressive bill regulating “online falsehoods.”¹⁰⁹ While the Canadians on the Committee did not, explicitly, endorse social media shutdowns, they also did not push back against the idea.

The broader tone of the conversation found them standing shoulder-to-shoulder with Singapore, and other governments with a chequered record on freedom of expression. Discussing a recent decision by Facebook not to delete a manipulated video of United States Speaker of the House of Representatives Nancy Pelosi, and instead to label it as false and suppress its spread, Peter Kent, the Member of Parliament from Thornhill, opined that “it would seem that Facebook is refusing to remove this politically hostile video, claiming a sort of perverted defence claim of free speech.”¹¹⁰ Peter Kent followed up by expressing his displeasure at the thought that videos of that type could be disseminated

world/2019/apr/21/social-media-shut-down-in-sri-lanka-in-bid-to-stem-misinformation > .

¹⁰⁵ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Sess., 42nd Parl., No. 152 (28 May 2019) at 0840 (Roger McNamee).

¹⁰⁶ *Joint Declaration on Freedom of Expression and the Internet*, signed by the U.N. Special Rapporteur on Freedom of Opinion and Expression, O.S.C.E. Representative on Freedom of the Media, O.A.S. Special Rapporteur on Freedom of Expression & A.C.H.P.R. Special Rapporteur on Freedom of Expression and Access to Information (1 June 2011) at para. 6(b), online: < www.oas.org/en/iachr/expression/showarticle.asp?artID=849&IID=1 > .

¹⁰⁷ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *International Grand Committee on Big Data, Privacy and Democracy*, 42-1, No 152 (28 May 2019) at 0935 & 0940 (Jens Zimmermann & Keit Pentus-Rosimannus).

¹⁰⁸ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *International Grand Committee on Big Data, Privacy and Democracy*, 42-1, No 152 (28 May 2019) at 0930 (Edwin Tong).

¹⁰⁹ *Protection from Online Falsehoods and Manipulation Act* (Singapore) 2019/10, online: Parliament of Singapore < www.parliament.gov.sg/docs/default-source/document-library/protection-from-online-falsehoods-and-manipulation-bill10-2019.pdf > . For a discussion of the problems with this law, from a human rights perspective, see e.g. “Singapore fake news law a ‘disaster’ for freedom of speech, says rights group,” *The Guardian* (9 May 2019), online: < www.theguardian.com/world/2019/may/09/singapore-fake-news-law-a-disaster-for-freedom-of-speech-says-rights-group > .

about Canadian politicians, before explicitly threatening the company: “Are you aware that, in democracies around the world, you are coming closer and closer to facing antitrust action?”¹¹¹

It is worth emphasizing that the video in question would unequivocally be legal to disseminate under Canadian law, even with the broadest possible interpretation of the revised s. 91 of the *Canada Elections Act*. This is for good reason. While it is easy to point to this piece of content, which manipulated video of the Speaker to suggest that she was drunk, as an example of misinformation which should be addressed, it is vastly more difficult to come up with a consistent rule that would prohibit the creation or distribution of this video while still allowing room for creations that constitute legitimate political satire. For example, it has become popular online to mock U.S. President Donald Trump’s staid legislative signing ceremonies by inserting crude or child-like drawings in place of the text of the bill.¹¹² Indeed, just a month after his comments at the Grand Committee, Mr. Kent’s own Conservative Party faced criticism for uploading its own manipulated photo of Prime Minister Justin Trudeau.¹¹³

Beyond the challenge of defining the scope of the problem, a particularly telling aspect of Peter Kent’s statement was the conflation of content moderation structures with questions around antitrust. Competition and antitrust questions were a common feature of the discussion at the Grand Committee, often posed alongside concerns related to content moderation, as well as related to privacy.¹¹⁴ Arguments that the platforms are wielding their power irresponsibly, or in a manner which is detrimental to the public interest, can, in some contexts, be relevant to a competition inquiry.¹¹⁵ However, while there are certainly legitimate concerns around the market dominance that major platforms wield, particularly Facebook and particularly in certain countries in the global south, the obvious impetus for legislators to push these issues together is because competition law is a heavier cudgel to wield, with far more substantial legal and financial consequences. It is troubling to see the utilization of a legal framework, whose purpose is to promote core economic goals and support

¹¹⁰ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Sess., 42nd Parl., No. 153 (28 May 2019) at 1225 (Hon. Peter Kent).

