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Social media responsibility and free speech:

A new approach for dealing with 'Internet Harms'

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Executive Summary

Canada has long been, culturally and politically, a liberal democracy. Key to this is its support for the free exchange of ideas and debate – support that has been codified in section 2 of the *Canadian Charter of Rights and Freedoms*, which protects the ability to express one's opinions and beliefs without fear of sanction, censorship, or retaliation.

However, freedom of expression is not absolute. It competes with other rights in the courts and in most countries is fettered by the notion of harm. One may, in general, express oneself freely, but only to the extent it is done in a responsible fashion that causes no harm to others. Speech that calls for or incites harm to be inflicted upon others is forbidden by the *Criminal Code*. Speech that unjustly damages a person's reputation is actionable by civil laws regarding defamation through libel and slander.

From its inception, the Internet has had a profound and liberating impact on society by giving everyone connected to it via a computer or mobile device access to billions of other people. As social media platforms such as Facebook and Twitter evolved, they made access to massive audiences completely free and, if one wished, anonymous. Initially, this innovation was received with unbridled optimism, but a number of incidents and patterns of behaviour evolved to pour cold water on the optimists.

Now there are increasing demands from the public, media, and politicians for some imposition of order on the Internet, much of which focuses on the management of speech and its use on social media and other Internet platforms. Social media companies are themselves asking for regulation. Given that liberal democracies depend upon a constant balancing of liberty and order, this is not surprising.

Efforts aimed at regulating the Internet should stay as far away as possible from attempting to manage what people have to say about the events of the day. To do otherwise only leads, at best, to endless haggling within an unnecessary legal quagmire and, therefore, inefficiency. At worst, such efforts lead to government suppression of freedom. Given that the primary harms (child

pornography, terrorism, inciting violence, hate speech, and non-consensual sharing of intimate images) are already illegal and punishable through the *Criminal Code of Canada*, there is no incentive for social media companies to allow criminal activity on their sites. Rather than focusing on civil penalties regarding those five areas, what Canada needs is legislation that establishes a regime of responsibility for social media companies.

That legislation, this paper's proposed *Social Media Responsibility Act*, would define large social media companies, impose duties of care upon them, recognize and clarify additional responsibilities including the preservation and promotion of Charter freedoms, and identify the Internet's most heinous aberrations in a manner that is efficient and effective.

We need to establish a set of principles that Social Media Enterprises must uphold regarding transparency, accountability, and due process in their content moderation actions. A Social Media Responsibility Council should be created to help ensure that Social Media Enterprises moderate content in a fair and balanced fashion through an approved code of conduct and that there are appeal mechanisms, including an option to subject decisions made by the Council to judicial appeal.

Social Media Enterprises understand the workings of their companies and the technical difficulties and costs involved in monitoring user-generated content better than any regulator. Hence, they should be required to create their own code of conduct and specify the means of monitoring (subject to prior approval by the regulator) by which they will be held accountable.

We believe that an appropriate regulatory framework, as proposed by this paper, proposes would moderate and minimize online harms, and impose duties of care on large, powerful social media platforms, while simultaneously (and in keeping with Canada's long and honoured tradition of supporting free speech), value Internet freedom for legal content and protect as paramount the interests of citizens and consumers.

Government's primary motivations on behalf of citizens should be the preservation of their freedom to speak, write, post, listen, read, and watch (uploading and downloading) as guaranteed in the *Canadian Charter of Rights and Freedoms*. Ultimately, we need to have greater clarity on the rules and consequences for Social Media Enterprises, which will be applied and interpreted in a stable and predictable manner that doesn't stifle innovation.

The *Social Media Responsibility Act* is the most sensible, efficient solution to the commercial and cultural challenges created by some of the unfortunate unintended consequences of technological innovations.

Sommaire

Le Canada est depuis longtemps, culturellement et politiquement, une démocratie libérale. Le facteur clé à cela est le soutien à l'échange des idées et des points de vue – soutien qui a été codifié dans l'article 2 de la Charte canadienne des droits et libertés pour protéger la capacité d'exprimer ses opinions et ses croyances sans crainte de sanction, de censure ou de représailles.

Toutefois, la liberté d'expression n'est pas absolue. Devant les tribunaux, elle fait concurrence à d'autres droits et, dans la plupart des pays, elle est limitée par la notion de préjudice. En général, si toute personne peut s'exprimer librement, elle ne peut le faire que de manière responsable et non préjudiciable envers quiconque. Les propos invitant ou incitant à faire du mal à autrui sont interdits par le Code criminel. Ceux qui portent injustement atteinte à la réputation d'une personne peuvent faire l'objet d'une action en justice en vertu des lois civiles relatives à la diffamation (libelle et calomnie).

