

CDA 230 Goes *North American*?

**Examining the Impacts of the USMCA's Intermediary
Liability Provisions in Canada and the United States**

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The authors are solely responsible for any errors or omissions in this report.

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SUMMARY

Article 19.17 of the United States-Mexico-Canada Agreement (USMCA) requires Canada, Mexico, and the United States to provide online intermediaries (such as Facebook and Google) with broad protections against liability relating to their hosting of user-generated content.

The current approach to intermediary liability in Canada is incompatible with USMCA Article 19.17, and stands to put Canadian platforms at a disadvantage when compared to their Mexican and U.S. counterparts. Correspondingly, we recommend that consideration be given to introducing legislation in Canada that would clarify how USMCA Article 19.17 will be applied in general, but especially to Canadian and third-country intermediaries.

The current approach to intermediary liability in the United States under Section 230 of the Communications Decency Act (CDA 230) exceeds the requirements of USMCA Article 19.17. Hence the agreement should not result in any changes in the U.S. domestic legal landscape. In view of the ongoing conversation regarding amending CDA 230, however, we recommend further study of whether USMCA Article 19.17 could serve as a template for doing so. This is in view of the balance the USMCA strikes between providing redress for online harms, and providing online platforms with protections from liability related to user-generated content.

INTRODUCTION

Section 230 of the Communications Decency Act of 1996 (CDA 230)¹ continues to incite immense controversy in the United States. Some argue that it permits tech companies to get away with not moderating content sufficiently, in turn promoting hate speech and harassment online.² Conversely, others believe CDA 230 permits too much content moderation—allowing online platforms to suppress so-called “conservative speech,” for example.³

Intermediary liability laws like CDA 230 define whether and how companies that host user-generated content, including social media giants like Facebook, Twitter, and Google, are legally responsible for harms relating to such content. These laws generally have three main policy goals.⁴ The first is to prevent harms (ranging from copyright infringement to non-consensual pornography); the second is to promote free expression and information access, and the third is to encourage economic growth and technical innovation.⁵ As one might expect, balancing these objectives has proven complicated.

This report examines the impact of the United States-Mexico-Canada Agreement (USMCA) on the intermediary liability regimes in Canada and the United States. The report is in four parts.

- Part 1 provides an overview of relevant background information: it explains the origins of the USMCA, the similarities of its intermediary liability provisions to CDA 230, the difference between liability and equitable remedies under Canadian and American law, and who is entitled to protections under the USMCA.
- Part 2 considers the impact of the USMCA in Canada: it begins by examining the current Canadian approach to intermediary liability before considering the domestic impact of the USMCA in Canada and potential avenues for legislative action.
- Part 3 explains the USMCA’s impact—or lack thereof—in the United States: it starts by summarizing the current debate regarding CDA 230, and then examines how the USMCA could complicate outright repeal

¹ 47 U.S.C. § 230 (2018).

² See e.g. Danielle Keats Citron, *HATE CRIMES IN CYBERSPACE* (2014); Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

³ See e.g. Ted Cruz, *Facebook has Been Censoring or Suppressing Conservative Speech for Years*, FOX NEWS (Apr. 11, 2018), <https://www.foxnews.com/opinion/sen-ted-cruz-facebook-has-been-censoring-or-suppressing-conservative-speech-for-years> [<https://perma.cc/XG6Q-JTZL>].

⁴ See Joris van Hoboken and Daphne Keller, *Design Principles for Intermediary Liability Laws*, TRANSATLANTIC HIGH LEVEL WORKING GROUP ON CONTENT MODERATION ONLINE AND FREEDOM OF EXPRESSION 2-3 (Oct. 8, 2019), https://www.ivir.nl/publicaties/download/Intermediary_liability_Oct_2019.pdf [<https://perma.cc/8HEB-GDSN>].

⁵ *Id.*

of CDA 230, before ending with a suggestion as to how CDA 230 might be amended following the pattern of the USMCA.

- Finally, Part 4 provides a summary of our conclusions and recommendations.

It is important to note that the scope of this report is limited to U.S. and Canadian common law jurisdictions. We hope to expand our coverage to include Quebec and Mexico in a future version of this report.⁶

1. DEFINING THE USMCA'S INTERMEDIARY LIABILITY PROVISIONS

In 1994, the North American Free Trade Agreement (NAFTA) came into force between Canada, the United States, and Mexico. This trilateral agreement covered a wide array of topics ranging from intellectual property and the environment, to trade barriers and labor. In 2017, NAFTA underwent renegotiations, with the Canadian and American governments suggesting the regime needed to be modernized.⁷ The resulting United States-Mexico-Canada Agreement (USMCA) included an entirely new chapter on digital trade, and one of the key issues covered in this chapter was legal liability for websites that host user-generated content⁸—known in the agreement as “Interactive Computer Services” (ICS).⁹ Under Article 19.17 of the USMCA, these websites are provided with a broad liability shield in relation to harms arising from content posted by their users.

USMCA Article 19.17 is clearly inspired by CDA 230. Although both provisions are aimed at limiting liability for online platforms that host user-generated content, they are not identical. Meaningful textual differences between the two will shape the interpretation of Article 19.17. Knowing that CDA 230 preceded and inspired USMCA Article 19.17 allows us to predict, to a certain extent, how the latter will be applied in practice. Yet while CDA 230 can serve to illuminate the meaning of Article 19.17, the two provisions are subject to interpretation

⁶ It is worth noting that the Annex to USMCA Chapter 19 provides Mexico with an additional three years to implement the provisions of Article 19.17.