¹¹¹ *Ibid.* at 1230 (Hon. Peter Kent).

¹¹² Mark Malloy, “Donald Trump Signing Executive Order Photo Sparks Hilarious Meme” *The Telegraph* (3 February 2017), online: < www.telegraph.co.uk/news/2017/02/01/donald-trump-signing-executive-order-photo-sparks-hilarious/ > .

¹¹³ Emma McIntosh, “Don’t Read Into Darker-Skinned Trudeau Image, Conservatives Insist” *National Observer* (28 June 2019), online: < www.nationalobserver.com/2019/06/27/news/dont-read-darker-skinned-trudeau-image-conservatives-insist > .

¹¹⁴ See e.g. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Sess., 42nd Parl., No. 153 (28 May 2019) at 1115 (Nathaniel Erskine-Smith).

¹¹⁵ See e.g. Australia, *Competition and Consumer Act 2010*, 1974/51, s. 44X(1)(b), online: < www.legislation.gov.au/Details/C2017C00369 > .

market competition and consumer choice,¹¹⁶ being used to push extra-legal action on regulating speech.

At the conclusion of the session, the participants in the Grand Committee signed a joint declaration. While much of the language is relatively benign, such as commitments to strengthen privacy rights and data protection, it also includes a line suggesting that “measures should be imposed on social media platforms to prevent digital activities that threaten social peace.”¹¹⁷ That language conspicuously draws the line for intervention far beyond the sorts of legal restrictions which might pass muster under Canada’s *Canadian Charter of Rights and Freedoms*.¹¹⁸ Indeed, it bears more of a resemblance to Chinese governmental approaches, which emphasize collective harmony over individual rights, than it does to traditional liberal democratic regulatory standards.¹¹⁹ While it is important not to read too much into the specific use of the phrase “social peace” considering the give and take that accompanies the drafting of these joint statements, it is nonetheless troubling to see Canada acquiescing to this hazier definition of the problem, particularly given the government’s position as the host for this particular session.

7. WHY DO WE HAVE A CONSTITUTION?

The contextual importance of political speech to our democratic system requires, simultaneously, the greatest measure of deference to airing a diversity of views, and the greatest care to safeguard against manipulation. This is an incredibly delicate balance, and it is among the trickiest areas to define in terms of the contours of prohibited speech.¹²⁰ Novel challenges related to jurisdiction and enforcement of online speech restrictions, and the emergent weaponization of social media as a vector for foreign intelligence operations, add significant new complications to an already fraught regulatory space.

¹¹⁶ *Competition Act*, S.C. 1985, c. C-34, s 1.1.

¹¹⁷ *Ottawa Declaration*, International Grand Committee on Big Data, Privacy and Democracy (28 May 2019) available in House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *International Grand Committee on Big Data, Privacy and Democracy: Report of the Standing Committee on Access to Information, Privacy and Ethics*, 1st Sess., 42nd Parl. (June 2019) at appendix A, online: < www.ourcommons.ca/Content/Committee/421/ETH1/Reports/RP10583356/ethirp20/ethirp20-e.pdf > .

¹¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.

¹¹⁹ See e.g. “Remarks of the Spokesperson of the Chinese Embassy in Canada on the Canadian side’s statement on the Hong Kong SAR government’s amendment to the Fugitive Offenders Ordinance” (13 June 2019), online: *Embassy of the People’s Republic of China in Ottawa* < ca.chineseembassy.org/eng/sgxw/t1671812.htm > . While this is just one recent example, the phrase is a relatively common feature of Chinese government communiqués, particularly those which aim to push back against criticisms of China’s human rights record.