Depuis sa création, Internet a eu un impact profond et libérateur sur la société en permettant à tous d'entrer en lien avec des milliards d'autres personnes au moyen d'un ordinateur ou d'un appareil mobile. À mesure que les plateformes de médias sociaux, telles que Facebook et Twitter, ont évolué, elles ont rendu l'accès totalement gratuit et, lorsque souhaité, anonyme, à d'immenses auditoires. Au départ, cette innovation a été accueillie avec un optimisme débridé, mais un certain nombre d'incidents et de conduites ont fini par refroidir les optimistes.

À l'heure actuelle, le public, les médias et les politiciens réclament tous un certain maintien de l'ordre sur Internet, tout particulièrement en ce qui touche la gestion des contenus et les propos échangés dans les médias sociaux et d'autres plateformes. Les entreprises de médias sociaux demandent elles-mêmes une réglementation. Comme les démocraties libérales dépendent d'un équilibre constant entre la liberté et l'ordre, ces demandes n'étonnent pas.

Les efforts déployés en vue de réglementer Internet doivent se tenir le plus à l'écart possible de toute tentative de contrôle de l'opinion publique sur

les événements du jour. Autrement, ces efforts n'entraînent, au mieux, que d'interminables complications donnant lieu à un bourbier juridique inutile et sont, par conséquent, inefficaces. Dans le pire des cas, ils préparent la voie à des mesures gouvernementales qui briment la liberté. Puisque les principaux méfaits dans cinq domaines (pornographie juvénile, terrorisme, incitation à la violence, discours haineux et partage non consensuel d'images intimes) sont déjà illégaux et punissables en vertu du Code criminel du Canada, les entreprises de médias sociaux ne sont nullement disposées à les permettre sur leurs sites. Plutôt que de mettre l'accent sur des sanctions civiles dans ces cinq domaines, le Canada doit plutôt envisager la nécessité d'une législation qui établit un régime de responsabilité pour les entreprises de médias sociaux.

Le présent document propose à cet égard la Loi sur la responsabilité en matière de médias sociaux, législation qui déterminerait qui sont les grandes entreprises de médias sociaux, imposerait à ces dernières des devoirs de diligence, reconnaîtrait et définirait leurs responsabilités supplémentaires, y compris en matière de préservation et de promotion des libertés de la Charte, et cernerait les aberrations les plus odieuses sur Internet de manière efficace et efficiente.

Nous devons établir un ensemble de principes en matière de transparence, de reddition de compte et de diligence auxquels les entreprises de médias sociaux doivent adhérer en mettant en œuvre leurs mesures de modération des contenus. Un Conseil responsable des médias sociaux doit être mis sur pied pour veiller à ce que les entreprises de médias sociaux modèrent les contenus de manière équitable et équilibrée, en s'appuyant sur un code de conduite approuvé, et à ce que des mécanismes d'appel existent, notamment en vue de soumettre les décisions prises par le Conseil à un processus d'appel judiciaire.

Les entreprises de médias sociaux comprennent mieux que n'importe quel régulateur le fonctionnement d'affaires ainsi que les difficultés techniques et les coûts liés au contrôle du contenu généré par les utilisateurs. Elles devraient donc définir elles-mêmes un code de conduite et préciser les moyens de contrôle par lesquels (sous réserve de l'approbation préalable du régulateur) elles seront tenues responsables des contenus diffusés.

Nous pensons qu'un cadre réglementaire tel que celui qui est proposé dans ce document permettrait d'atténuer et de minimiser les méfaits en ligne et d'imposer des obligations de diligence aux grandes et puissantes plateformes de médias sociaux. Ce cadre valoriserait simultanément (et conformément à la longue et honorable tradition canadienne de soutien à la liberté d'expression) la liberté sur Internet, dans la mesure où les contenus sont légaux, et protégerait de manière primordiale les intérêts des citoyens et des consommateurs.

Le gouvernement doit chercher en tout premier lieu, au bénéfice des citoyens, à préserver la liberté de parler, d'écrire, de publier, d'écouter, de lire et de regarder (téléchargement en amont et en aval), comme le garantit la Charte canadienne des droits et libertés. Ultimement, nous avons besoin de rendre plus clairs pour les entreprises de médias sociaux les règles et les résultats, qui seront mis en œuvre et interprétés de manière uniforme et prévisible sans étouffer l'innovation.

La Loi sur la responsabilité en matière de médias sociaux est la solution la plus sensée et la plus efficace pour relever les défis commerciaux et culturels posés par certaines des conséquences regrettables et imprévues des innovations technologiques.

Introduction

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
>
> United Nations, *Universal Declaration of Human Rights*

It has long been acknowledged that the freedom to express ideas – either through nailing them to the door of a church in Wittenberg as Martin Luther did, printing pamphlets, belching tweets, standing on street corners, or shouting from rooftops – is a foundation of liberal democratic societies and the structures they have created.

Like all rights, however, freedom of expression is not absolute. It competes with other rights in the courts and in most countries is fettered in particular by the notion of harm. One may, in general, express oneself freely, but only to the extent it is done in a responsible fashion that causes no harm to others.