⁷ See Chrystia Freeland, Global Affairs Canada, Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017), available at https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html [<https://perma.cc/8Y8Z-GC35>]; see also Office of the U.S. Trade Representative, United-States-Mexico-Canada Trade Fact Sheet Modernizing NAFTA into a 21st Century Trade Agreement (USMCA) available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> [<https://perma.cc/D9J4-BKZP>] (last visited Jun. 16, 2020).

⁸ See Agreement between the United States, the United Mexican States, and Canada, (Nov. 30, 2018), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/PHP6-72XV>] [hereinafter *USMCA*].

⁹ Note that the terms “Interactive Computer Service,” “platform,” and “intermediary” will be used interchangeably throughout this document.

based on different principles, given that CDA 230 is a U.S. federal law, while Article 19.17 is part of an international trade agreement. Therefore, to consider Article 19.17 in a robust and comprehensive manner, it is important to give regard to domestic context and principles of treaty interpretation. The fact remains, however, that CDA 230 can aid our understanding of the potential implications of Article 19.17 in countries like Canada that do not already possess an analogous statutory framework.

1.1. COMPARING CDA 230 AND USMCA ARTICLE 19.17

This section provides a brief overview of the provisions of CDA 230 and compares them with the text of USMCA Article 19.17.

CDA 230 comprises six sections. CDA 230(a) describes the benefits that accompany an open Internet, including education, free speech, cultural exchange and intellectual development. CDA 230(b) sets out the purpose of the provision as furthering these benefits by maximizing user control over content and allowing platforms to make decisions in the interest of their users. CDA 230(c), the heart of the provision, bars platforms from being treated as the “publisher or speaker” of third-party content and establishes that a platform moderating content in good faith maintains its immunity from liability. CDA 230(d) requires platforms to make users aware of parental control mechanisms that can be used to restrict access to harmful materials. CDA 230(e) lays out the exceptions to the limitation of liability, including for criminal law and intellectual property rights enforcement. Finally, CDA 230(f) contains definitions relevant to the provision as a whole.

In comparison, Article 19.17 comprises four paragraphs. Like CDA 230(a) and (b), Article 19.17.1 addresses the purpose of the provision and recognizes “the importance of the promotion of interactive computer services...as vital to the growth of digital trade.” Article 19.17.2, which is analogous to CDA 230(c), establishes that interactive computer services shall not be treated as content providers for the purposes of determining liability for harms. Article 19.17.3 provides a liability shield for good faith moderation efforts by platforms. Finally, Article 19.17.4 outlines exceptions to the limitation of liability, including for intellectual property, criminal law enforcement, and other matters.¹⁰

¹⁰ Given that findings of criminal liability in both Canada and the United States require significantly higher standards of proof than civil liability (“beyond a reasonable doubt” versus a “preponderance of the evidence”), in addition to proof of the requisite mental state for the offence, the impact of this exemption for criminal law upon the legal exposure of online intermediaries appears to be quite limited. Correspondingly, the likelihood that an online intermediary might be found criminally liable under, for example, the provisions of the Canadian Criminal Code that criminalize hate speech (Sections 319.1, 319.2) and defamation (Sections 297-315) appears to be quite low.

The focus of our analysis will be on Article 19.17.2, as it forms the heart of the USMCA’s intermediary liability provisions, and the differences between it and CDA 230(c) are likely to be salient to its implementation and interpretation.

CDA 230(c)

*No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*¹¹

USMCA Article 19.17.2:

*No Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created or developed the information.*¹²

There are obvious similarities between the two provisions. Legal experts on both sides of the border have indicated that Article 19.17.2 and CDA 230 were meant to confer similar protections.¹³ Indeed, the USMCA provision is drafted in a way that incorporates certain aspects of U.S. case law interpreting CDA 230. For example, the presence of the “created or developed” qualification in the USMCA codifies the “material contribution” standard as established by the U.S. Ninth Circuit Court of Appeals in the *Roommates.com* case.¹⁴

There is, however, one very significant textual difference between the two provisions. CDA 230(c) bars *all* causes of action against a platform that treat it as the “publisher(s) or speaker(s)” of information hosted on an online platform, whereas Article 19.17.2 simply prevents platforms and users from being held *liable* as an “information content provider[.]” As a result, CDA 230(c) prohibits courts both from imposing *liability* or granting *equitable relief* (such as restraining orders and injunctions) against a platform for content created and uploaded by platform users. By contrast, the text of Article 19.17.2 suggests that it only bars

¹¹ 47 U.S.C. § 230 (2018).

¹² USMCA art. 19.17.2.

¹³ See Eric Goldman, *Good News! USMCA (a/k/a NAFTA 2.0) Embraces Section 230-Like Internet Immunity*, TECH & MKTG. L. BLOG (Oct. 3, 2018), <https://blog.ericgoldman.org/archives/2018/10/good-news-USMCA-a-k-a-nafta-2-0-embraces-section-230-like-internet-immunity.htm> [<https://perma.cc/YE3G-9VLW>]; see also Emily Laidlaw, *Mapping Current and Emerging Models of Intermediary Liability* (June 15, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574727 [<https://perma.cc/XVC2-87VT>].

¹⁴ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (Explaining that a website will fall within the exception to CDA 230 if it helps develop unlawful content; “a website helps to develop unlawful content...if it contributes materially to the alleged illegality of the conduct.”)

findings of liability against platforms in such situations, yet leaves open the possibility of equitable remedies.

1.2. DISTINGUISHING LIABILITY FROM EQUITABLE REMEDIES

Understanding the significance of this textual difference between CDA 230(c) and USMCA Article 19.17.2 requires an understanding of the difference between liability and equitable remedies in both Canadian and American law.

