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/amplify: Using legislation to address health misinformation on social media

Law and Policy of Modern-Day Plagues

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Social media misinformation is the biggest public health threat now and into the foreseeable future. This issue requires government action. In this paper, I will argue that, as part of a holistic plan to address misinformation on social media, the federal government has the power to enact legislation that requires algorithms to increase the reach of certain posts while limiting the reach of other health-related posts during a health emergency. In other words, the federal government can and should implement legislation that changes social media algorithms to push reliable non-government health information to the top of feeds before health misinformation.

This paper is divided into three parts to make that argument. In the first part, I consider how legislation should be designed which includes looking at how other countries have addressed health misinformation on social media and, by using a United States Senate bill as a guideline, I propose a bill that can be used in Canada. In the second part, I use the section 2(b) test to show how my proposed legislation might be found to violate the freedom of expression. In the third part, I use the section 1 *Oakes* test to show how my legislation would still be found as a justifiable limit in a free and democratic society.

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Solving the issue of health misinformation on social media through legislation

Health misinformation is currently circulating through social media. One study found that the truth takes around six times longer than falsehoods to reach the same amount of people because social media does not allow the truth to spread easily due to it not getting the same number of clicks.¹ In the United States (US) and Canada, the governments have been struggling to fight vaccination misinformation online, especially at a time where new and more infectious variants are spreading.²

One of the main problems with social media is that it can create “echo chambers” and “filter bubbles.” These are algorithm-created things where people only encounter information that confirms their existing political views, which includes misinformation.³ This is successful on social media because people react to content that knocks on their current grievances and beliefs.⁴ Thus, posts with misinformation that supports social media users’ world beliefs will generate quick engagement.⁵ During a pandemic, this means that people who question the science will see posts and memes that further push their belief that it is all a hoax. Social media sites will allow this to continue because they will stay on the site and see ads, that the social media company

¹ Moonyati Mohd Yatid, “Truth Tampering Through Social Media: Malaysia’s Approach in Fighting Disinformation & Misinformation” (2019) 2:2 Indonesian J of Southeast Asian Studies 203 at 208.

² Alexandra S. Levine, “Klobuchar targets vaccine misinformation with Section 230 bill”, *Politico* (22 July 2021) online: <<https://www.politico.com/news/2021/07/22/klobuchar-vaccine-misinformation-section-230-bill-500554>>.

³ Martin Ebers, “Regulating AI and Robotics: Ethical and Legal Challenges” in Martin Ebers & Susana Navas Navarro, eds, *Algorithms and Law* (Cambridge: Cambridge University Press, 2019) at 31.

⁴ Yatid, *supra* note 1 at 208.

⁵ *Ibid.*

sells, because the site reaffirms their worldview. However, when this misinformation is occurring in a health crisis, the misinformation can cause a serious health threat to public health as a whole. This is happening with the COVID-19 pandemic, the flood of vaccine misinformation on Facebook is fueling vaccine hesitancy, creating a larger risk for those who cannot get vaccinated.⁶ The social media sites users' who see misinformation are who legislation should try to reach with accurate information, as that may get them to question the things that they see on social media.

There needs to be careful consideration when solving problems with legislation

Ronald Leenes has correctly stated that people suffer from what he calls "Flawed Law Syndrome," which is a desire to fix emerging social problems by addressing them with legislation rather than using other ways to mend assumed legal gaps.⁷ Other authors believe that calling for legislation is premature and that the effect of algorithm-driven information intermediaries requires further study.^{8,9} However, I respectfully disagree with this assessment. There is plenty of evidence that a high rate of vaccination benefits society and the antivaccine misinformation shared on social media harms vaccination rates, which hurts the most vulnerable.¹⁰ The danger created by health misinformation has been more noticed by social

⁶ Brett Molina & Jessica Guynn, "Facebook overrun by COVID vaccine lies even as it denied fueling hesitancy, report says" (17 September 2021), online: *USA Today* <<https://www.usatoday.com/story/tech/news/2021/09/17/mark-zuckerberg-vaccines-facebook-misinformation/8377267002/>>.

⁷ Ronald Leenes, "Regulating New Technologies in Times of Change" in Leonie Reins, eds, *Regulating New Technologies in Uncertain Times*, 32nd ed (The Hague: T.M.C. Asser Press, 2019) at 5.

⁸ Ebers, *supra* note 3 at 32.

⁹ Renee Diresta, "Free Speech Is Not the Same As Free Reach", *WIRED* (30 August 2018), online: <<https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach/>>.

¹⁰ Y. Tony Yang, David A. Broniatowski, & Dorit Rubinstein Reiss, "Government Role in Regulating Vaccine Misinformation on Social Media Platforms" (2019) 173:11 *American Medical Assoc* 1011 at 1011.

media users.¹¹ To regain trust, the government should create legislation to make a healthier public sphere on social media.