In Canada this harm takes legal form in the concept of hate speech, which is addressed in Section 319 of the *Criminal Code* (RSC, 1985, c. C-46, s. 319) and through civil law. (In the United States, the right is considered absolute, but speech can for practical purposes nevertheless be undermined through civil actions, most famously in recent decades through financially-crippling suits filed by the Southern Poverty Law Center (Yousef 2021).)

Freedom of expression has also, throughout most of human history, been socially restricted by access to technology. Newspaper proprietors, for instance, have always curated the content of their publications to suit their own and community standards, most frequently understood but unstated. Those with views outside those standards were certainly free to express them, but were generally limited to handing out pamphlets on street corners. Without a printing press, access to mass audiences was impossible.

From its inception, the Internet has had a profound and liberating impact on that dynamic by giving everyone connected to it via a computer or mobile device access to billions of other people. No longer was an expensive printing press or a government broadcasting licence required to "publish" one's message – a website could be built at very low cost. As social media platforms such as Facebook and Twitter evolved, they made access to massive audiences completely free and, if one wished, anonymous.

Initially, this innovation was received with unbridled optimism. As was noted as recently as 2013 in *The Conversation*, "These days all you need to be a revolutionary is a mobile phone and a grievance" (Reilly 2013).

But as the saying goes, one man's freedom fighter is another man's terrorist – and a number of incidents and patterns of behaviour evolved to pour cold water on the optimists. For instance, cancel culture, a post-modern version of Puritanical shunning and ostracism, has become a powerful force not just online, but in society generally. Online videos not only revealed true outrages such as in the George Floyd murder, they also at times trampled due process and unjustly punished the innocent in panicked rushes to judgment. A good example of the latter occurred following the Covington School tour of Washington, when high school students in one march collided with Native Americans participating in another march, which resulted in insults and threats being exchanged. Observers who praised the ability of dissidents in places such as Egypt and Russia to coordinate their efforts online reacted in horror when a mob supporting outgoing US President Donald Trump organized through similar platforms.

There are increasing demands from the public, media, and politicians for some imposition of order on the Internet, much of which focuses on the management of speech and its use on social media and other Internet platforms. Social media companies are themselves asking for regulation. Given that liberal democracies depend upon a constant balancing of liberty and order (whenever there is too much of one, the pendulum swings in the other direction), this is not surprising.

What this paper will do is outline some of the primary pressures Canadians are facing in terms of censorship, algorithms, data collection, and transparency. It will then outline a legislative solution for policy-makers. In doing so, we will put the interests of citizens – their safety and their freedom – at the top of the hierarchy of stakeholders involved.

Part I: The Problem

Background

For many of its advocates, the Internet is speech – its free flow and exchange. Early efforts in Canada to create federal regulatory frameworks for the Internet, such as Bill C-10 and the "online harms" proposals, were oblivious to this reality and widely panned as a result. To put it bluntly, any efforts aimed at regulating the Internet should stay as far away as possible from attempting to manage what people have to say about the events of the day. To do otherwise only leads, at best, to endless haggling within an unnecessary legal quagmire and, therefore, inefficiency. At worst, such efforts lead to government suppression of freedom.

The defence of a Charter right should not be controversial. And it is our view that the government is misguided in articulating its solution to preventing "online harms" (Canada 2021) when the real issue, beyond matters already covered by the *Criminal Code*, is the concept of social media responsibility.

Key to this responsibility is the ability of the various platforms to monitor the safe uploading and downloading of users' information and discussion while simultaneously allowing speech to flourish. To place that in context, we provide a brief background on the issue in Canada.

As noted in Section 2 of the *Canadian Charter of Rights and Freedoms*, Canada protects the ability to express one's opinions and beliefs without fear of sanction, censorship, or retaliation. Section 2 details "fundamental freedoms," including "freedom of conscience and religion, freedom of thought, belief, opinion and expression, freedom of peaceful assembly, and freedom of association." Each of these is circumscribed by the preceding "reasonable limits" clause in section 1 which states: "*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Constitution Act 1982).

When it comes to freedom of expression in Canada (and in liberal democracies elsewhere), reasonable limits tend to be defined in terms of harm, incitement, sedition, or "fighting words." Speech that calls for or incites harm to be inflicted upon others is forbidden through the *Criminal Code*. Speech that unjustly damages a person's reputation is actionable by civil laws regarding defamation through libel and slander.

The most controversial piece of legislation with the power to regulate speech on the Internet in recent decades has been Section 13 of the *Canadian Human Rights Act* (RSC, 1985, c. H-6). It expanded the quasi-judicial jurisdiction

of human rights tribunals from their traditional areas of employment and housing to the pages of magazines and newspapers online. As it goes on to say:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination. (Canadian Human Rights Act (RSC, 1985, c. H-6, s. 13(1))

In 1990, the Supreme Court of Canada found section 13 to infringe on freedom of speech but nevertheless upheld its constitutionality by a four-to-three vote. The Canadian Human Rights Tribunal then ruled that amendments made between 1990 and 2009 rendered it unconstitutional, after which a Federal Court ruled it again to be constitutional.