Liability is a finding of fault that can be enforced by a civil remedy or criminal punishment,¹⁵ whereas equitable remedies are non-monetary forms of relief granted by courts when other legal remedies will not adequately redress an injury.¹⁶ For example, an injunction is a form of equitable relief ordering a party to undertake or abstain from a certain action, while specific performance is an equitable remedy that requires the precise fulfillment of a legal or contractual obligation when money damages will not make an aggrieved party whole. Canadian and American courts apply similar tests to determine whether an injunction should be granted. The Supreme Court of Canada outlines a three-factor test, requiring (1) a serious issue, (2) a risk of irreparable harm, and (3) a balance of convenience that favors granting the injunction.¹⁷ Similarly, the United States Supreme Court uses a four-factor test, requiring (1) an irreparable injury, (2) an inadequate alternative remedy, (3) a warranted balance of hardships between the plaintiff and defendant; and (4) a showing that the injunction does not hurt the public interest.¹⁸ Both tests essentially require the party seeking the injunction to show it will suffer irreparable harm if the injunction is not granted, and that the injunction is in the best interests of all relevant parties.

Injunctions are often issued following a finding by a court of a wrongful act or omission,¹⁹ though they can also be issued against third parties that have done no wrong. In Europe, injunctions against “innocent” third party online intermediaries have become common in the last twenty years.²⁰ Under the European Union’s Ecommerce Directive, injunctive relief “[is] not intended as a penalty against [intermediaries], but [is] simply based on the fact that such intermediaries [...] are in certain cases in the best position to stop or to prevent an infringement.”²¹ In particular, Article 45 of the Ecommerce Directive’s Preamble sets out that limitations on liability for intermediaries does not affect the granting or enforcement of injunctions, thereby establishing that injunctions are separate from findings of liability. Under this approach, courts consider

¹⁵ *Liability*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁶ *Equitable Remedy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR MacDonald*].

¹⁸ *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–313 (1982).

¹⁹ *RJR MacDonald*, *supra* note 17.

²⁰ Martin Husovec, *Injunctions against Innocent Third Parties: The Case of Website Blocking*, 4.2 J. INTEL. PROP. INFO. TECH. ELECTRONIC COM. 116 (2013).

²¹ *Id.* at 117–118.

granting an injunction as a matter of practicality as opposed to a question of fault.²²

Canadian courts have taken a similar approach in splitting the granting of injunctive relief from determinations of liability in cases involving online platforms. For example, in *Google v. Equustek*, the Canadian Supreme Court upheld a worldwide injunction against Google requiring it to de-index certain sites from its search results.²³ The Canadian Supreme Court did so even though no court had found Google to have engaged in any wrongdoing.²⁴ Rather, the normal functioning of Google's search engine resulted in its indexing of websites operated by Equustek's competitor, Datalink, which Equustek claimed was trafficking in its intellectual property.²⁵ Even so, the Canadian Supreme Court held that an injunction against Google was proper, based on its extensive case law regarding third parties who either have not or could not be found liable for the wrongdoing in question.²⁶

Following this decision, Google sought and obtained an injunction of its own in its home jurisdiction (the Northern District of California) holding that the Canadian Supreme Court's decision was unenforceable in the United States. While American law certainly permits the imposition of injunctions and other equitable remedies against third parties,²⁷ the Court here found that the Canadian injunction would effectively treat Google as "the publisher or speaker" of the content on Datalink's website.²⁸ Hence, enforcing the Canadian injunction in the United States would run afoul of CDA 230.

The *Equustek* decisions in Canada and California illustrate the significance of the textual differences between CDA 230 and Article 19.17.2 of the USMCA. Under CDA 230, websites are essentially immune from suit, since the provision has been interpreted by U.S. courts to extinguish causes of action against intermediaries that seek to treat them as the "publisher or speaker" of someone else's content.²⁹ This "publisher or speaker" language could have been copied from CDA 230 and pasted directly into the USMCA, but it was not. Instead, the USMCA says that website owners or users should not be treated as the content provider "in determining liability for harms." Therefore, whereas CDA 230 has been interpreted to prevent the issuing of injunctions against third parties,

²² *Id.* at 116 (citing Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1-15).

²³ *Google v. Equustek*, 2017 S.C.C. 34 [hereinafter *Equustek*].

²⁴ *Id.*

²⁵ *Id.* at para 45.

²⁶ *Id.* at paras 31-33.

²⁷ 15 MOORE'S FEDERAL PRACTICE — CIVIL § 101.60 (2020)

²⁸ *Google LLC v. Equustek Sols. Inc.*, No. 5:17-cv-04207-EJD, 2017 U.S. Dist. LEXIS 182194, at *2-3 (N.D. Cal. Nov. 2, 2017)

²⁹ *Barnes v. Yahoo!*, 570 F.3d 1096, 1107 (9th Cir. 2009) (holding that CDA 230 provides internet service providers, web site hosts, and other online intermediaries general immunity from liability for republishing defamatory statements made by third parties.)

Article 19.17.2 does not explicitly exclude other forms of court-granted relief, such as equitable remedies.

1.3. WHO IS ENTITLED TO ARTICLE 19.17'S PROTECTIONS?

The question of who is entitled to Article 19.17's protections implicates both international and domestic law. From an international law perspective, trade and investment agreements like NAFTA and the USMCA confer privileges and protections for non-domestic entities, with the purpose of protecting them from certain forms of state action in the host state.³⁰ Correspondingly, many of the benefits that such agreements confer upon foreign economic actors (such as the ability to arbitrate disputes involving the government before *ad hoc* international tribunals rather than before their own domestic courts) are not available to domestic economic actors.³¹ Were this logic applied to USMCA Article 19.17, American and Mexican-owned online intermediaries operating in the Canadian market (for instance) would enjoy stronger liability protections than Canadian-owned platforms, given the weakness of Canada's current intermediary liability protections (discussed below in Section 2.1).