¹²⁰ See e.g. *Harper*, *supra* note 29 at paras. 1, 66.

However, there are good reasons why, unlike hate speech and defamation, which are both well-recognized as areas where relatively robust limits on speech may be justified, international human rights standards have always viewed laws targeting “fake news” with suspicion.¹²¹ The drift in how the term has been employed by U.S. President Donald Trump, ultimately to refer to any information which contradicts his own personal narrative, is well illustrative of the problem with allowing governments, or any authority, to dictate a centralized version of the truth, a power which is implicit in the enforcement of misinformation rules.¹²² Abuses of “fake news” legislation in places like Egypt show precisely why our constitutional rules outlining how and when our government may curtail speech are so important.¹²³

Obviously, Canada is not Egypt, and there is a clear difference between jailing those accused of spreading misinformation and merely working to suppress particular content. However, the latter measure can still be a severe interference with the right to freedom of expression, especially where carried out in the context of an election. Although Canada has a robust system of constitutional oversight, it is troubling that, while both of the approaches discussed in this paper have the potential to substantially impact the right to freedom of expression, neither approach has been seriously evaluated in terms of its impacts on s. 2(b) of the Charter. There is no judicial remedy to a moderation decision taken “independently” by a platform according to its own content guidelines, even if these guidelines have been drafted, and are being enforced, as a result of direct pressure, and even overt threats, from the Canadian government.

In terms of the new “fake news” provisions in the *Canada Elections Act*, it is important to bear in mind that, even without direct enforcement, overbroad restrictions on expression can have a substantial chilling effect on legitimate speech. This is particularly true, where the rules are vague or broadly drawn, as the new restrictions in s. 91 certainly are.¹²⁴

None of this is to discount the challenge in combating misinformation, particularly given its potential for weaponization by foreign governments. But given that a major goal of State-orchestrated disinformation attacks is to undermine democracy,¹²⁵ it seems self-defeating if, in our efforts to safeguard

¹²¹ *Joint Declaration on Freedom of Expression and “Fake News,” Disinformation And Propaganda*, declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, O.S.C.E. Representative on Freedom of the Media, O.A.S. Special Rapporteur on Freedom of Expression & the A.C.H.P.R. Special Rapporteur on Freedom of Expression and Access to Information (3 March 2017), online: < www.oas.org/en/iachr/expression/showarticle.asp?artID=1056&IID=1 > .

¹²² Tamara Keith, “President Trump’s Description of What’s ‘Fake’ Is Expanding” *NPR* (2 September 2018), online: < www.npr.org/2018/09/02/643761979/president-trumps-description-of-whats-fake-is-expanding > .

¹²³ “Egypt: Activists Arrested in Dawn Raids” *Human Rights Watch* (31 May 2018), online: < www.hrw.org/news/2018/05/31/egypt-activists-arrested-dawn-raids > .

¹²⁴ *General Comment No. 34: Article 19 (Freedom of opinion and expression)*, *supra* note 30 at para. 25.

our elections, we sidestep the constitutional structure which is at the core of our system of government. Constitutional democracy is not just about cleaving to the letter of the law, but also about working within the spirit of it. This means, in part, having a government whose regulatory approach respects the constitutionally established contours of protected speech, rather than seeking novel avenues to suppress speech which is not illegal.

This need not tie the government's hands in seeking to counter the threat of online misinformation. Indeed, there are a number of potential responses which are not inconsistent with Canada's constitutional principles, some of which are already incorporated into the *Elections Modernization Act*. These include, for example, moves to enhance transparency in political advertising, allowing people to see past the customized version of a message they are being offered.¹²⁶ Algorithmic transparency, which was also discussed at the International Grand Committee on Big Data, Privacy and Democracy,¹²⁷ could be another area of regulation, in order to help voters understand the machinations behind why they are being exposed to particular kinds of advertising or content on social media, and potentially smell for themselves whether there is manipulation afoot.