Former Liberal MP Keith Martin first tried to have section 13 repealed in 2008 and, in response to a nationwide campaign, the Harper government finally removed it in 2013 (S.C. 2013 Ch. 37 s. 2).

Mary Agnes Welch, spokesperson for the Canadian Association of Journalists, noted at the time that human rights commissions "were never meant to act as language nannies. The current system allows complainants to chill the speech of those they disagree with by entangling targets in a human rights bureaucracy that doesn't have to operate under the same strict rules of defence as a court."[1]

Regardless, human rights commissions remain active on the issue and late in 2021 the Supreme Court of Canada ruled on *Ward v. Commission de droits de la personne et des droits de la jeunesse* (2021 SCC 43), finding that the Quebec Human Rights Commission erred in regulating speech under the purported authority of protecting disabled persons. The narrowness of the five-to-four decision generated considerable debate regarding whether the dissenting views indicated an unprecedented judicial willingness to expand the definition of "harm" to include hurt feelings.

Why any government would want to wade into this legal muck through "Online Harms" and resurrecting section 13 and all the uncertainty that goes with it is unclear. In any event, to do so would be a distraction and a mistake.

Rather than focusing on civil penalties regarding the five areas targeted by the government (child pornography, terrorism, inciting violence, hate speech, and non-consensual sharing of intimate images), what is needed is legislation

that establishes a regime of responsibility for social media companies.

Common carriage and net neutrality

The non-discriminatory treatment of content has long been a foundational principle underpinning communications legislation and must be embedded in any legislation governing the Internet. Indeed, the Canadian Radio-television and Telecommunications Commission (CRTC) was among the first regulators in the world to detail its commitment to net neutrality, a concept which Prime Minister Justin Trudeau has championed as well.

Net neutrality was forged on the basis of "common carriage," which is among the oldest principles of common law. It can be traced at least as far back as the Roman Empire, with its laws on the obligation of ship owners, innkeepers, and stable keepers. Over the years, it has been largely extended to the fields of transportation and communications, ensuring that common carriers from medieval ferrymen to modern Internet providers do not give preferential treatment to those seeking their services. Common carriers typically are characterized by an assumption of duty to serve all without discrimination, of responsibility to protect the goods in the carrier's custody from harm, and of no liability as a result of any harm caused by the goods carried.

In terms of the Internet, threats to net neutrality have generally been associated with traffic management practices, in which Internet service providers implement technical/economic measures to shape how much bandwidth someone might use. While at times necessary to the maintenance of networks, these measures must be practised in a thoroughly transparent fashion that treats all customers equally.

Now, however, this principle of non-interference must be applied not just to how Internet service providers treat the bytes streaming through their networks, but also to how social media companies treat user-generated content upon which their business models depend. That means any rules that currently exist or will be developed must be applied in a non-discriminatory fashion. Further, for regulatory measures to be successful, there must be public confidence that the rules will be applied and upheld fairly and subject to the whims of neither big tech nor politicians. And that requires transparency.

Defining scope

Government has promoted online harms legislation as necessary to protect marginalized groups from being victimized online. More specifically, it has mentioned five areas requiring censorship and oversight by a Digital Safety Commissioner: child sexual exploitation, actively encouraging terrorism, encouraging or threatening violence, hate speech, non-consensual sharing of intimate images.

Philip Palmer, vice-chair of the Internet Society Canada chapter, has already provided a summation of the significant structural flaws posed by the original consultation on online harms (Palmer 2021). For the purpose of brevity, we will hold ourselves to the following contextual points.

Legislation may be referred to in terms of "online harms." But, while the means by which those harms are transmitted may be new, the behaviours about which alarms are being raised are not. The inability of consumers to discern fiction from reality, for instance, has been of concern to rulers and governments for as long as history has been recorded. The printing press, for instance, made it possible for the literate to subjectively interpret the Bible. Radio famously raised alarms through the 1938 Orson Welles' War of the Worlds broadcast, which instilled public panic. Television has long been the favoured vehicle of propagandists and coup leaders alike.

> *Legacy media have long biased bad news over good and do so without apology.*

Some points worth considering when it comes to harms. First, legacy media have long biased bad news over good and do so without apology. By putting profits before the public good and doing so without sanction despite evidence, this practice has a negative impact on the public's mental health (Perimutter 2019). Many people, for instance, commonly believe that crime is on the rise and demand public policies to "crack down" on a problem exaggerated by deliberate media distortion. Perpetrators of domestic violence commit copycat crimes. Suicide reports inspire other suicides. People refuse to take vaccines because reports of negative consequences are highlighted out of proportion and absent crucial context.

Second, harassment of journalists is a scourge and is certainly more visible now than in the past thanks to the online world – but it is not new. Newsroom operators have for years been forced to seek court restraining orders to protect their staff and, in particular, female journalists. And the media are not alone. Violence and threats against politicians and other individuals also take place and have been illegal for a great many years. It is not uncommon for individuals to face charges (for example, see Duhatschek 2021). The same can be said about terrorism and recruitment of terrorists, which have been specifically addressed in law since 2001 (Anti-terrorism Act (SC 2001, c. 41)).