I recognize that the best solution to addressing misinformation on social media requires taking a variety of approaches. It has been suggested that there needs to be increased transparency from social media on how they manipulate the content on their site with their algorithm.¹² The provincial governments could also minimize the effect of misinformation by promoting health literacy education in public schools and at health departments.¹³ There is also the interesting solution that the federal government could provide subsidies and tax breaks to social media platforms that actively and effectively moderates health misinformation.¹⁴ Though these are good alternative solutions that could help address health misinformation online, they are beyond the scope of this paper. In this paper, I want to focus on legislation because that could have the most immediate effect on curbing the effects on people who get trapped by the health misinformation on social media.

When creating legislation that affects social media, you need to balance free speech with the issues that the legislation is attempting to address. Obviously, in strengthening the government's efforts to exert control over misinformation, the government should not fall short of its human rights obligation under section 2(b) of the *Charter* and violate the right to freedom of expression online. When there are hard restrictions of sharing health misinformation online, the question of what health misinformation is and about who watches the state if they become the arbiter of truth comes to the forefront.¹⁵ While addressing these serious issues, I believe that governments

¹¹ Pattamon Anansaringkarna & Ric Neo, "How can state regulations over the online sphere continue to respect the freedom of expression? A case study of contemporary 'fake news' regulations in Thailand" (2021) 30:3 Inf & Comm Tech L 283 at 302.

¹² Diresta, *supra* note 9.

¹³ Yang, Broniatowski, & Reiss, *supra* note 10 at 1012.

¹⁴ *Ibid* at 1011.

¹⁵ Anansaringkarna & Neo, *supra* note 11 at 301.

should stay away from regulating what individuals post online. I also think that some people are very likely to doubt a government during a pandemic. So, if the government wants to curb misinformation during a pandemic, they must put some steps in between them and where to find correct health information. That is why I believe the best approach is to regulate the algorithms that push the health misinformation to the forefront of users' social media pages. I do not believe in completely changing algorithms, as they do share information that you want to see before annoying self-promotion. Also, regulating algorithms solves some of the free speech issues. As researcher Renee DiResta states, free speech does not mean free reach, as there is no right to algorithmic amplification.¹⁶

Looking at how other countries have created legislation to address social media misinformation

Looking at how other countries have addressed social media misinformation is relevant because we can learn from what has worked in real life. Currently, there are at least 35 countries whose governments are taking some form of action against misinformation, either directly or indirectly.¹⁷ Much of the legislation that has been created comes from Asian countries.

Unfortunately, many of those countries have inappropriately addressed misinformation on social media. In China, regulators have launched a three-year campaign to regulate algorithms so that they align with the government's socialist ideals.¹⁸ Indonesia is mixing site-tracking through blocking and removing fake content, while also vigorously arresting alleged makers of misinformation.¹⁹ Cambodia introduced a law that when one shares false information that

¹⁶ Diresta, *supra* note 9.

¹⁷ Yatid, *supra* note 1 at 210-211.

¹⁸ Will Oremus, "Lawmakers' latest idea to fix Facebook: Regulate the algorithm", *The Washington Post* (12 October 2021) online: <<https://www.washingtonpost.com/technology/2021/10/12/congress-regulate-facebook-algorithm/>>.

¹⁹ Yatid, *supra* note 1 at 213.

“threatens national security” they could face up to two years in prison.²⁰ Cambodia has also assigned three ministries to monitor social media for violations, which could be a threat to free speech ahead of their general elections.²¹ Malaysia has taken a multi-prong approach to fight misinformation online. They have a fact-checking website, started efforts to increase digital literacy, and created the controversial *Anti-Fake News Act*, which was rushed through their Parliament just in time for the general election.²² The Act, which the new government has not been able to repeal, bans any false information, even from outside Malaysia, with a penalty of up to six years in prison and a fine of 500,000 Malaysian Ringgit.²³ In Thailand, they made misinformation illegal and have created an anti-fake news center that empowers state ministers to label a variety of content as misinformation.²⁴ In my opinion, giving government officials the power to determine what is misinformation is a scheme ripe for abuse.

We see better legislation in Europe. The European Union (EU) has the e-Commerce Directive, which creates a quid pro quo, by exempting social media platforms from liability so long as they quickly remove or disable any information that is deemed to be illegal by any given EU country.²⁵ Using the Directive as a basis, Germany enacted the “Netzwerkdurchsetzungsgesetz” (NetzGD) to counteract the spread of hate speech and misinformation online.²⁶ Specifically, NetzGD forces social media sites, that have two million German users, to remove “obviously illegal” misinformation and hate speech within 24 hours or face a fine of up to €50 million.²⁷

²⁰ *Ibid* at 214.

²¹ *Ibid* at 213.

²² *Ibid* at 217-218.

²³ *Ibid* at 218.

²⁴ Anansaringkarna & Neo, *supra* note 11 at 300-301.

²⁵ Paul M. Barrett, *Regulating Social Media: The Fight Over Section 230 — and Beyond* (New York: NYU STERN, 2020) at 6.

²⁶ Nic DePaula et al, “Challenges for Social Media: Misinformation, Free Speech, Civic Engagement, and Data Regulations” (2018) ASIS&T 665 at 666-667.

²⁷ Yatid, *supra* note 1 at 212.