Greater support for fact-checking, and even for traditional journalism, is another important response which the government is already pursuing.¹²⁸ These initiatives seem far more in line with the broader approach of the Supreme Court in *Thomson Newspapers Co.*, with respect to its presumption that the Canadian voter is a rational, mature and intelligent actor,¹²⁹ and in *Bryan*, with regard to the need to promote informational equality.¹³⁰

Canada also has constitutionally-tested legal solutions already on the books to combat problematic speech, such as our hate speech and defamation laws, as well as laws targeting harassment and violent speech. While there may be scaling challenges in dealing with these types of content in an online context, these could nonetheless be used to target particularly meddlesome or egregious strains of election interference, as these often overlap with more well-established categories of prohibited speech.

None of these potential responses is a silver bullet. However, it is worth noting that, at the moment, we also have no evidence that existing measures are

¹²⁵ Henry Farrell & Bruce Schneier, "Common-Knowledge Attacks on Democracy" (17 November 2018), 2018:7 Berkman Klein Center for Internet & Society, online: < papers.ssrn.com/sol3/papers.cfm?abstract_id=3273111 > .

¹²⁶ Bill C-76, *supra* note 9 at ss 351-362.

¹²⁷ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Sess., 42nd Parl., No. 153 (28 May 2019) at 1250 (Nathaniel Erskine-Smith).

¹²⁸ Canada, Department of Finance, *Investing in Middle Class Jobs* (Ottawa: Department of Finance, 2018) at 40, online: < www.budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf > .

¹²⁹ *Thomson Newspapers*, *supra* note 54 at paras. 101, 112.

¹³⁰ *Bryan*, *supra* note 22 at paras. 35, 62.

insufficient to deal with the threat that Canada faces. While there is no question that the danger of election interference via misinformation exists, Canada has counter-measures that were not available in the British or American context in 2016. One significant advantage is the Canadian public's general awareness of this threat, as a result of the widespread media coverage of the 2016 campaigns of interference. At the very least, it seems reasonable, in this context, to verify that Canada's current constitutional framework for regulating election speech is inadequate to safeguard our democratic process before we explore approaches that circumvent this formula.

8. CONCLUSION

In the evening session of the *International Grand Committee on Big Data, Privacy and Democracy*, which followed the platforms' own session, an illuminating exchange took place when Joseph Cannataci, the United Nations Special Rapporteur on the right to privacy, was asked for examples of countries which, in his opinion, could be looked to as a best practice in terms of election law.¹³¹ The Special Rapporteur responded that he could not think of any such instances. It is a problem which, as of yet, no country has really been able to get right. In part, the global embrace of jawboning, and the desire to outsource the problem to private sector platforms, is born out of this common frustration.

Canada's response should remain grounded in constitutional and human rights-based approaches which, while addressing the challenge, nonetheless stay true to our core commitment to robust freedom of expression, particularly in the political arena. Staying true to these principles is particularly important in light of broader global backsliding in the freedom of expression space, including among well-established democracies, like Australia and the United States.¹³² In the absence of a strong model which safeguards expressive rights, countries which prize order and control over liberal democratic individual freedom will be eager to fill the void.

A departure from these values, even in the face of a real and substantial threat, presents challenges that cut to the heart of our democracy. Respect for our democratic institutions is, somewhat circularly, heavily derivative of the fact that governments across Canada respect and adhere to them. Our political system, and indeed every political system, relies enormously on precedent.

This is a fragile state of affairs. If a particular problem can be resolved through means that subvert our core constitutional values, there is every reason to expect that the government will employ the same approach to address other

¹³¹ House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Sess., 42nd Parl., No. 154 (28 May 2019) at 1715 (Jo Stevens).

¹³² Christopher Brandt et al., *Democracy in Retreat: Freedom in the World 2019* (Freedom House, 2019), online: < freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat > .

pressing issues. Rather than going down this path, Canadian democracy would be best served by cleaving to the spirit and letter of our Charter values.