Third, hate speech has been illegal in Canada since 1970 (Walker 2018). In addition, the sharing of intimate images without consent in Canada is pun-

ishable by up to five years in prison (Criminal Code ((RSC, 1985, c. C-46, s. 162.1) and child sexual exploitation and pornography is punishable by up to 10 years in prison (Criminal Code (RSC, 1985, c. C-46, ss. 519 and 550, Form 39)). Indeed, police have worked efficiently with Internet service providers for many years to prevent the loading of images online and track pedophiles.

So, if all the primary harms are already illegal and punishable through the *Criminal Code of Canada*, it is worth asking what the government's aim is? Certainly, there is no incentive for social media companies to allow criminal activity on their sites. While this has undoubtedly occurred – the Facebook live streaming of the New Zealand mosque massacre being the most notable example – little evidence has been presented that suggests a government regulator could have forced its takedown faster than the company itself did or that the actions taken in response, including making the sharing of the video punishable by a prison term as long as 14 years (Stevens 2019), could be made more effective.

> *There is no incentive for social media companies to allow criminal activity on their sites.*

While there is no denying the seriousness of the issues raised by the government, the creation of a regulator to focus by civil means on matters already dealt with under the far more punitive *Criminal Code* is misguided and unnecessary. Worse, this misdirection of energy is at the expense of matters that do require attention to move forward and ensure the public is assured of social media responsibility.

At the broadest level, we need both a legal definition of social media – one that makes it distinct from interactive communications that take place through other online entities such as media commentary – and a legal definition of the social media companies to which regulation would apply.

We propose to call these companies Social Media Enterprises (SME), recognizing that some SMEs have evolved into entities with significant market power. What this means is that SMEs, while not owning the means of transportation, have in effect become communication carriers with the capacity to treat posted content in a prejudicial fashion and with no incentive to monitor for harmful content. Yet SMEs also understand the workings of their companies and the technical difficulties and costs involved in monitoring user-generated content better than any regulator. Hence, they should be required to create their own code of conduct and specify the means of monitoring (subject to

prior approval by the regulator) by which they will be held accountable.

Legislation should define the standard for monitoring to be used by SMEs. Users that own their own speech and online identity should have the ability to control how others may access and use information about their online activities. Indeed, the purpose of regulation is to support the fostering of legal free speech online and ensuring citizens can engage in it legally, safely, and without prejudice from either the platform or the government. With that in mind, we need to ensure that SMEs conduct their business in a fully transparent fashion that respects the privacy of users and imposes duties of care upon SMEs similar in principle to the fiduciary duty placed upon banks entrusted with the safekeeping of customers' money.

We need to establish a set of principles that SMEs must uphold regarding transparency, accountability, and due process in their content moderation actions. The regulator should help ensure that SMEs moderate content in a fair and balanced fashion through an approved code of conduct and that there are appeal mechanisms, including an option to subject decisions made by a Social Media Responsibility Council (SMRC) to judicial appeal.[2]

As with all components of society, SMEs – the behemoths in particular – have responsibilities that come along with their right to conduct their businesses. The government should focus on codifying these responsibilities in the most transparent fashion possible to ensure citizens and the platform operators are aware of the rules of engagement on social media and how they are applied.

Government's primary motivations on behalf of citizens should be the preservation of their freedom to speak, write, post, listen, read, and watch (uploading and downloading) as guaranteed in the *Canadian Charter of Rights and Freedoms*. Ultimately, we need to have greater clarity on rules and consequences for SMEs, which will be applied and interpreted in a stable and predictable manner that doesn't stifle innovation.

International motivation

In the past year, at least 48 countries have taken action to regulate the Internet and companies that conduct business upon it.

According to the Freedom on the Net report, the biggest losers in the power struggle between big tech and governments are individual users (Freedom House Undated). Global Internet freedom declined for the 11th consecutive year with the heaviest crackdowns occurring in Myanmar, Belarus, and Uganda. As the report says, China ranks as the worst country for Internet freedom for the seventh year in a row. Chinese authorities have imposed prison terms for online dissent, independent reporting, and mundane daily communications.

The Freedom House report makes clear that free expression online is under unprecedented attack. More governments are arresting users for nonviolent political, social, or religious speech than ever before. Officials suspended Internet access in at least 20 countries, and 21 states blocked access to social media platforms. Authorities in at least 45 countries are suspected of obtaining sophisticated spyware or data-extraction technology from private vendors. With a few positive exceptions, the push to regulate the tech industry, which stems in some cases from genuine problems like online harassment and manipulative market practices, is being exploited by governments and commercial operators to repress free expression and gain greater access to private data.

In the United States, false, misleading, and manipulated information continues to proliferate online, to the extent that it has even affected public acceptance of the 2020 United States presidential election results. Canada currently ranks third globally behind only Iceland and Estonia as the country offering the most online freedom. State intervention must protect human rights online and preserve an open Internet. The emancipatory power of the Internet depends on its egalitarian nature.

