BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION | ASSOCIATION DES LIBERTÉS CIVILES DE LA COLOMBIE-BRITANNIQUE

Submissions to the House of Commons Standing Committee on Public Safety and National Security regarding Bill S-210, *An Act to restrict young persons' online access to sexually explicit material*

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Introduction

Bill S-210 is a simplistic, overbroad, and inadequate attempt to address a pressing problem. If enacted in its current form, it will have a profound deleterious effect on the privacy rights and fundamental freedoms of people in Canada, namely the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" enshrined in s 2(b) of the *Canadian Charter of Rights and Freedoms*.[1] The bill proposes that people living in Canada be required to reveal personally identifying information ("PII") to a third party in order to access lawful content online. Moreover, the bill allows for expressive content to be blocked in its entirety from access within Canada, in some cases without the proponents or creators of this content having any right to participate in the legal proceedings.

Both privacy and freedom of expression are core, fundamental rights that must be protected and upheld for our society to remain free and democratic. As such, the British Columbia Civil Liberties Association ("BCCLA") urges Parliament to carefully tailor any age-verification legislation to ensure that these foundational rights are infringed as little as possible to achieve the legislation's goals, as is required by Canada's *Charter*. We organize these submissions according to these primary areas, first addressing the issues of scope that bear equally on privacy and s 2(b) interests, and then considering expression- and privacy-specific issues in turn.

Summary of Recommendations

Recommendation 1: Replace the reference to s 171.1 of the *Criminal Code* with a definition of sexually explicit material ("SEM") purpose-built for the regulatory context. This definition should capture only those materials where mere exposure may cause harm to a young person and for which there is no legitimate educational, artistic, scientific, or medical purpose.

Recommendation 2: The broad definition of 'organization' should be replaced with a tailored definition of 'content host', 'website operator', or similar term that is appropriately scoped for the goals of this legislation. This definition should target maintainers of websites over a specified threshold of size, proportion of pornographic content, and/or revenue. It should also explicitly exempt content-neutral webhosting services, individual sex-workers, artists or collectives of these individuals, and any other appropriate groups.

Recommendation 3: Copyright holders for the content in question should have standing as of right to defend their expression before the Federal Court, regardless of who is distributing that content online. The enforcement body should be required to serve them with originating pleadings for these enforcement actions, in order to enable the participation of those with the greatest stake and best evidence regarding the artistic, educational, scientific, or medical value of that expression.

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Recommendation 4: Section 9(4) should be amended to replace "must" with "may" and should make it clear that these orders should only be in effect until the site implements appropriate age verification or removes the SEM. Federal Court judges must be able to exercise their discretion to balance the degree of potential harm that could flow from the specific content with the infringement of rights that website blocking would necessarily entail and allow parties who advance a good-faith but unsuccessful defence to come into compliance.

Recommendation 6: Section 6(1) should be amended to ensure that, in the absence of prescribed age-verification methods, organizations can defend themselves on the basis of having implemented reasonably adequate age-verification methods.

Recommendation 7: Add a section to the bill imposing a duty on age-verification providers ("AVPs") to ensure that their prescribed services meet the criteria of s 11(2)(c)-(e) and proscribing meaningful penalties for violation of this duty. Penalties could include, for example, services of the AVP being removed or suspended as prescribed age-verification methods, as well as substantial fines.

Recommendation 8: Section 11(2) should be revised to forbid age-verification methods from being prescribed unless they meet each of the enumerated criteria. A subsection (3) should be added requiring the periodic review of prescribed methods to ensure that they still meet the criteria as best practices evolve over time.

Scope and Overbreadth

Two definitions key to this bill, those for SEM and "organization", are simply incorporated by reference from the *Criminal Code*[2] without any adjustment for the radically different, fundamentally regulatory context in which the bill would operate. These inappropriate borrowings from the criminal law render the bill both unjustifiably overbroad and under-inclusive. These issues of scope implicate both fundamental freedoms and privacy interests, as they simultaneously chill and restrict unproblematic expression as well as requiring for the disclosure and use of PII in situations where it is not necessary to achieve the aims of the bill.

Definition of SEM should be purpose-built for this legislation

The bill defines SEM with reference to s 171.1(1) of the *Criminal Code*, which is a clear error as subsection (1) contains no definition for the term. We assume for the purposes of this submission that the intended definition is the one found at s 171.1(5), a definition which is specific to the offence defined in s 171.1(1) and does not apply to the rest of the *Code*. This offence involves making SEM available to a child for the purpose of facilitating the commission of certain

[2] RSC 1985, c C-46.

enumerated sexual offences involving children. Section 171.1 does not, crucially, criminalize making SEM available to young people accidentally or for other purposes.