This is a slightly better option than what is legislated in Asia, as it leaves the determination of what is misinformation in the hands of the social media companies and not in the hands of the government, as the latter option could lead to abuse of power. However, such a regulation would still likely be an unjust violation of freedom of speech.

The legislation I think has the best basis for possible future Canadian legislation, is United States Senators Ben Ray Lujan and Amy Klobuchar's "*Health Misinformation Act of 2021*." It has no chance of passing due to a lack of Republican support.²⁸ However, it has a strong base that Canada could use to make its own act to address health misinformation on social media. It is premised on the fact that we now live in a world where misinformation about the pandemic during a public emergency proliferated on the internet with social media.²⁹ It amends the general liability shield given in the US to social media companies to have an exemption where the social media companies will face liability when their algorithm promotes health misinformation during a declared public health emergency.³⁰ The Secretary of Health and Human Services, with input from experts and the leaders of other federal agencies, is tasked with defining what qualifies as health misinformation, in guidance, 30 days after the Act is published.³¹

My proposed legislation that could limit the effect of health misinformation in Canada

I propose taking what is found in the *Health Misinformation Act of 2021*, currently being proposed in the US Senate, and modifying it to work for Canada. In a federal act, I would keep the aim at social media algorithms as it limits the interference with the free speech of the people who use those platforms. I would also keep the part where the interference with social media's

²⁸ Levine, *supra* note 2.

²⁹ US, Bill S 1, *Health Misinformation Act of 2021*, 117th Cong, 2021 at s.2(4)(5).

³⁰ *Ibid* at s.3(1)(2).

³¹ *Ibid* at s.3(2).

algorithm is only during public emergencies. However, I would expand it beyond federally declared health emergencies to include provincial and municipal health emergencies, although the modifications to the algorithms would be local to where the health emergency is declared. I do not believe that steps on the toes of provincial powers, as regulating the internet and social media, as it is a newer technology, falls into federal jurisdiction, as they are things that are best managed through a federal response.

There are a few things I would change from the *Health Misinformation Act of 2021* to make it fit better in Canada. Instead of getting experts to define what public health misinformation is in regulations, as that could be abused by the government, I would get experts to write guidance with a changeable list of groups that generally share accurate health information. During a public health emergency, the social media's algorithm would be expected to promote those organizations' posts while minimizing the reach of posts that could contain health misinformation through word connection, in both English and French, that would be clearer during the health emergency. For example, in the current COVID-19 pandemic, the social media sites would limit the reach of posts that use terms such as "COVID-19," "pandemic," "pandémie," "plandemic," and "lockdown." This change to the algorithm would essentially throw a lifeline into the previously mentioned social media bubbles, so the people in their bubbles would be more likely to see accurate information, which may make them critical of the less far-reaching posts that might contain misinformation. I would also change the liability requirement to a fine of the higher of \$20,000,000 or 4% of the worldwide turnover for the social media's preceding financial year. Such a high fine is necessary because the main plaintiff, that would have identifiable harm rising to liability, is the health care sector, which is funded by the government. Thus, a fine avoids the costs associated with a lawsuit that the federal government would have to file, while still giving them compensation. I also picked the fine amount by

replicating the penalty of the GDPR which, after three years of being in force, has resulted in paid fines that compensate the government, and the companies tending to adopt remedial measures afterwards to ensure future compliance.³²

The question then turns to whether the social media companies can implement the measures that I am proposing. Though my knowledge of technology is limited, from the research that I have done, the answer seems to be yes. It has been noted that forcing social media companies to be more careful about what they amplify might sound straightforward, but it poses a challenge to social media companies because the algorithms are generally not smart enough yet to fully grasp the message of every post.³³ The algorithm is designed to find content that is relevant to the user and amplify it.³⁴ My legislation is adjusted to this limitation by only expanding the reach of specific organizations to users, which does not require the algorithm to analyze those posts. The algorithm simply needs to amplify the posts from reliable sources. I also do not accept that algorithms cannot search for words in posts and then limit their reach. Any computer can find words on social media sites through the key combination of control (Ctrl) and F, which I believe an algorithm can also do. There is also evidence that changing an algorithm can work because when Facebook banned health misinformation in its advertisement, there was a 75% decrease in antivaccination misinformation being shared on Facebook relative to Twitter, which had no change in its advertising policy at that time.³⁵

Charter challenges that my proposed legislation might face

³² Ilse Heine, "3 Years Later: An Analysis of GDPR Enforcement" (13 September 2021), online: *Centre for Strategic & International Studies* <<https://www.csis.org/blogs/strategic-technologies-blog/3-years-later-analysis-gdpr-enforcement>>.

³³ Oremus, *supra* note 18.

³⁴ Diresta, *supra* note 9.

³⁵ Yang, Broniatowski, & Reiss, *supra* note 10 at 1011.

There is no doubt that the legislation I am proposing brings *Charter* concerns. My proposed legislation modifies the reach of speech online, which brings it into conflict with section 2(b), freedom of expression, of the *Charter*. There are two groups that I could see attempting to challenge such a piece of legislation. First, the users of the social media sites, whose posts during the health emergency will get limited reach. Second, social media companies may see the regulation of their algorithms as restricting their editorial expression.