That said, the ordinary meaning of Article 19.17.2 suggests that its provisions were not solely intended to protect foreign-owned intermediaries operating in another USMCA member-country. The text of Article 19.17.2 is clear that “[n]o party shall adopt or maintain” certain measures that would hold online intermediaries liable for harms related to the content they host in certain circumstances. By contrast, other USMCA provisions such as Article 18.3, which concerns access to telecommunications networks, state that “Each Party shall ensure that any enterprise of another Party” shall enjoy certain forms of access to its telecommunications network. Whereas a strong textual argument could be made that Article 18.3 is not intended to benefit domestic enterprises, the same cannot be said of Article 19.17.2.

The question of whether Article 19.17.2's protections apply only to foreign enterprises or equally to domestic enterprises could be resolved through the USMCA's dispute settlement system, though this seems very unlikely. Unlike NAFTA, which permitted investor-state arbitration, the USMCA only permits state-to-state dispute settlement.³² Correspondingly, to settle this question through dispute settlement, one USMCA party would have to invoke the dispute settlement mechanism on this issue, and do so in a manner that challenged

³⁰ JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 367 (8th ed. 2012).

³¹ JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 128 (2015).

³² Office of the U.S. Trade Representative, Agreement Between the United States of America, the United Mexican States, and Canada 12/13/19 Text (USMCA) ch. 31, art. 31.22, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/WY3M-XUUU>].

another state's treatment of its domestic enterprises. It seems unlikely that one USMCA party will initiate such a dispute against another.

Correspondingly, whether Article 19.17.2 applies to domestic enterprises is a question that, for all practical intents and purposes, is going to be determined by the domestic legal systems of the three USMCA parties. It is to the question of these domestic impacts that we now turn.

2. USMCA ARTICLE 19.17'S IMPACTS IN CANADA

There are many aspects of Canadian intermediary liability law that are likely incompatible with Article 19.17 of the USMCA. To understand which aspects run afoul of the USMCA and which do not, we set forth the key aspects of Canadian intermediary law below before evaluating those provisions against the text of the USMCA.

2.1. THE CURRENT CANADIAN APPROACH TO INTERMEDIARY LIABILITY

Canada does not currently have any statutory measures limiting the civil liability of third-party intermediaries akin to USMCA Article 19.17 or CDA 230. Canada's Copyright Act and its Broadcasting Act both contain provisions that limit the liability of content hosts, search engines, and telecommunications companies for hosting or transmitting content that violates copyright, but they do not address the specific issue of intermediary liability (or lack thereof) for harms relating to the substance of the content posted on online platforms and services.³³ This means that the law applicable to these questions has been developed by the courts through general common law principles.³⁴ In no place is this better illustrated than in the Canadian approach to defamatory content posted online—particularly in the context of finding third-party intermediaries liable for such content.

Under Canadian common law, defamation is a strict liability tort, subject to certain defenses.³⁵ Therefore, a plaintiff is not required to prove that an author or publisher acted maliciously or carelessly.³⁶ Instead, the plaintiff merely needs to establish that the author or publisher made a statement that referenced the plaintiff, that caused injury to the plaintiff's reputation, and that was communicated to someone other than the plaintiff.³⁷

Traditional principles of publisher liability for defamation have been somewhat moderated for online intermediaries, with the Supreme Court of Canada stating

³³ Compare Copyright Act, R.S.C., 1985, c. C-42 with Broadcasting Act, S.C., 1991, c. 11.

³⁴ See Corey Omer, *Intermediary Liability for Harmful Speech: Lessons from Abroad*, 28 HARV. J. L. TECH. 290 at 305 (2014).

³⁵ See *Grant v. Torstar*, 2009 S.C.C. 61 at para. 28.

³⁶ See HALSBURY'S LAWS OF CANADA, DEFAMATION IN CANADIAN LAW, §1.2(3)(a)) at heading 6 ("Elements of the Cause of Action").

³⁷ See *Id.*

in *Crookes v. Newton* that “knowing involvement in the process of publication of the relevant words” is required to find “publishers” of defamatory content liable.³⁸ This provides online intermediaries with some degree of protection against defamation suits as compared to traditional publishers (in view of their lesser degree of “knowing involvement” in the publication process), but it is a far cry from the immunities provided by Article 19.17.2.

The difference is brought into clear focus by *Baglow v. Smith*, a case in which the plaintiff sued a poster in an online forum in addition to the forum’s administrators over an alleged defamatory statement.³⁹ The administrators claimed they should not be held liable in view of the “passive” role they played in the publication of statements by the online forum’s users.⁴⁰ However, given that the plaintiff had alerted the administrators to the defamatory nature of the statement, and that the administrators chose not to remove it even though it violated the forum’s rules against “abusive” and slanderous material, the Court found that the administrators could be held liable as publishers of the post.⁴¹ (Ultimately, neither the user nor the administrators were found liable even though the post was *prima facie* defamatory, as the defense of “fair comment” was made out.)⁴²

Similarly, in *Holden v. Hanlon*,⁴³ the operator of a website on which defamatory statements about the plaintiff had been posted was found jointly and severally liable for defamation with the author of the statements based on traditional common law principles of publisher liability.⁴⁴ Specifically, liability against the website operator was upheld because they possessed actual knowledge of the defamatory content after the plaintiff had requested the content be removed, and the operator refused to do so.⁴⁵ As with *Baglow*, the outcome of this case is inconsistent with the protection that USMCA Article 19.17.2 provides online intermediaries for liability for harms resulting from content authored by someone else.