In this context, the very broad definition of SEM found at subsection (5) is narrowed considerably by the purpose element of the offence. Indeed, it serves the purpose of the criminal provision to ensure that any material that could conceivably be used to groom a child into increased vulnerability to sexual predation be included. As Bill S-210 contains no analogous restriction, being aimed at the mental health effects on young people from merely being exposed to pornographic material, the application of the s 171.1(5) definition would be effectively much broader in this legislation. Material that could be used to facilitate the commission of an enumerated offence – including material with manifest artistic, educational, or scientific merit that could be used to desensitize a young person to inappropriate sexual discussions with adults – will not necessarily have any detrimental effects on a young person's psyche if encountered during self-directed exploration.

The regulatory context of the bill further broadens the effect of using this definition, as organizations seeking to avoid any regulatory action will likely take a much more conservative approach to interpreting this definition than would a Crown prosecutor considering a s 171.1 charge or, indeed, a court ruling on the same. This will chill the expression not only of regulated organizations, but of the end-users of hosting services like social media platforms. Even expression with a legitimate purpose will likely be chilled or unnecessarily age-restricted because the definition includes these materials: a large social media platform is incentivized to disallow these kinds of expression from their platform or age-gate them overzealously, rather than bear the pecuniary and reputational costs of defending each individual user's expression.

Recommendation 1: Replace the reference to s 171.1 of the *Criminal Code* with a definition of SEM purpose-built for the regulatory context. This definition should capture only those materials where mere exposure may cause harm to a young person and for which there is no legitimate educational, artistic, scientific, or medical purpose.

Definition of 'organization' is not rationally connected to purpose of legislation

The prohibition on making SEM available to young people in this bill falls on all and only organizations. This is an inelegant and inadequate way to shield individual artists and sex workers from disproportionate costs of compliance and penalties for failure to do so, which would otherwise be a laudable goal. It is inadequate to accomplish the legislation's goals because sites operated by individuals would be exempt from any enforcement, no matter how large they are in terms of content or traffic and regardless of how extreme the content may be.

At the same time, it is overbroad because general-purpose content hosts would be captured – including platforms that host non-pornographic material with sexual content like CBC Gem, Netflix, and Spotify, as well as those that merely sell server space and have no control over or input into the operation of the hosted website. The result is that, if the bill were to pass in its

current form, it would no longer be possible for content-neutral webhosting services to operate as they currently do.

To illustrate this issue, consider an individual artist who produces content that falls within the *Criminal Code* s 171.1(5) definition of SEM. This content could be, for example, romance or erotic fiction writing, or visual artworks like paintings and photography that depict sexuality or the nude form. Even if their content is suppressed or prohibited on large social media sites, they currently have the ability to exercise their freedom of expression online by setting up their own websites by purchasing server space from a content-neutral webhosting service, like Bluehost or GoDaddy, and either coding their own site or hiring a web developer to do the same.

Since this artist is not an organization, they are not captured by the offence created by s 5 of Bill S-210. The webhost, on the other hand, *is* an organization and, although they have no control over the website's content and design, they own the servers that transmit the information to the end user and the transmission is part of their commercial operations. Accordingly, their activity would fall within the scope of the offence.

In order to comply with this bill, then, these webhosts will need to either impose content-specific requirements on users seeking to create websites with legal SEM, whether through technology or contract, deny these users access to their services outright, or ban Canadian IP addresses from accessing any sites hosted on their servers. The first choice will have the effect of imposing the costs of compliance on small actors and restrict the ability of Canadians to access their content, even if that content is not harmful or has a legitimate purpose, with no opportunity to defend the expression before a court or tribunal. The second choice will have similar suppressive effects on free expression, but to a heightened degree as the artist will be unable to publish even on a site they wholly control, and even if they implement age verification. The final choice, which would be the simplest for international webhosts to implement, will cut Canadians off from many independent websites, restraining Canadian residents' freedom of thought and expression unjustifiably without any recourse through the courts. This would parallel the recent example of Meta's response to the *Online News Act*[3] by blocking Canadians from accessing news content on their platforms.[4]

<u>Recommendation 2: The broad definition of 'organization' should be replaced with a tailored definition of 'content host', 'website operator', or similar term that is appropriately scoped for the goals of this legislation.</u> This definition should target maintainers of websites over a specified threshold of size, proportion of pornographic content, and/or revenue. It should also explicitly exempt content-neutral webhosting services, individual sex-workers, artists or collectives of these individuals, and any other appropriate groups.