The first group, social media users, do not have a strong claim, as that issue was essentially dealt with in *Montréal (City) v 2952-1366 Québec Inc.* In that case, the majority of the Supreme Court ruled that Montreal's limit on using a loudspeaker on the street did prohibit speech, but it was demonstrably justified with the government's goal of reducing noise production.³⁶ In a similar vein, decision-makers are unlikely to change that ruling by saying that people who use social media should have the right to a virtual loudspeaker, as it risks the spread of health misinformation during a health emergency, which is certainly a concern equivalent to reducing noise pollution.

The second group, social media companies, has a more unique claim. Thus, this paper will analyze whether my legislation would survive a section 2(b) claim coming from them. The first hump that social media companies would have to face is whether they even have access to the *Charter*, as my legislation regulates the algorithms and that does not directly affect the speech of their companies. The issue is with the growing autonomy of algorithms, it has become increasingly difficult over time to determine who is the author, as algorithms will make decisions that are contrary to what the author may intend.³⁷ However, algorithms don't have a right to free speech, as in all major legal systems, including the Canadian *Charter*, are premised on the fact

³⁶ *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 at para 100 [*Montréal (City)*].

³⁷ Ebers, *supra* note 3 at 18.

that only natural and legal persons have legal capacity and are thus actors.³⁸ However, we are not yet at the point where algorithms are that far separated from their creators' intent.³⁹ Thus, courts are likely to see social media companies like those who are expressing speech from the editorial control they have over the algorithms.

My legislation would likely fail a section 2(b) *Charter* challenge

Decisions of the Supreme Court have stressed the fundamental importance of freedom of expression.⁴⁰ That is why the jurisprudence from the top court has required broad protection be given at the section 2(b) stage, on the understanding that the government can limit that protection if they can justify the limit under section 1 of the *Charter*.⁴¹ The three-part section 2(b) test was set out in *Canadian Broadcasting Corp. v Canada (Attorney General)*: “(1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?”⁴² I will analyze each of these three sections in turn.

Does the activity have expressive content, thereby bringing it within s.2(b) protection?

I believe that the social media sites have used editorial expression to a level that is sufficient to satisfy this part of the test. However, it is important to note that commercial speech is protected

³⁸ *Ibid.*

³⁹ *Ibid* at 31.

⁴⁰ *R v Lucas*, [1998] 1 SCR 439 at para 24, 157 DLR (4th) 423 [*Lucas*].

⁴¹ *Montréal (City)*, *supra* note 36 at para 79.

⁴² *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2 at para 38 [*Canadian Broadcasting Corp.*].

because it can be useful to customers and society.⁴³ In this case, social media companies have the right to have their editorial speech protected.

Irwin Toy lays the groundwork for a large and liberal interpretation of freedom of expression, where the plaintiff must simply show that they performed expression to convey a meaning.⁴⁴ The algorithms that social media companies design generally have one purpose, to keep people watching, scrolling, and interacting, so they can show ads, which is their means of profit.⁴⁵ Though, on the face, that has no meaning, a social media company could argue that their editorial speech is trying to help people keep connected. By presenting them with new content they are giving them new information that they can share with friends. During a health emergency, they would want to be able to show all sorts of content, even if it includes health misinformation. Though this may seem like a stretch for speech, we must recall that the court accepts a wide range of speech. Being content-neutral, the *Charter* protects the true and false information that could be given further reach by the social media companies.⁴⁶ Thus, social media sites will likely pass this first stage of the section 2(b) test.

Does the method or location of this expression remove the s.2(b) protection?

I believe that this part of the test will likely be met, as there is no reason to believe that the method or location of the social media sites' editorial expression removes their section 2(b) protection. In *Montréal (City)*, the Supreme Court stated two factors that need to be considered when answering this part of the test. First, the historical or actual function of the location or the

⁴³ *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 34 [*JTI-Macdonald*].

⁴⁴ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969-970, 58 DLR (4th) 577 [*Irwin Toy*].

⁴⁵ Diresta, *supra* note 9.

⁴⁶ *R v Zundel*, [1992] 2 SCR 731 at para 36, 95 DLR (4th) 202 [*Zundel*].

method of expression.⁴⁷ Second, whether other aspects of the location or method of expression would undermine the values underlying free expression.⁴⁸

Social media sites, although young, have a historical function of being a place where communication is facilitated online. *Montréal (City)* tells us that finding the historical purpose of a place is for public discourse indicates that the expression in that place is consistent with the purposes of section 2(b).⁴⁹ In this case, it is important to think of property beyond land ownership. Online spaces are property, owned by individuals, corporations, and the government, where we can get information and express ourselves. Section 2(b) does not protect all places, such as private property.⁵⁰ However, since my legislation would impose state limits on the algorithms, it brings the private property into s.2(b) protection. Thus, it passes this part of the consideration.

Social media sites do not form an expression that would undermine the values underlying free expression. This is relevant because the second question concerns both the method of expression and the location where the activity is undertaken.⁵¹ The method and expression of social media's algorithms determines what we see, as it can filter useless information to get to what their customers might want to see. The message that social media companies convey through their algorithms is included because it is consistent with the purposed of the *Charter*. For instance, the Supreme Court has found that violent expression is not protected by the *Charter* because the message that it conveys is not consonant with the purposes of the *Charter*.⁵² That is not the case here, so the second stage of the section 2(b) test has been met.