Other studies outline a plethora of different approaches by different countries that tend to reflect their own political and cultural traditions (Ang Undated). Whereas France, for instance, appears focused on the proliferation of French language content, nations such as Germany interpret harm through the application of laws against hard core pornography and anti-Semitic online content.

Countries with traditions respectful of human rights, it is fair to say, work to justify the censorship undertaken to prevent harm, including the harm done by repression of rights such as speech. Nations with little or no traditional affiliation with what most Canadians would describe as democratic rights, on the other hand, aggressively restrict the flow of ideas and information beyond the grasp of state control.

Part II: The Solution

Issue

While most social media companies have maintained basic rules of engagement regarding the nature of the material shared – primarily in terms of nudity, pornography, and violence – they do not curate content. In other words, unlike newspapers and broadcasters, they do not select content for "publication" or "broadcast." Content is generated by users whose activity/data is then monetized by the platform.

This fundamental difference in approach has flummoxed policy-makers trying to force these innovative businesses into pre-existing regulatory templates – most notably in Canada through Bill C-10 and its clumsy efforts to define the Internet as broadcasting and give the CRTC authority over it. While material similar to traditional broadcasting is indeed carried on it, the Internet is no more broadcasting than it is publishing and is far vaster than either.

SMEs are a new form of communications provider. They have no physical facilities but ride on existing telecommunications/Internet structures, be they wires, satellites, or wireless. The use of a social media platform is free, but the company monetizes the content created by users. Canada presently has no specific government regime in place that regulates their activities. Yet as quasi-communications companies, SMEs have primary responsibilities both toward their users regarding the handling and use of data generated by such users, and toward society in terms of their platforms so that they do not contain data that is used to inflict or cause harm.

Any legislation imposing responsibilities on SMEs must be precise, modern, and targeted at those segments of the Internet about which governments and the public are concerned. Its stated purpose should be to implement a responsibility regime in a minimally intrusive way so as not to stifle innovation or free speech.

As noted, the *Criminal Code* already governs the Internet in terms of the most egregious concerns. The new legislation would develop a parallel civil track for dealing with them. Given the enormous amount of technological know-how required and the speed with which changes occur, the scheme for discharging these twin responsibilities should be devised by SMEs and administered by them. In short, they will be required to devise their own code of conduct and submit it to the regulator for approval. They need to specify how they treat their users and what rights their users enjoy, how they handle their data, how they monitor users' data, how they prevent harmful content, what artificial intelligence (AI) mechanism they use, and what avenues of redress they offer their users in case of conflict.

The regulator's role would be to approve the code of conduct after holding public hearings regarding acceptability, completeness, clarity and workability of proposed codes; monitor the implementation and administration of codes by the SMEs; impose penalties for violations; and resolve differences between users and SMEs as to whether content is harmful and deserves to be removed.

Recommendations

We propose a *Social Media Responsibility Act*, which will define what a social media enterprise is and the duties and responsibilities of SMEs, set out the standards to be used by SMEs when monitoring for harms, establish a

Social Media Responsibility Council, define the process for review of actions by SMEs in discharge of their twin responsibilities, and create the position of a Social Media Commissioner. The Act would also equip the Council with the power to require the registration of all SMEs defined under the legislation. Registration should be simple and consist of basic information such as titles, addresses, and contact information.

The rest of this section will offer a breakdown of the key elements in this proposed legislation.

1. Define Social Media

The *Social Media Responsibility Act* must define the entities (the most well-known being Facebook, Twitter, Instagram, Tik Tok, and YouTube) to which it applies. We recommend that the Act apply to SMEs that are identified as businesses with platforms that:

- Entirely or primarily conduct their affairs on the Internet and are available in Canada.
- Offer membership and viewing to the public.
- Are not dedicated to a specific professional, trade, or academic association with its own monitoring system to prevent harmful content under the guise of professional or academic discussion.
- Provide a platform for the posting and exchanging of alpha-numeric, audio, video, or visual content.
- Allow people to interact with each other regarding this content through digital or text comments and sharing.
- Monetize the data – including the identity of the user – posted on their platform.
- Earn revenue by providing subscribers enhanced visibility of their content for a fee or provide their content with embedded advertising.
- Have more than 100,000 account holders in Canada (a base is required both for the sake of efficiency and to avoid suppression of innovation).

The definition should clarify that it does not apply to certain tech giants such as Google, Amazon, and Yahoo where they do not function as a medium for exchanging ideas, news, or opinion. However, in cases where this definition does apply, the Social Media Responsibility Council (as defined in point five below) will require functional and operational separation before approving a

code of conduct. The *Social Media Responsibility Act* would, of course, only apply to the social media function.