While the existing Canadian common law of defamation is inconsistent with Article 19.17.2, the decision of the Supreme Court of Canada in *Equustek* appears to be consistent with Canada’s obligations under the USMCA. As noted above, the decision in *Equustek* did not hold Google liable for harms relating to content that had been posted by someone else (namely, the underlying content of the website trafficking in pirated versions of Equustek’s products). Rather, the Canadian Supreme Court upheld a worldwide injunction issued by the lower courts requiring Google to de-index search results from the websites in question.

³⁸ See *Crookes v. Newton* (Wikimedia Foundation), 2011 S.C.C. 47 at para 21.

³⁹ See *Baglow v. Smith*, 2015 O.N.S.C. 1175 [hereinafter *Baglow*].

⁴⁰ See *Id.* at paras. 177-78.

⁴¹ See *Id.*, paras. 192-95.

⁴² See *Id.*, para. 249.

⁴³ See *Holden v. Hanlon*, 2019 B.C.S.C. 622 [hereinafter *Holden*].

⁴⁴ See *Id.*, paras. 329-335.

⁴⁵ See *Id.*, paras. 273-77.

As noted above, the USMCA appears to permit equitable relief such as injunctions against online intermediaries with regard to content that is authored and posted by a third party, so long as its prohibition against holding intermediaries liable is respected.

If this interpretation of Article 19.17.2 is correct, it would permit the adoption of one of the principal recommendations on reforming defamation law issued by the Law Commission of Ontario (a law reform body in Canada's most populous province).⁴⁶ Specifically, the report recommends the adoption of a "notice and takedown" regime for online defamation,⁴⁷ not unlike the U.S. Digital Millennium Copyright Act. Under this proposal, victims of defamation would provide notice to online intermediaries that host user-generated content regarding content that they believe to be defamatory.⁴⁸ Intermediaries would then pass the notice on to the actual publisher of the content, after which the actual publisher would have a short period of time to respond.⁴⁹ If the actual publisher responds to the notice, the content would remain online while the complainant decides whether to directly pursue the publisher.⁵⁰ If, however, the actual publisher fails to respond to the notice, or if it proves impossible for the intermediary to transmit the notice to the actual publisher, the intermediary would then be required to take the content down.⁵¹

Under this proposal, intermediaries who do not remove allegedly defamatory content in a timely manner when the actual publisher fails to respond to a notice would be liable to the plaintiff for statutory damages.⁵² At first glance, this provision appears to run counter to USMCA Article 19.17.2, which states that parties shall not maintain measures that hold intermediaries liable "for harms related to information stored, processed, transmitted, distributed, or made available by the service." However, the LCO proposal does not seek to hold platforms directly liable for harms resulting from defamatory content posted by another. Rather, any liability imposed would stem from the platform's failure to comply with the proposed statutory regime. That is, platform liability would arise in the case that a platform failed to take down content when a proper notice had been received, and the actual publisher either couldn't be located or didn't respond. Correspondingly, the LCO proposal appears to be consistent with the limitations on platform liability that Article 19.17.2 provides.

⁴⁶ See generally L. COMM'N. ONTARIO, DEFAMATION LAW IN THE INTERNET AGE ch. 8 (2020), <https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf> [<https://perma.cc/V3YY-QM6M>].

⁴⁷ *Id.* at 85.

⁴⁸ *Id.* at 85-86.

⁴⁹ *Id.*

⁵⁰ *Id.* at 85.

⁵¹ *Id.* ISPs and Search Engines are excluded from this proposed regime, as they are adequately removed from the actual publishers of the content that appears through their services. They would still be subject to injunctions, however. *Id.*

⁵² *Id.* at 88.

By contrast, two high-profile proposals that have been advanced within the last year in Canada to address the impacts of harmful online content appear to be inconsistent with Canada's international legal obligations under the USMCA. In its policy platform released during the 2019 Canadian general election campaign, the governing Liberal Party proposed to "move forward with new regulations for social media platforms, starting with a requirement that all platforms remove illegal content, including hate speech, within 24 hours or face *significant financial penalties*."⁵³ (Emphasis added.) Similarly, the final report of the Broadcasting and Telecommunications Legislative Review (BLTR)—a blue-ribbon group appointed by the Canadian government in 2018 to conduct a comprehensive review of the country's communications laws— recommends "that the federal government introduce legislation with respect to *liability* of digital providers for harmful content and conduct using digital technologies...."⁵⁴ (Emphasis added.)

While neither the Liberal Party's platform nor the BLTR's report provide much elaboration regarding these proposals, they appear to be facially inconsistent with USMCA Article 19.17.2. Specifically, both seek to treat online platforms— "suppliers" of "interactive computer services" in the parlance of the USMCA—"as an information content provider in determining *liability for harms* related to information" that they took no part in "creating" or "developing." Such treatment, however, is inconsistent with USMCA Article 19.17.2.

2.2. THE IMPACT OF USMCA ARTICLE 19.17 IN CANADA

The discussion above shows how some aspects of Canadian intermediary liability law are very likely inconsistent with USMCA Article 19.17, although one of the most high-profile and controversial cases, *Equustek*, could still probably come out the same way. However, the question remains as to whether cases like *Baglow* or *Holden* would come out differently now that the USMCA has been ratified. The answer is somewhat unclear, in part because it depends on what legal status Canadian courts give to the USMCA when dealing with cases that implicate intermediary liability.

The Supreme Court of Canada has found that international treaties are of no force and effect beyond what is provided in their implementing legislation.⁵⁵ Since there is nothing in Canada's USMCA implementing legislation that refers directly to Article 19.17, the provision appears to have no direct domestic legal

⁵³ Liberal Party of Canada, *Online Hate Speech, Exploitation and Harassment Online, FORWARD: A REAL PLAN FOR THE MIDDLE CLASS* (2019), <https://www2.liberal.ca/our-platform/online-hate-speech-exploitation-and-harassment-online/> [<https://perma.cc/BX33-J652>].