⁴⁷ *Montréal (City)*, *supra* note 36 at para 74.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at para 62.

⁵¹ *Canadian Broadcasting Corp.*, *supra* note 42 at para 49.

⁵² *Irwin Toy*, *supra* note 44 at 969-970.

Does the government action in question infringe the s.2(b) protection in purpose or effect?

Having found that social media companies' editorial speech is worthy of section 2(b) protection, the question becomes whether either the purpose or the effect of the measures results in an infringement of the protected right.⁵³ In my view, the legislation's interference is very minimal. It only interferes with social media sites' editorial speech in terms of altering what the algorithm amplifies during a health emergency. During a health emergency, social media companies can still amplify information that will keep people on their site and communicating. However, the minimal impairment argument is best left for the section 1 analysis. Here an infringement, even minimal, meets this element of the test, especially since the courts have given a broad analysis of the section 2(b) test. As such, all three elements of the s.2(b) test have been met and my legislation will likely be found to have violated the social media sites' freedom to editorial expression.

My legislation is likely going to survive a *Charter* challenge due to section 1

Given the liberal interpretation of the section 2(b) test, section 1 must be used, which permits a reasonable limit on *Charter* rights so long as they can be demonstrably justified in a free and democratic society.⁵⁴ Particularly, section 1 is where the right to limit the freedom of speech tends to be argued. The test for section 1 has not changed much since it was first used in *R v Oakes*. The test created in *Oakes* has two parts. The first part asks whether the legislative goal is pressing and substantial to justify limiting a *Charter* right?⁵⁵ The second part asks whether there is proportionality between the objective and the means used to achieve the objective?⁵⁶ The

⁵³ *Canadian Broadcasting Corp.*, *supra* note 42 at para 54.

⁵⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s.1.

⁵⁵ *R v Oakes*, [1986] 1 SCR 103 at 138-139, 26 DLR (4th) 200 [*Oakes*].

⁵⁶ *Ibid* at 139.

proportionality part of the test has three subsections: (a) a rational connection between the limit and the objective, (b) the limit minimally impairs the right to accomplish the objective, and (c) a final balancing, so there is proportionality between the deleterious and salutary effects of the law.⁵⁷ The Supreme Court noted that when applying the test, the court should be guided by values and principles including the inherent dignity of people and faith in the institutions to enhance the participation of individuals and groups in society.⁵⁸ The onus of proving that a limit or freedom guaranteed by the *Charter* meets the criteria of section 1 rests upon the party seeking to uphold the limitation, on the balance of probability.⁵⁹ In the case of my legislation, the onus would rest on the federal government.

Is the legislative goal pressing and substantial to justify limiting the s.2(b) Charter right?

Reducing the spread of health misinformation is a pressing and substantial goal that justifies limiting the freedom of expression. The Supreme Court has said that to justify a limit to a *Charter* right, the objective of the impugned measure must advance concerns that are pressing and substantial in a free and democratic society.⁶⁰ Since the second part of the s.1 test, the balancing proportionality part, is so interconnected to this part of this test, it is important to define the objective carefully and with precision.⁶¹

The objective to curb health misinformation on social media is not new. In 2019, the World Health Organization (WHO) listed vaccine hesitancy, caused in part by misinformation on social media, as among the top ten global health threats of that year.⁶² Vaccine hesitancy caused by

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at 136.

⁵⁹ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para 418 [*Taylor*].

⁶⁰ *Canadian Broadcasting Corp.*, *supra* note 42 at para 65.

⁶¹ *R v K.R.J.*, 2016 SCC 31 at para 63 [*KRJ*].

⁶² “Ten threats to global health in 2019” online: *World Health Organization* <<https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019>>.

health misinformation has fallen off the WHO's list of pressing global health threats, but I suspect that it will reappear with COVID-19 vaccine skepticism on the rise, amplifying the hospital rates of COVID-19 patients.⁶³

The objective of limiting the spread of health misinformation at times of a health emergency, when there is significant uncertainty, is important because, on social media, the circulation of rumours, misinformation, and outright falsehoods tends to increase substantially.⁶⁴ When official news and government information remains limited, citizens are more likely to supplement their news diet with unverified information from less reliable sources, while also favouring information that aligns with their pre-existing worldviews.⁶⁵ This tends to downplay the severity of the health crisis often by presenting convenient external scapegoats that can be blamed for the disruption to citizens' lives.⁶⁶ In the current COVID-19 pandemic, COVID-19 related rumours and the "misinformation infodemic" have become a serious problem.⁶⁷ Bruns, Harrington, and Hurcombe noticed that, during the COVID-19 pandemic, health misinformation, that could be connected to specific terms, increased rapidly, with the biggest acceleration occurring when the pandemic started to affect a particular nation's local population.⁶⁸ This is part of the reason why my proposed legislation uses term search.