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[3] SC 2023, c 23.

[4] See e.g. Nadine Yousif, "Meta's news ban in Canada remains as Online News Act goes into effect" (18 December 2023), online: *BBC* <https://www.bbc.com/news/world-us-canada-67755133>.

Recommendation 3: Copyright holders for the content in question should have standing as of right to defend their expression before the Federal Court, regardless of who is distributing that content online. The enforcement body should be required to serve them with originating pleadings for these enforcement actions to enable the participation of those with the greatest stake and best evidence regarding the artistic, educational, scientific, or medical value of that expression.

Freedom of Expression and Thought

The system described in Bill S-210 imposes both barriers to the publication of content, implicating freedom of expression, as well as barriers to Canadian residents accessing the content of their choosing. The latter barriers necessarily represent an infringement of our freedom of thought, as we develop our own thoughts and opinions in dialogue with the expression of others. It is long-settled law that the constitution requires that these fundamental freedoms be impaired as little as possible in order to accomplish the pressing objective of the statute, and that their deleterious effects be proportionate to that objective.[5]

The bill as drafted fails to proportionately balance these *Charter*-protected freedoms with the objective of protecting young people's mental health from exposure to extreme pornography. This is so not only because of the issues of scope addressed above, but also because of the bluntness of the website blocking remedies. Moreover, there is a possibility that the bill will come into force before any age-verification methods are prescribed by regulation, which would result in a de facto prohibition of SEM for Canadian residents of any age.

There is a distinct risk that enforcement of this bill will inequitably suppress the expression of sexual minority communities, simply by virtue of their sexual expression being seen by the broader culture as more extreme or explicit than are expressions of normative heterosexual sexuality. As the Supreme Court of Canada recognized 24 years ago in a landmark case regarding an LGBTQ+ bookstore that was found by the trial judge to be disproportionately targeted by customs officials regulating the importation of sexually explicit publications, "[g]ays and lesbians are defined by their sexuality and are therefore disproportionately vulnerable to sexual censorship."[6] This risk of discriminatory enforcement underscores the importance of ensuring that regulation of SEM is appropriately narrow.

[5] See e.g. *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at paras 69-71.
[6] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 53.

Blocking access to non-SEM and to SEM for adults is draconian and disproportionate

Section 9(4) of the bill requires judges to issue an order that would block access to an offending website if they have not complied with a regulatory notice. This is mandatory even if the defendant advances a good-faith but ultimately unsuccessful defence. For example, a defendant who did not implement age-verification because they mistakenly believed that making the content available had a legitimate purpose within the meaning of s 6(2) will have no opportunity to come into compliance once this mistaken belief is corrected by the court, thereby increasing the risk to defendants who wish to raise such defences and intensifying the chill that this bill will place on expression.

More broadly, the mandatory nature of these orders means that the judge has no discretion to impose a tailored remedy for material that, while falling within the definition of SEM, is unlikely to cause any actual harm, or for SEM that has a legitimate purpose if the defendant has not raised that defence explicitly. Judges, who will have the specific facts of the actual expression at issue before them, are well-positioned to perform this balancing, and foreclosing this possibility is not necessary to achieve the goal of protecting young people from harm. The mandatory nature of this remedy in the current bill is therefore unconstitutional.

Recommendation 4: Section 9(4) should be amended to replace "must" with "may" and should make it clear that these orders should only be in effect until the site implements appropriate age verification or removes the SEM. Federal Court judges must be able to exercise their discretion to balance the degree of potential harm that could flow from the specific content with the infringement of rights that website blocking would necessarily entail and allow parties who advance a good-faith but unsuccessful defence to come into compliance.

Section 9(5) of the bill explicitly licenses the blocking of non-SEM content in Canada and blocking the access of adults in Canada to legal SEM. These are extreme, draconian remedies that represent profound infringements of s 2(b) *Charter* rights. Their use to prevent access to mild SEM that is unlikely to cause harm would be completely unjustifiable under the *Charter*.

Recommendation 5: Section 9(5) should be removed. In the alternative, it must be amended to ensure that these extreme remedies are only available to prevent access of young people to SEM that is so extreme that it is reasonably certain to cause significant harm.