⁵⁴ BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE REVIEW, CANADA'S COMMUNICATIONS FUTURE: TIME TO ACT 193 (2020), [https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/\\$file/BTLR_Eng-V3.pdf](https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf) [<https://perma.cc/U53K-3EHC>].

⁵⁵ See *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at para. 60 (holding that "[i]nternational treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment.").

effect.⁵⁶ However, the Supreme Court has also held that it will consider Canada's international obligations and customary international law as interpretive aids when the meaning and effect of a provision is called into question.⁵⁷ Therefore, ambiguous legislation will be presumed to be consistent with Canada's international obligations.⁵⁸ That said, if the legislation's ordinary meaning is inconsistent with Canada's international obligations, the legislation prevails.⁵⁹

Since Article 19.17 is not mentioned in Canada's implementing legislation, it is possible that Canadian courts may decide that its protections only apply to U.S. and Mexican intermediaries. However, this interpretation would seem to run contrary to the text of the provision, which states: "*no Party* shall adopt or maintain measures" that hold intermediaries liable in specified circumstances. This suggests that the intent of the drafters of the USMCA was for the parties to the agreement to eliminate any provisions inconsistent with USMCA Article 19.17.2 *in toto*, rather than simply refrain from applying them to intermediaries from the other USMCA parties.

There are two additional factors relevant to evaluating what will happen if and when USMCA Article 19.17 is raised in Canadian courts. First, Canadian tort law, like defamation, is a matter of provincial jurisdiction. Second, the elements of defamation are mostly judge-made, though many provinces have statutes that establish ordinary or affirmative defenses and other procedural aspects.⁶⁰ Taken together, these factors raise the possibility that Canadian judges could incorporate the provisions of USMCA Article 19.17.2 into the common law—something that is explicitly contemplated by the text of the USMCA. Specifically, a footnote to Article 19.17.2 provides that "a Party may comply with this Article through its laws, regulations, or application of existing legal doctrines as applied through judicial decisions."

2.3. ALIGNING CANADIAN LAW WITH THE USMCA

Given the foregoing analysis, we recommend Canadian policymakers carefully consider introducing statutory provisions to harmonize Canada's current intermediary liability framework with USMCA Article 19.17. Although we do not

⁵⁶ See Canada–United States–Mexico Agreement Implementation Act, S.C. 2020 c. 1.

⁵⁷ See *Baker v. Canada* (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817 (international human rights), *Suresh v. Canada* (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3 (immigration law); See also R. SULLIVAN, DRIEDGER ON THE CONSTRUCTION OF STATUTES 330 (3rd ed. 1994) (Explaining that values reflected in international human rights law can assist with statutory interpretation and judicial review.)

⁵⁸ See *Pfizer Inc. v. Canada* [1999] 4 F.C. 441 ("Parliament is presumed not to intend to legislate contrary to international treaties or general principles of international law[.]")

⁵⁹ See *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd* (2002) 17 C.P.R. (4th) 478 at para. 25 (F.C.A.) ("However, the international treaty cannot be used to override the clear words used in a statute enacted by Parliament[.]").

⁶⁰ See *Libel and Slander Act*, R.S.O., 1990, c. L. 12; see also *Defamation Act* R.S.A., 2000, c. D-7.

advocate for or against such legislation, we articulate two reasons below as to why such a proposal merits serious study.

The first is that an intermediary liability statute could help Canada ensure that it is meeting its international obligations under the USMCA. As noted above, it would clearly be a violation of Article 19.17.2 if the logic of the *Baglow* or *Holden* decisions were applied to Mexican or American intermediaries operating in Canada. While Canadian courts may well reinterpret existing common law doctrines to conform with the USMCA, legislation that articulates the responsibilities of intermediaries regarding third-party content on their platforms could contribute to greater legal certainty while ensuring that Canada meets its international legal obligations.

Second, given the unresolved question of whether Canadian and third-country platforms can benefit from the protections offered by Article 19.17.2, the current legal landscape potentially puts such intermediaries at a disadvantage when compared to their Mexican and American counterparts. Should a case like *Baglow* or *Holden* arise again, there is little clarity on how the courts would interpret the responsibility of Canadian and third-country platforms. Legislation would help to clarify the legal landscape for Canadian and third-country platforms, and consideration could be given in the legislative process as to whether such platforms should operate under the same rules as their American and Mexican competitors.

The prospect of legislation raises the question of which level of government is competent to act in this area. Without expressing a view on this question, we note that the *Personal Information Protection and Electronic Documents Act* (PIPEDA)—Canada's federal privacy law for the private sector—could serve as a model for federal legislation in this field.

PIPEDA purports to apply to all commercial entities in Canada, regardless of whether they are subject to federal regulation (such as airlines, banks, and telecommunications companies) or provincial regulation (most other sectors of the economy). There have long been questions as to the constitutionality of PIPEDA,⁶¹ which culminated in the Government of Quebec initiating court proceedings in 2003 for a judicial determination of the matter.⁶² These proceedings were discontinued, however—perhaps in view of the use by the federal government of PIPEDA provisions that allow it to certify provincial laws

⁶¹ Michel Bastarache, THE CONSTITUTIONALITY OF PIPEDA: A RE-CONSIDERATION IN THE WAKE OF THE SUPREME COURT OF CANADA'S REFERENCE RE SECURITIES ACT (2012), <http://accessprivacy.s3.amazonaws.com/M-Bastarache-June-2012-Constitutionality-PIPEDA-Paper-2.pdf> [<https://perma.cc/9MYZ-MTKZ>].