⁶³ Leslie Young, "Unvaccinated 60 times more likely to end up in ICU with COVID-19, Ontario data shows" (29 September 2021), online: *Global News* <<https://globalnews.ca/news/8230051/covid-vaccine-hospitalization-risk-ontario/>>.

⁶⁴ Axel Bruns, Stephen Harrington, & Edward Hurcombe, "'Corona? 5G? or both?': the dynamics of COVID-19/5G conspiracy theories on Facebook" (2020) 177:1 *Media Intl Australia* 12 at 13.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Mingxi Cheng et al., "Deciphering the laws of social network-transcendent COVID-19 misinformation dynamics and implications for combating misinformation phenomena" (2021) 11:10 *Scientific Reports* 1 at 1.

⁶⁸ Bruns, Harrington, & Hurcombe, *supra* note 64 at 16-19.

Most research has found that health misinformation spreads faster than accurate health information.⁶⁹⁷⁰⁷¹⁷² Bruns, Harrington, and Hurcombe found that misinformation got to 330 and 580 posts per day, in multiple languages, that started to spread relatively widely in January, which increased rapidly as the COVID-19 pandemic spread.⁷³ In contrast, they found that fact-checking material only started to spread in April and did not spread as well as the misinformation.⁷⁴ Similarly, in Klimiuk's analysis of 18,685 Facebook comments, he found that 19.9% contained health misinformation, 14% of the total comments included vaccine misinformation, and 5.4% of the comments involved alternative medicine.⁷⁵ Jamison et al. looked at 309 vaccine-related ads and found that, despite the similar number of ads being bought, the median number of ads per buyer was significantly higher for anti-vaccine ads.⁷⁶ They found that the top five anti-vaccine ad buyers accounted for 75% of anti-vaccine ads, while the top five pro-vaccine ad buyers accounted for 35% of pro-vaccine ads.⁷⁷ These numbers definitively show how misinformation spreads rapidly on social media, especially in the current COVID-19 pandemic.

Though health misinformation has been most prominent in the current COVID-19 pandemic, there is evidence of health misinformation spreading during, and even possibly causing, other health emergencies.⁷⁸ Klimiuk's analysis found that even before the pandemic there were social media communities that shared vaccine misinformation due to their lack of trust in the scientific

⁶⁹ *Ibid* at 16.

⁷⁰ Cheng et al., *supra* note 67 at 8.

⁷¹ Amelia M. Jamison et al., "Vaccine-related advertising in the Facebook Ad Archive" (2019) 38 Elsevier 512 at 512.

⁷² Samia Tasnim, Md Mahbub Hossain, & Hoimonty Mazumder, "Impact of Rumors and Misinformation on COVID-19 in Social Media" (2020) 53 J Prev Med Public Health 171 at 171.

⁷³ Bruns, Harrington, & Hurcombe, *supra* note 64 at 19.

⁷⁴ *Ibid* at 23.

⁷⁵ Krzysztof Klimiuk, "Vaccine misinformation - topic-based content analysis on Facebook" (2020) World Congress on Public Health 1069 at 1069.

⁷⁶ Jamison et al., *supra* note 71 at 512.

⁷⁷ *Ibid* at 516.

⁷⁸ *Ibid* at 519.

achievements in medicine.⁷⁹ Jamison et al. found that though they cannot definitively connect a Facebook anti-vaccination advertisement to specific measles outbreaks that occurred at the same point, they said that it is something that should not be discounted.⁸⁰

In my research, I was only able to find one article that did not find health misinformation on social media as an issue. In that paper, the authors note that in the 500 posts that they analyzed from two Facebook groups, 28% of the posts can be considered as health misinformation, which got 14.3% of the total interactions.⁸¹ They found when they limited their search to particularly harmful health misinformation, 21% of the 500 Facebook posts were a match, with 10.7% of those posts getting interaction.⁸² The authors argue that these results suggest that Facebook is first and foremost a social network, used by people to foster their social relations, not to spread online health misinformation.⁸³ This is a flawed analysis. First, 500 posts over two Facebook groups is not a sufficient analysis of the platform's average posts. Other articles that I have noted in this section have looked at many more posts than that and have come to the opposite conclusion. However, even if we were to accept these numbers as accurate, they are highly concerning. If one in five posts that the average members of those groups see is particularly harmful health misinformation, that is concerning. Seeing that number of posts with health misinformation could create doubt, which is dangerous for our collective health. Further, when there is interaction with these posts, the algorithm will give those people similar posts, meaning that they could fall further into a hole of health misinformation.

⁷⁹ Klimiuk, *supra* note 75 at 1069.

⁸⁰ Jamison et al., *supra* note 71 at 519.

⁸¹ Manon Berriche & Sacha Altay, "Internet users engage more with phatic posts than with health misinformation on Facebook" (2020) 6:71 Palgrave Communications 1 at 5-6.

⁸² *Ibid.*

⁸³ *Ibid* at 7.

The majority of academic articles clearly articulate that reducing the spread of health misinformation on social media is a pressing and substantial issue that should be addressed in a free and democratic society. There is no obscurity in how this objective is defined. That is why I believe that a decision-maker would find the objective of reducing the spread of health misinformation on social media meets the first part of the *Oakes* test.

