



Summary Report

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Panel Theme: Building Democratic Resilience Amid Value Conflict

Key Issue: The spread of disinformation during election campaigns

Assessment:

When foreign intervention into Canadian politics takes the form of speech/expression – such as the spread of mis/disinformation online during an election campaign - any attempt to regulate it will raise free speech issues under the Canadian Charter of Rights and Freedoms.

Section 2(b) of the Charter protects, among other things, the individual's freedom of expression. This freedom, like the other rights in the Charter, may be limited, provided the limit is, in the language of s. 1 of the Charter, reasonable and demonstrably justified in a free and democratic society. The free expression right under s. 2(b) extends to “everyone”, whether or not they are a citizen or ordinarily resident in Canada. As well, it is a right not just of the speaker (the person who wants to say something to others) but also of the listener (the speaker's potential audience).

Disinformation spreads quickly and widely on social media platforms. It is a concern whether its source is foreign or domestic. Foreign actors though may have a particular motivation for spreading false news. In spreading disinformation, they may be seeking to affect voting behavioural or to shape public opinion on certain policies or issues; Or they may simply want to sow confusion and to encourage distrust in political and other institutions, such as the traditional media.

It is not, at least ordinarily, the role of the state to censor speech it considers to be false. As early defenders of the right to free speech, such as JS Mill, argued there are too many costs or risks to leaving it to the state to decide what community members should be allowed to hear.¹ The censor may get it wrong and censor speech that is not false. They may be tempted to suppress speech with which they disagree. The censored claim may contain an element a of truth. And, perhaps most importantly, if citizens are to develop the capacity to make judgments – to distinguish truth from falsity or wisdom from foolishness -- they must be allowed to hear and assess different views.

Speech that is judged to be untrue should be restricted in only very limited situations: when the ability of the audience to assess the merits of the speech is limited or when ‘more speech’ is unlikely to be an effective response or corrective.² Canadian law prohibits only a few types of false speech, such as defamation and false advertising.

¹ John Stuart Mill, *On Liberty* (1859) <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf>

² In American free speech jurisprudence, the classic example of a failure in the conditions of ordinary discourse comes from a judgment of Holmes J, who said that “[t]he most stringent protection of free speech would not protect



Disinformation/deceit may be different. When the speaker knows that what they are saying is untrue – when their purpose is to mislead their audience – there is a good argument that their speech should not be protected under the free expression right. The liar – the promotor of disinformation -- seeks to deceive or manipulate his/her audience. Deceit undermines the communicative relationship. It also undermines general trust in communication.

The problem though is that it can be difficult to determine not just when speech is untrue but also when the speaker is lying. If the speaker does not admit to knowing that her/his speech is false, the determination that she/he is lying must be based on the content and context of the speech. There is a risk always that the decision-maker will decide that a speaker is lying, when they think that the speaker's claim is false or implausible or harmful. As well, even if the original source of the claim knew that it was false, the claim may be reposted by others who believe it to be true. Given how much material is posted online every day, online platforms must rely on automated means to identify misinformation or disinformation. For the time being at least these means may not do well in assessing the context of the claim or in determining the intention of the person or entity posting the claim.

Even greater caution is needed when attempting to regulate political or election campaign speech that may contain mis/disinformation. Political speech is said to lie at the core of the free speech right.³ As well, state authorities may sometimes be tempted to suppress political speech for partisan reasons. It is for this reason that the principal form of election speech regulation has been campaign spending limits - limits on the amount of spending or the volume of speech rather than on the content of the speech. Spending ceilings may represent a less troubling form of restriction on expression than a limit that is based on its content.

The justification for spending limits on candidates, parties, and 'third parties' during an election campaign has been to ensure that the voices of some do not 'drown out' the voices of others.⁴ However, if spending inequality (or differences in the amount of advertising put out by different candidates) is unfair or distorts the democratic process, it is because campaign communication has increasingly come to resemble commercial advertising. This is why message repetition matters. Most campaign speech treats voters as consumers of images, rather than as citizens who must make decisions about public issues. Campaign ads rely on soundbites, slogans, and short visual clips. They emphasize image and impact rather than idea and persuasion.

The Canada Elections Act prohibits a foreign actor from "unduly" influencing "an elector to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at the election" which includes "knowingly incur[ring] any expense to directly promote or oppose a candidate in that election, a registered party that has endorsed a candidate in

a man in falsely shouting fire in a theatre and causing a panic" (*Schenck v. United States*, 249 US 47 (1919)). The theatre audience in such a case would not have time to stop and think before acting on the communicated message. The panic that would follow the yell of "fire!" in these circumstances would almost certainly result in injury.