⁶² *Fresh Questions about the Constitutionality of PIPEDA?*, TERESA SCASSA (Jan. 17, 2012, 12:24 PM), http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=96:fresh-questions-about-the-constitutionality-of-pipeda?&Itemid=80 <https://perma.cc/UZP9-B5EC>.

as “substantially similar.”⁶³ In such cases, PIPEDA does not apply to provincially-regulated industries in that province. It is therefore possible that a similar approach could be taken in pursuit of a federal intermediary liability statute.

Federal legislation may be the fastest way to a level playing field for all online actors in Canada, but in view of the difficult constitutional questions discussed above, uniform provincial legislation is another option that should be explored. As it happens, the statutory law of defamation is quite similar between the nine Canadian common law provinces, thereby offering a template for the drafting of similarly uniform legislation regarding intermediary liability.

3. USMCA ARTICLE 19.17’S IMPACTS IN THE UNITED STATES

The ratification of the USMCA does not change the legal landscape around intermediary liability in the U.S., for two reasons. First, CDA 230 affords stronger protections for online intermediaries than the USMCA, so the U.S. is therefore already fully complying with its international legal obligations under the USMCA. Second, the U.S. implementation legislation for the USMCA specifies that any provision or application of the USMCA that is inconsistent with United States law will have no effect.⁶⁴ Hence, even if the USMCA afforded intermediary liability protections that were superior to CDA 230, such provisions would have no domestic legal force in the U.S. without further legislative action.

What is more interesting to consider, however, is how the USMCA factors into the ongoing debate in the U.S. regarding the future of CDA 230. Given the longstanding controversy surrounding CDA 230, the incorporation of USMCA Article 19.17 was met with significant opposition in Congress. This is exemplified by a bipartisan letter from the Chair and Ranking Member of the House Energy and Commerce Committee to the U.S. Trade Representative, stating that it would be inappropriate for the United States “to export language mirroring Section 230,” or include “any provision regarding intermediary liability protections of the type created by Article 19.17” in any trade deal going forward.⁶⁵ Elected officials from both parties also expressed concerns that enshrining provisions analogous to CDA 230 in a trade agreement would

⁶³ See Office of the Privacy Commissioner of Canada, *Provincial Legislation Deemed Substantially Similar to PIPEDA* (May 29, 2017) https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/r_o_p/prov-pipeda/ [<https://perma.cc/P9F3-66AE>].

⁶⁴ See United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, § 102(a)(1) (2020).

⁶⁵ See Letter from Reps. Frank Pallone (D-NJ) and Greg Walden (R-OR), to Hon. Robert E. Lighthizer, United States Trade Representative (Aug. 6, 2019) <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/USTradeRep.2019.8.6.%20Letter%20re%20Section%20230%20in%20Trade%20Agreement.s.pdf> <https://perma.cc/8ASZ-YA67>].

foreclose opportunities for domestic reform.⁶⁶ Despite pressures from Congress to revise the provision, House Speaker Nanci Pelosi ultimately endorsed the entire USMCA as a package deal,⁶⁷ and the implementing legislation was passed by both houses of Congress by large bipartisan majorities (385-41 in the House, and 89-10 in the Senate).

While CDA 230 and the broad immunity it confers has been lauded as providing the legal basis for the growth and development of online platforms,⁶⁸ there is a growing chorus of voices from both sides of the U.S. political spectrum calling for reforms. On the left, critics charge that the immunity CDA 230 provides has contributed to the proliferation of harmful content like misinformation, hate speech, non-consensual pornography, and discrimination towards ethnic and sexual minorities.⁶⁹ Meanwhile, American conservatives have long complained that CDA 230 permits discrimination against their viewpoints.⁷⁰

The conservative critique of CDA 230 underlies the recent executive order issued by President Trump on “Preventing Online Censorship”⁷¹ which, among other things, instructs the Attorney General and the Federal Trade Commission to investigate tech companies for allegedly deceptive practices and behavior with regard to content moderation.⁷² President Trump’s executive order also instructs the Federal Communications Commission to clarify several of CDA 230’s key terms—such as what constitutes an action taken in good faith—to help determine whether certain behavior by online platforms strips them of their immunity.⁷³ While the legality of the executive order has been called in to question,⁷⁴ the fact remains that the conversation about revising CDA 230 is growing in volume.

⁶⁶ See Lauren Feiner, *Pelosi pushes to keep tech’s legal shield out of trade agreement with Mexico and Canada*, CNBC (Dec. 5, 2019, 11:01 AM), <https://www.cnbc.com/2019/12/05/pelosi-pushes-to-keep-section-230-out-of-USMCA-trade-agreement.html> [<https://perma.cc/B9C7-545X>].

⁶⁷ See Mills Rodrigo, *Tech Legal Shield Included in USMCA Despite Late Pelosi Push*, THE HILL (Dec. 10, 2019, 01:45 PM), <https://thehill.com/policy/technology/473905-tech-legal-shield-included-in-USMCA-despite-late-pelosi-push> [<https://perma.cc/MZ3M-4H6B>].

⁶⁸ See generally JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

⁶⁹ See e.g., Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMENDMENT INSTITUTE: EMERGING THREATS (Apr. 1, 2018), <https://knightcolumbia.org/content/discriminatory-designs-user-data> [<https://perma.cc/RMD8-8DAE>]; Danielle Keats Citron, *Section 230’s Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMENDMENT INSTITUTE (Apr. 6, 2018), <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties> [<https://perma.cc/YSY9-PERE>].