Belief that user was of age should be a defence while there are no prescribed age-verification methods

Section 12 of the bill provides that it comes into effect one year after royal assent, whether or not regulations are in place. As s 6(1) requires the use of a prescribed age-verification method in order to rely on a defence that a person was believed to be of age, even websites that implement state-of-the-art, best-practice age-verification methods will be vulnerable to liability if regulations are not in place when the legislation comes into effect. In order to insulate themselves from this risk, organizations will have no alternative to blocking access to SEM generally. This would be an

extreme result of what is likely an oversight in drafting, amounting to an effective prohibition on making SEM available to all people in Canada.

Recommendation 6: Section 6(1) should be amended to ensure that, in the absence of prescribed age-verification methods, organizations can defend themselves on the basis of having implemented reasonably adequate age-verification methods.

Privacy

Privacy is not only a freestanding right protected by s 8 of the *Charter*, but also an important precondition for the exercise of other *Charter*-protected rights. Freedom from unjustified surveillance affords us the space to think and believe freely, to associate with who we choose, and to enjoy intimate relationships with our family and friends that are necessary for our wellbeing.

In the context of the internet, informational privacy is constantly at risk of erosion as PII and other biographical information is tremendously valuable to private interests. As the Supreme Court of Canada recently recognized, there is a porous boundary between online surveillance by private entities and surveillance by law enforcement and other arms of the state, such that "the Internet has fundamentally altered the topography of informational privacy under the *Charter* by introducing third-party mediators between the individual and the state — mediators that are not themselves subject to the *Charter*."[7] Canadians must not, in the words of the Supreme Court of Canada, be "required to become digital recluses in order to maintain some semblance of privacy in their lives."[8] We must be able to use the internet to conduct our ordinary lives without undue interference with our privacy.

It is not possible to perform age verification without some use of PII, whether that is biometric information used by age estimator tools, credit card information, telephone subscriber information, or other forms of PII. The most promising technological solution for verifying age without exposing PII is the use of zero-knowledge proofs, which use cryptographic protocols to verify facts about information without revealing the information itself.[9] Even these zero-knowledge proofs, however, do not verify that the input information is true and relevant to the question of concern, so a further step that reveals PII would be required in order to make this a complete solution.[10]

We strongly caution Parliament against taking the age-verification industry's marketing materials as truth and legislating a captive market for them on that basis. "Privacy-protective age-

[7] *R v Bykovets*, 2024 SCC 6 at para 10.
[8] *R v Jones*, 2017 SCC 60 at para 45.
[9] See Kenneth A. Bamberger et al., "Verification Dilemmas in Law and the Promise of Zero-Knowledge Proofs" (2022) 37:1 Berkeley Tech LJ 1 at p 2.
[10] See *ibid* at p 57.

verification methods" can never be completely protective of individual privacy: they can only be less invasive than other methods. Legislating in this area therefore requires a careful balancing to ensure that Canadian residents are not coerced into exposing our PII to unnecessary risk so that we may access lawful content.

Clear, strict, and enforceable standards needed regarding PII for age-verification purposes

AVPs, like pornography websites, are subject to general-purpose privacy legislation, and their use provides only the minimal additional protection that the PII used for identification is not directly linked with the user's activity on the age-gated site. This bill would elevate those AVPs whose services are prescribed as age-verification methods with a special status, making them mandatory intermediaries of Canadians' PII and increasing the importance of holding them to account for any negligence or misconduct. It is therefore appropriate and necessary for these AVPs to be subject to clear standards and penalties commensurate with the seriousness of the conduct.

Recommendation 7: Add a section to the bill imposing a duty on AVPs to ensure that their prescribed services meet the criteria of s 11(2)(c)-(e) and proscribing meaningful penalties for violation of this duty. Penalties could include, for example, services of the AVP being removed or suspended as prescribed age-verification methods, as well as substantial fines.

Section 11(2) factors should be mandatory

Section 11(2) of the bill is an anemic, unenforceable list of factors for consideration. It does not restrict the ability of the Governor-in-Council, having considered the factors, to prescribe a method that is deficient with respect to each, and provides no mechanism for review of these choices to ensure that they continue to be adequate. As such, it is grossly inadequate to protect the privacy of Canadian residents.

Recommendation 8: Section 11(2) should be revised to forbid age-verification methods from being prescribed unless they meet each of the enumerated criteria. A subsection (3) should be added requiring the periodic review of prescribed methods to ensure that they still meet the criteria as best practices evolve over time.

About the BC Civil Liberties Association

The BCCLA is the oldest civil liberties and human rights group in Canada, advancing litigation, law reform, community-based legal advocacy, and public legal education across the country since 1962.