2. Clarify Expectations

Due to the novelty of platforms based on speech and user generated content, companies such as Facebook and Twitter have to date generally eluded being defined as publishers and therefore have been able to avoid liability for the content that gets posted on their platforms. For instance, if one is called a racist by someone on Twitter, the responsibility to make amends for such a defamation through civil action is the responsibility of the poster and not the entity – Twitter – that provided the platform used to inflict the offence. This differs from the traditional legal responsibilities assigned to newspapers, book and magazine publishers, and broadcasters who, as curators of the content they carry, are legally liable for the nature of that content and the harm it may cause, irrespective if they generated that content.

Still, these entities have themselves acknowledged the need to police the content on their sites. Each SME has to develop its own code of conduct (incorporating the standard set out in point four below) in order to reflect the unique nature of each platform and yet allow for an innovative environment. However, each code must be consistent in its application of the expectations of the Act.

It will be the responsibility of the SME to apply its code of conduct, notify users and ask them to remove content if necessary, suspend users, and manage their appeals. It will be the Social Media Commissioner's responsibility to see to it that companies are applying their codes in an accurate, efficient, and objective fashion. The Social Media Responsibility Council will provide a venue for redress by citizens or the Social Media Commissioner when they are dissatisfied with any SME's application of its code. SMEs will be obliged to give the Commissioner and Council their full cooperation.

SME Code of Conduct

Legislation will clarify that all social media companies as defined under this Act must develop and implement a code of conduct which shall govern their activity, and insist that the code must be made public prominently and easily accessible on their websites, platforms, and any other public use vehicles.

All elements of the code of conduct must be approved by the Social Media Responsibility Council. If an SME does not produce one or fails to make amendments ordered by it, the Council can impose one. The Code must include monitoring user content and provisions for the removal of it when it violates the standards outlined within it, and ensure transparency provisions to both the public and the Social Media Commissioner regarding the use of algo-

rithms and options for subscribers to control the visibility of their profile.

The code of conduct should also specify the mechanisms the SMEs will use for monitoring users' content and the criteria used (incorporating the legislated standards referred to in point four below), outline the procedures for handling suspected harmful content (i.e., notification, suspension, removal, redress in case of disputed decisions), and provide that while the SME may use technology such as AI to monitor compliance and make initial orders for removal, no orders for permanent removal of content may be issued unless it has been assessed by a human being employed by the SME.

The SME can supplement its code of conduct by issuing Interpretation Notes (with prior approval from the Social Media Responsibility Council) to facilitate compliance by users of its service.

3. Define the Duties of Care

Each approved code of conduct must spell out the duties of care owed by the SME. First, SMEs have a duty of care to respect the right of people to express themselves freely, to encourage the flourishing of that freedom, and to apply any rules of conduct fairly and without prejudice.

Second, SMEs have a duty of care to protect the public and implement measures that ensure their platforms carry no content within the following categories: child pornography and exploitation, terrorism, inciting violence, hate speech, and disclosure of intimate images posted without consent that would violate the legislated standard.

Third, SMEs have a duty of care to their users that is akin to a fiduciary duty. An individual's speech and/or expression is inherently the property of that individual and user-generated data can only be used to the extent that the user explicitly permits it. Codes must provide that users may withdraw their consent for an SME to use their data; and when that happens, the user has the right to be forgotten insofar as the data in question should not be findable in the SME's search engines; the user has the right to control the visibility of their content, the extent to which others may comment upon it or share it and the privacy of their location; the user has a right to confirm the identity of all posters with the platforms for the purpose of filing a complaint with the police for threats and harassment or for the pursuit of other legal remedies; and all codes must include a review process that includes an appeal of decisions made by the Social Media Responsibility Council.

4. Set the Standard

It is vitally important that the standard which the Council will use to review the actions of SMEs and determine whether the actions were reasonable be

set out within legislation approved by Parliament and not left to cabinet appointees to determine.

The legislated default standard should be: "Could this content reasonably be foreseen to foment, instigate, inspire, or lead to action causing any of the five enumerated harms (child pornography and exploitation, terrorism, inciting violence, hate speech, and disclosure of intimate images posted without consent) as they are defined in the *Criminal Code of Canada*?"

5. Define Structures

Social Media Responsibility Council

While its initial structure must necessarily involve government, every effort should be made to ensure the Social Media Responsibility Council is truly independent in both substance and perception. Therefore, it should be:

- Composed of nine members, each appointed by the Governor-in-Council (cabinet) for a maximum of a single, non-renewable seven-year term.[3]

- Three of the Council's members must have at least five years of verifiable experience working in social media.

- Three of the Council's members must have at least five years of verifiable experience working in the fields of civil liberties and human rights.

- Three of the Council's members must be retired members of the Canadian judiciary.

- The nine appointees to the Council elect their chair from within their midst. If they are unable to agree, the Governor-in-Council will select the chair from among them.

In that vein it will be of the utmost importance that the public view the Social Media Responsibility Council as a trusted institution held captive by neither industry nor politics. That calls for a very high level of transparency that traditionally hasn't been a hallmark of content regulators such as the CRTC (which makes its decisions outside of the public's view, doesn't record votes, hasn't published a dissent in years, and doesn't even post minutes of its meetings).