⁷⁰ See Anupam Chander and Vivek Krishnamurthy, *The Myth of Platform Neutrality*, 2 GEO. L. TECH. REV. 400, 413-15 (2018).

⁷¹ Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Sara Harrision, *What Does President Trump’s “Crackdown” on Twitter Do?* THE MARKUP (June 11, 2020, 10:00 AM) <https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do> [<https://perma.cc/SW2R-GYGR>].

3.1. ARTICLE 19.17 COMPLICATES REPEAL OF CDA 230

Perhaps the most significant impact of USMCA Article 19.17 in the U.S. is that it would make outright repeal of CDA 230 challenging, in view of the U.S.'s international legal responsibilities toward Canada and Mexico. Several proposals have been made to repeal CDA 230 in its entirety. For example, former vice president and 2020 presumptive Democratic presidential nominee Joe Biden suggested that CDA 230 should be revoked.⁷⁵ Likewise, a bill was introduced in the Senate last year that proposed to strip immunity for any information content provider that failed to undergo an audit examining political bias in content moderation.⁷⁶

If CDA 230 were repealed completely, pre-CDA 230 intermediary liability law may very well come back into force across the U.S., under which online intermediaries were held liable for content posted by their users based on traditional principles of publisher liability.⁷⁷ This would be an ironic outcome, given that CDA 230 was enacted specifically to overturn such cases.⁷⁸

The effects of repealing CDA 230 and reverting back to the prior law of intermediary liability could extend beyond the U.S., in view of the U.S.'s legal obligations to Canada and Mexico under the USMCA. The difficulty would arise if state courts (which are responsible for torts in the United States) held a Canadian or Mexican platform liable for user-generated content on theories similar to those prevalent in the pre-CDA 230 legal landscape. The USMCA implementing legislation provides a limited backstop against such an eventuality, as it contains a provision permitting the U.S. Attorney General to sue states over provisions of their laws that are inconsistent with the Agreement, either on their face or as applied.⁷⁹ This provision would not benefit intermediaries based in the U.S., however, since they are plainly not entitled to benefit from the USMCA in their dealings with U.S. governments.

3.2. AMENDING CDA 230 IN THE SPIRIT OF THE USMCA

Many different viewpoints have been expressed in the ongoing debate regarding the future of CDA 230, but one that has not received much attention is the notion of amending CDA 230 to harmonize its provisions with the USMCA. Although we do not advocate for or against this proposal, we believe that it is

⁷⁵ Makena Kelly, *Joe Biden wants to revoke Section 230*, The Verge (Jan 17, 2020, 10:29 AM) <https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke> [<https://perma.cc/Y4CF-UX8Y>].

⁷⁶ See Ending Support for Internet Censorship Act, S. 194, 116th Cong. (2019).

⁷⁷ See, e.g., *Stratton Oakmont v. Prodigy Services*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

⁷⁸ See KOSSEFF, *supra* note 68, at 45-56, 61-64.

⁷⁹ See United-States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, § 102(b)(1) (2020).

sufficiently compelling that it merits further study and serious debate, for at least three reasons.

The first is that USMCA Article 19.17 preserves much of the policy underlying CDA 230 by providing significant immunity “to protect service providers from investigation and litigation burdens arising from notice of users’ ‘potentially’ defamatory statements.”⁸⁰ As shown in our analysis in Section 1, above, USMCA Article 19.17 preserves the core of CDA 230, as that provision has been interpreted by the U.S. federal courts, by protecting online intermediaries from liability relating to the content of user-generated material unless they have materially contributed to what makes it actionable.

The second is that USMCA Article 19.17 moderates CDA 230 to a certain degree by providing individuals that are being harmed by defamatory and other objectionable online speech with the ability to obtain equitable remedies in the courts against online platforms. Consider, for example, the 4-3 decision of the Supreme Court of California in *Hassell v. Bird*, in which it was held that CDA 230 barred the granting of an injunction that would require an online platform to take down a post that a lower court had adjudged as defamatory.⁸¹ Were CDA 230(c)(1) harmonized with Article 19.17.2, platforms would continue to enjoy immunity from liability for the harms associated with such content, though they would be required to take action against such content pursuant to a court order.

Finally, the U.S. is already bound by Article 19.17 in view of its ratification of the USMCA. Correspondingly, it might be an easier political sell to amend CDA 230 in line with the U.S.’s existing international legal commitments, rather than on some other basis.

4. CONCLUSIONS AND RECOMMENDATIONS

The passage of the USMCA and the ongoing debate in the U.S. regarding CDA 230 illustrate how intermediary liability is, and will continue to be, an important topic for companies, policymakers, and ordinary internet users to track for the foreseeable future.

As we have shown in our analysis, the current approach to intermediary liability in Canada is incompatible with USMCA 19.17 and may place Canadian and third-country platforms at a disadvantage when compared to their Mexican and U.S. counterparts. We therefore recommend careful study of legislation in Canada that would clarify the current ambiguities regarding how USMCA Article 19.17 will be applied to Canadian and third-country intermediaries. Such legislation could help Canada ensure that it fulfills its international legal obligations to American and Mexican platforms, and afford an opportunity to

⁸⁰ See *Hassell v. Bird*, 420 P.3d 776 at 802-03 (Cal. 2018) (Liu J., dissenting).

⁸¹ *Id.* at 791 (majority opinion).

consider whether USMCA-like protections should be extended to Canadian and third-country platforms, too.

By contrast, USMCA Article 19.17 changes nothing for now in the United States, as CDA 230 already exceeds the requirements of the USMCA. Even so, we believe that Article 19.17 deserves serious study as a template for amending CDA 230 to help prevent online harms while continuing to protect platforms from liability relating to user-generated content.