Is there proportionality between objective and the means used to achieve it?

As my analysis of the three parts of the proportionality part of the *Oakes* test will show, I believe that there is proportionality between the objective to reduce the spread of misinformation on social media is proportionate with the way that my legislation proposes to achieve it. The second part of the *Oakes* test comes from the fact that most modern constitutions recognize that rights are not absolute and that rights can be limited if it is necessary to achieve an important objective and if that limit is appropriately tailored.⁸⁴ Indeed, the concept of proportionality is said to have its roots in ancient and scholastic scholarship on the legitimate exercise of government power.⁸⁵ As such, the three parts of the *Oakes* test that determine proportionality must be concerned with balancing the interests of society with that of individuals and organizations.⁸⁶ This is something that was taken into consideration when I developed the legislation that alters what algorithms must do during a health emergency.

(a) Rational connection between the objective and the limit

There is a clear rational connection between the objective of reducing the spread of health misinformation on social media and the limits imposed by my proposed legislation. I determined

⁸⁴ *JTI-Macdonald, supra* note 43 at para 36.

⁸⁵ *Ibid.*

⁸⁶ *Oakes, supra* note 55 at 139.

this because, in the first part of the proportionality test, there is a rational connection between the infringement and the benefit that is sought through evidence or, where it is impossible to provide evidence, based on reason or logic.⁸⁷ In other words, I can prove that the limit on the right is reasonably tailored to the objective.⁸⁸

The legislation that I proposed earlier in this paper forces algorithms to amplify information from trusted sources and hold the reach of other health-related posts. The hoaxes and rumours caused by misinformation during the current COVID-19 pandemic, have resulted in reduced compliance with home quarantine and social isolation orders.⁸⁹ That is why Jamison et al. suggest that government efforts need to consider what exposure to this content may have on social media users' vaccine attitudes and behaviours to determine a feasible means to counter such exposure. (VRA519) The amplification is required because evidence shows that though fact-checked information that debunks these conspiracy theories does circulate, it does so less consistently, and in other networks, than the original conspiracist content.⁹⁰ Further people will generally seek out information that confirms their world belief and thus might miss good health information during a health emergency.⁹¹

Using the algorithm to limit the reach of posts with health misinformation is better than taking down posts with health misinformation. Recent studies have shown that taking down content, in an attempt to slow health misinformation on social media, may only entrench the ideas of people who believe in conspiracy theories, as those interventions will be seen as proof that they are in the process of uncovering deeper secrets that “the establishment” or “deep state” does not want

⁸⁷ *Canadian Broadcasting Corp.*, *supra* note 42 at para 70.

⁸⁸ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 102 [*Carter*].

⁸⁹ Tasnim, Hossain, & Mazumder, *supra* note 72 at 172.

⁹⁰ Bruns, Harrington, & Hurcombe, *supra* note 64 at 26.

⁹¹ *Ibid.*

them to see.⁹²⁹³ Even if it was a good idea to amplify all accurate health information and delete all health misinformation on social media sites, it is something algorithms currently cannot do. Indeed, currently, algorithms are not advanced enough to tell what accurate health information is and what inaccurate health information is.⁹⁴ That is why I tailored my proposed legislation to what algorithms can actually do.

I also limited the extent of the algorithm modification to when there is a public health emergency. This has a rational connection to limiting the spread of health misinformation because, as previously noted, online health misinformation spreads exponentially faster when the health emergency starts to affect people's daily lives. This was seen in the recent COVID-19 pandemic, where Bruns, Harrington, and Hurcombe noticed that the number of health misinformation posts increased exponentially in mid-March when COVID-19 started interfering with the lives of most people in the world.⁹⁵

Finally, it is important to note that though there may be room for debate about what methods work best to address the problem, Parliament's decision as to what means to adopt should be accorded considerable deference.⁹⁶ Based on the facts presented above and the deference generally given by courts to Parliament, I believe that the legislation I am proposing is rationally connected to the goal of reducing the spread of health misinformation on social media sites.

(b) The limit accomplishes the objective with minimal impairment on the freedom of speech

The limits imposed by my legislation are minimally impairing the social media sites' right to editorial expression through their algorithms. The test for this part of the proportionality analysis

⁹² *Ibid* at 23-26.

⁹³ Cheng et al., *supra* note 67 at 9.

⁹⁴ Diresta, *supra* note 9.

⁹⁵ Bruns, Harrington, & Hurcombe, *supra* note 64 at 19.

⁹⁶ *JTI-Macdonald*, *supra* note 43 at para 41.

is whether the government can demonstrate, among the range of reasonable alternatives available, that there are no other less rights-impairing means of achieving the objective, in a real and substantial manner.⁹⁷ You also need to look at whether the means are carefully tailored to the objective to limit the impact on the *Charter* rights.⁹⁸

My legislation attempts to not significantly impair the freedom of speech by only being applicable when there is a health emergency. The judge in *Taylor v Newfoundland and Labrador* correctly noted that “...the pandemic is not a magic wand which can be waved to make constitutional rights disappear.”⁹⁹ However, when health emergencies are called, there is often little substantial medical information that is available, and that information can quickly change. As has been noted, during that period is when health misinformation is the most effective, as it can quickly spread and confirm people’s preconceived biases in a hard time.¹⁰⁰ Thus, forcing social media algorithms to change when health misinformation is dangerous is an acceptable limit.