All meetings involving decisions by the Council must be available for viewing by the public. In-camera meetings should be rare and only held for clearly stated and justifiable legal purposes. The Council will approve the codes of conduct developed by the SMEs; on request by the SME approve any Interpretation Notes the SME proffers; deal with complaints by SME users concern-

ing the actions of SMEs; sustain or reverse (on appeal) removal orders and suspensions imposed by SMEs; make determinations of alleged breaches of a code of conduct brought by the Social Media Commissioner; and impose administrative penalties where it finds breaches of the code of conduct have occurred.

In exceptional cases where an SME refuses to register or intentionally and habitually refuses to comply with the *Social Media Responsibility Act*, the Council will also be empowered to make an application before the federal court for an order to block the carriage of the SME by Internet service providers. It should also exempt entities whose nature of interaction is such that the Social Media Responsibility Council is satisfied they are not of concern (for instance, professional/academic platforms and forums).

In short, the primary purpose of the Council is to ensure that SMEs are managing their platforms in a fashion consistent with the issued codes of conduct and treat their users and their posted content in accordance with the *Social Media Responsibility Act*.

Social Media Commissioner

The Social Media Commissioner and their office will be responsible for monitoring the SMEs' compliance with their approved codes of conduct including their discharge of duties of care owed to the public and users of social media.

This individual must have a minimum of 10 years experience in IT and law and will be appointed to the position by the Governor-in-Council for a five-year term renewable for one additional maximum five-year term only upon recommendation of the Social Media Responsibility Council. This reappointment provision is for the purpose of enhancing operational efficiency.

The primary responsibility of the Commissioner will be to monitor the SMEs' compliance with the codes of conduct approved by the Council and to monitor for and investigate possible breaches of those codes. The Commissioner may do so of their own volition where there is reasonable suspicion of violation by an SME or on request from users of social media or persons affected by content carried on the platforms of social media.

To do such monitoring, the Commissioner must have access to the technology used by the SME including any AI used. At the Commissioner's request, the SME must also explain how the AI technology it uses works and it must run specific tests and trial alterations as required by the Commissioner.

Where the Social Media Commissioner makes a finding that an SME has breached its code, the Commissioner has the duty to ask the SME to remedy the situation forthwith and propose to the Social Media Responsibility Council

the following requirements: (1) the imposition of appropriate Administrative Monetary Penalties for breaches of the code of conduct; (2) the issuance of appropriate cease-and-desist orders or mandatory orders so as to fulfill duties of care owed to users; and (3) that it mandate alterations to the SME Code of Conduct, specifically the methodology for monitoring used by the Commissioner, including the AI employed.

6. Funding

The operations of the Social Media Responsibility Council and the Social Media Commissioner should be funded by a levy payable by all SMEs annually. The levy will be set by the Council and has to be approved by Treasury Board before coming into effect. It will be calculated on the same basis as levies that are imposed on banks and insurance companies to pay for the operation of the Office of the Superintendent of Financial Institutions. The aim of this is to ensure that the agency is sufficiently funded to carry out its independent mandate.

7. Review and Appeal

The Social Media Responsibility Council will review the actions of SMEs in response to user complaints or applications by the Social Media Commissioner. Its task is to determine whether decisions made by the SME were reasonable. It may uphold, reverse, and alter the decision or substitute its own version. Decisions by the Social Media Responsibility Council will be subject to judicial review by the Federal Court of Appeal.

Conclusion

Canada has a long and proud tradition, culturally and politically, as a liberal democracy. Key to this is its support for the free exchange of ideas and debate underpinned by a commitment to the principle of "peace, order and good government." We have been mindful of honouring that heritage in creating what we believe is an appropriate regulatory framework that would moderate and minimize online harms, impose duties of care on large, powerful social media platforms, and simultaneously value Internet freedom for legal content and protect as paramount the interests of citizens and consumers.

What we are calling for is straightforward. Canada needs legislation that defines large social media companies, imposes duties of care upon them, recognizes and clarifies additional responsibilities including the preservation and promotion of Charter freedoms, and identifies the Internet's most heinous aberrations in a manner that is efficient and effective.

The focus of these recommendations is, as illustrated in the proposed title of the legislation, responsibility. The emphasis is on duties of care and the focus is on the application of reasonableness – a virtue we believe is consistent with Canadian socio-political culture. The *Social Media Responsibility Act* is the most sensible, efficient solution to the commercial and cultural challenges created by some of the unfortunate unintended consequences of technological innovations.

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Endnotes

1 This quote is from a Canadian Association of Journalists news release. Unfortunately, the original link is now defunct.

2 A good example can be found at https://santaclaraprinciples.org

3 Obviously, the terms of the initial appointees would have to be staggered from four to seven years to ensure efficient successions and the purpose of the non-renewable provision is to ensure no member can be open to the accusation that they were modifying their decisions – even subconsciously – in the hope of currying favour with the government of the day in order to get re-appointed.

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