³ See for example, *Thomson Newspaper v. Canada (AG)*, [1998], 1 SCR 877.

⁴ *Harper v. Canada (AG)*, 2004 SCC 33.



that election or the leader of such a registered party” but does not include “expressi[ng] ... their opinion about the outcome or desired outcome of the election; [making] a statement ... that encourages the elector to vote or refrain from voting for any candidate or registered party in the election; or ... transmi[tt]ing to the public through broadcasting, or through electronic or print media, of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news, regardless of the expense incurred in doing so”.⁵

The spread of disinformation is objectionable regardless of whether the source is foreign or domestic. However, in the case of election spending, foreign actors are treated differently from domestic actors. This differential treatment reflects our ambivalence about election spending/advertising and our recognition that most advertising is concerned with image rather than information. For good reason the state does not regulate the content of campaign speech (except as noted below) but instead limits the amount a candidate, party, or third-party can spend. Any attempt to distinguish reasoned argument from emotional appeals carries too many risks, particularly since there is no clear line separating them. While the law prohibits foreign actors from paying for advertising that support a particular candidate or party, it does not preclude them from making statements in support of a candidate and party. This ban on spending by foreign actors then limits their ability to engage in image-based, emotional, appeals in support of a preferred candidate or party. Our concern about foreign interference appears then to be limited to the generation of image-based messages.

The harms of speech have become much greater online. Hate speech and disinformation, for example, spread quickly and widely through different networks. As well, political and commercial advertisers are now able to use personal data gathered by search engines and platforms to micro-target their ads – tailoring ads to the fears and biases of particular individuals. Because ads may be directed at very small groups of individuals, they can remain out of public view.

At the same time, traditional forms of legal regulation are simply too slow and cumbersome to address these harms. We have seen some recognition of this with the introduction of the Online Harms Bill which understands that any form of regulation of unlawful speech (such as hate speech) must involve the social media platforms and search engines, placing a duty on them to design their systems in such a way as to limit the posting and spread of unlawful material.⁶

The Online Harms Bill, though, does not address disinformation and instead focuses on unlawful speech such as hate speech and child pornography. The decision not to include disinformation is perhaps understandable, given the challenges and risks in restricting online misinformation and disinformation.

⁵ Canada Elections Act, s.282.4.

⁶ Bill C-63: An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts



Particular forms of disinformation are restricted under the Canada Elections Act during an election campaign including: **(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.⁷ There may be other false claims that are commonly made about candidates and parties that are specific and provably untrue and that have the potential to influence voter behaviour. Consideration should be given to adding such claims to the list of prohibited disinformation (claims that the speaker knows are false). However, a more general ban on misinformation or disinformation during an election campaign is impractical and carries too many risks.

Election ads must now be included in online ad registries, allowing others to know what the parties and candidates are saying to potential voters.⁸ Consideration should be given to precluding political advertisers from making use of user data when designing and distributing ads. This would limit the ability of advertisers to micro-target ads, in a way that plays to the particular fears and biases of individual voters.⁹

A commitment to free expression means that the audience – members of the community – should be left to decide for themselves whether they agree or disagree with what others may say to them. It is up to the audience to decide the merits of the speech. Underlying the commitment to freedom of expression is a belief that humans are substantially rational beings capable of evaluating factual and other claims and an assumption that public discourse is open to a wide range of competing views that may be assessed by the audience. The claim that bad speech should not be censored, but instead answered by better speech, depends on both of these assumptions -- the reasonableness of human judgment and the availability of competing perspectives.

In the online world, false or misleading claims are unimpeded by media filters and spread quickly and widely to individuals who are often not in a position to assess their reliability or the trustworthiness of their source, and who may have been encouraged by partisan actors to distrust traditional sources of information. As a consequence, disinformation has become a much larger and more serious problem for public discourse. The challenge is to limit or contain disinformation without undermining the protection of important political speech.

⁷ Canada Elections Act, s. 91(1).

⁸ Canada Elections Act, s. 325.1.

⁹ See recent changes to political advertising rules introduced by the European Parliament:

<https://www.europarl.europa.eu/topics/en/article/20230202STO71504/why-new-eu-rules-for-political-advertising-are-important>



Recommendations:

1. The Canada Elections Act currently prohibits particular forms of dis/misinformation. The Government should consider adding to this list, if it finds that particular types of false claim have become commonplace during election campaigns. The government should not introduce a general ban on either misinformation or disinformation during an election campaign. However, social media platforms should be encouraged to continue and expand their practice of flagging mis/disinformation and directing users to more reliable sources.
2. The Government should consider prohibiting candidates, parties, and third parties from using personal data, when designing and distributing election campaign advertisements.