Forcing social media algorithms to change how they amplify health information is also minimally impairing how they can control their algorithms. During a health emergency, they can still attempt to keep people on their sites and communicating through amplifying non-health-related posts. Non-health-related posts still makes up most of the user-created content on social media sites.¹⁰¹ Thus, the social media sites still retain quite a bit of editorial speech through their algorithms.

⁹⁷ *KRJ*, *supra* note 61 at para 70.

⁹⁸ *JTI-Macdonald*, *supra* note 43 at para 42.

⁹⁹ *Taylor*, *supra* note 463.

¹⁰⁰ Bruns, Harrington, & Hurcombe, *supra* note 64 at 13.

¹⁰¹ Berriche & Altay, *supra* note 81 at 7.

There are alternative approaches that could be used to try to limit the spread of health misinformation online. The government could take one of the approaches used by some Asian countries, as previously described in this paper, where they create a government agency that monitors social media sites and criminalizes those who post health misinformation. Even if we take away the criminal aspect of those schemes, and just delete social media posts with misinformation, it is a much higher interference with freedom of speech than the scheme I am proposing. Those schemes, even when there is some degree of separation to the elected government, could be abused for political gain, which would result in a much worse fate for the freedom of speech. As such, I cannot think of a scheme that would be less intrusive on freedom of speech while also limiting the spread of health misinformation on social media.

It is important to note that when governments are tackling a complex social problem, such as reducing health misinformation in a health emergency, courts are to provide a certain measure of deference.¹⁰² That means that the court should not interfere simply because it can think of a better, less intrusive way to manage the problem.¹⁰³ However, this is unlikely to be used, as I have shown that the legislation that I am proposing minimally impairs the freedom of speech.

(c) There is proportionality between the deleterious and salutary effects of the law

In the final balancing part of the proportionality test, my legislation would likely be found to be an appropriate balance between the deleterious and salutary effects of the law. Courts have said that the final balancing section allows for a broader assessment of whether the benefits of the law

¹⁰² *JTI-Macdonald*, *supra* note 43 at para 43.

¹⁰³ *Montréal (City)*, *supra* note 36 at para 94.

are worth the costs of limiting a right.¹⁰⁴ This step of the proportionality test focuses on the practical impact of the law.¹⁰⁵

There are salutary effects of my proposed legislation. When working, it should advise social media users of the updating medical knowledge during a health emergency. My legislation would also make it so that the accurate health information gets to the average user before the misinformation. The expanded reach of accurate health information would also act as a lifeline for someone who is entrenched in health misinformation and might make them critically think about what they are seeing. Plus, in cases where health is involved, courts have noted how an objective of getting the truth out can be a matter of life or death for the millions of people who could be affected.¹⁰⁶

On the other hand, there are some deleterious effects of my proposed legislation for social media companies. Their editorial speech through their algorithms is somewhat limited. However, the form of corporate expression being used here, that allows them to use harmful health misinformation to keep people on their site and talking, is the sort of speech that courts find has a tenuous value.¹⁰⁷ The other deleterious effect of my legislation is that social media organizations will have to pay the cost of modifying their algorithms during a health emergency. However, those costs may pay for themselves as the viewers of the accurate information are more likely to take the steps to stay healthy during the health emergency, meaning that they can see more ads in the future.

When balancing the salutary effect of reducing the spread of health misinformation on social media with the low-value expression of the social media companies, it is evident that the prior

¹⁰⁴ *KRJ*, *supra* note 61 at para 77.

¹⁰⁵ *JTI-Macdonald*, *supra* note 43 at para 45.

¹⁰⁶ *Ibid* at 68.

¹⁰⁷ *Ibid* at para 47.

outweighs the former. That is why my legislation would succeed on the final balancing part of the proportionality test. Thus, my legislation would pass the section 1 *Oakes* test and would be upheld as a reasonable limit on the freedom of speech.

Conclusion

In this paper, I have argued that, as part of a holistic plan to address health misinformation on social media, the federal government should, and has the power to, implement legislation that requires algorithms to promote certain posts while limiting the reach of other health-related posts during a health emergency. I made this argument in three parts. In the first part of my paper, I considered how legislation should be designed, which included looking at how other countries have addressed health misinformation on social media and, by using the *Health Misinformation Act of 2021* as a guideline, I proposed a bill that could be used in Canada. In the second part of my paper, I used the section 2(b) test to show how my proposed legislation might be found to violate freedom of expression due, in part, to the liberal interpretation that courts have used when implementing that test. In the third part of my paper, I used the section 1 *Oakes* test to show how my legislation would still be a justifiable limit in a free and democratic society. However, for change to truly happen, there needs to be action on behalf of the government. Unfortunately, the current federal government is willing to keep social media the same as always and has not made any notable moves to address health misinformation on social media.