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Chapter 3 - I

“PARTNERING” WITH THE PLATFORMS LEARNING FROM CANADA’S BATTLES WITH GOOGLE AND META

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Introduction

In his chapter “Modern Sovereign States and Digital Platforms - Leviathans vs. Behemoths”, Professor Tatsuhiko Yamamoto calls for a rethinking of how governments interact with digital platforms. He suggests looking to medieval concordats for inspiration; concordats were agreements that some states made with the Church in the Middle Ages to set rules for their complex relationship. The Concordat of Worms, for example, was an agreement to amicably prevent and resolve conflicts between the Church and the Roman Empire. For Yamamoto, studying how states interacted with the Medieval Church can teach us important lessons about how to deal with the platforms. The idea, however, is not simply to return to medieval constitutionalism. What he proposes is to draw inspiration from Concordats to redefine the parameters of the relationship between states and platforms.

As Canadians, this invitation struck a particular chord with us. Canada just went through a major battle with Google and Meta, with mixed results, at best. The battle resulted in Meta blocking Canadians from sharing and viewing news content on its platforms. It’s the second time a digital platform used this “walk away strategy” to protest against a Canadian attempt to regulate them. Knowing that Canada is currently working on other pieces of legislation that will have an impact on platforms, such a situation is no longer sustainable. Our chapter proposes to use the Canadian example as a case study to reflect on how to move towards more fruitful relationships between states and platforms.

In Part 1, we present the two cases in which platforms used the “walk away strategy” to protest Canadian efforts to regulate the tech industry. In Part 2, we use one of the two examples presented in the previous

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section to discuss how transparency of negotiations between states and platforms and international alliances between states could help increase the democratic legitimacy of modern concordats. In Part 3, we draw inspiration from the literature on partnering—a conflict prevention mechanism specifically designed to foster cooperation in potentially tense contexts—to propose two additional features that should be included in modern concordats. In conclusion, we propose a first sketch for a process for fostering more productive collaborations between states and platforms in Canada and possibly abroad.

1 Canada's Strained Relationship with the Platforms

In recent years, the regulation of digital technologies has been at the heart of Canada's legislative agenda: a number of proposals to reform the legal regimes governing the protection of personal information and online speech were tabled. Two laws—the *Canada Elections Act* and the *Broadcasting Act*—were significantly amended to reflect the new realities created by digital platforms. Right now, the Parliament is studying a bill to regulate artificial intelligence. Finally, and of particular interest to us, the *Online News Act*, a new law on the funding of online news media, has come into force in December 2023.

Canada's legislative power was significantly limited by the platforms in the process leading up to the entry into force of the Act. Meta blocked news content on its platforms to protest the bill, and Google threatened to follow suit if the government didn't amend the regulations associated with the Act. All of this forced the Canadian government to compromise on its legislative agenda. This was the second time Canada was faced with the platforms' "walk away strategy". In 2019, Google pulled out of the Canadian political advertising market in response to the adoption of the *Election Modernization Act*.

In the next subsections, we explain how these two conflicts—i.e. the conflict with Meta over the *Online News Act*, and the conflict with Google over the *Election Modernization Act*—unfolded to illustrate the importance of finding ways to move toward more fruitful collaboration between states and platforms.

(1) Meta and the Online News Act

The Canadian news industry is undergoing difficult times. Newsrooms are closing, journalists are laid off, and news outlets struggle to remain profitable. The situation can be partly attributed to the rise of digital platforms which disrupted the traditional news media's business model, first by digitizing classified ads, and then by making media's advertising revenue plummet by proposing a different advertising model (targeted advertising) that turned out to be more appealing to advertisers than placing ads in newspapers.

In reaction to that crisis, the Canadian government passed a law establishing a bargaining framework that aimed to bring more money into the journalism industry: the *Online News Act*, also known as Bill c-18. The practical effect of that law was to force Meta and Google to negotiate with news outlets to compensate them for the content they produce. The bill was largely inspired by the Australian *News Media and Digital Platforms Mandatory Bargaining Code*, but it purports to improve the model Australia had set. The main way in which the Canadian bill distinguished itself from the Australian code is that it includes transparency

provisions aimed at leveling the playing field by ensuring that information about deals concluded by larger media outlets be available to smaller players who want to negotiate with platforms in an informed way¹.

Meta took a page out of its Australian playbook. Shortly after the bill was introduced, it informed the government that if the bill was to become law, it would stop making news content available on its platforms²—in other words, it would disallow Canadians to share and see news content on Facebook and Instagram. The reason for that is that Meta objects to the very premise of the bill. It does not believe it owes money to news outlets. On the contrary, it holds that it *provides* value to news outlets by giving visibility to their content—while benefiting little from it. So all through the process leading up to the bill’s adoption, Meta consistently reiterated its intention to exit the Canadian market in the event of the bill’s adoption. And it did. In August 2023, Meta carried out its threat and banned news content on Facebook and Instagram³.

There was fear that Google would follow suit and ban news content from its platforms as well. Indeed, in October 2023, the platform announced that it would stop making news content available to Canadians when the *Online News Act* would enter into force in December, 2023⁴. However, three weeks before the fateful date, Google reached a deal with the Canadian government: it will invest 100 million dollars each year in the news industry. The sum will be indexed to inflation and will be given to a collective of news organizations that will be responsible for distributing it fairly among its members⁵. However, the long-term effects of the law, and those of Meta’s withdrawal from the Canadian market, remain to be seen.

While the clash between Google, Meta and the government over the *Online News Act* makes a compelling case for finding ways to develop more productive relationships between the platforms and the states, it may not be the best example to teach us what these collaborative relationships should look like, as we lack information to draw informed conclusions at this stage.

However, there is another conflict between the Canadian government and the platforms that might be better suited to teach us such lessons: the conflict between Google and the Canadian government over the *Election Modernization Act*, which resulted in Google’s stopping selling political advertising during Canadian elections. This is what the next section is about.

(2) Google and the Election Modernization Act

After the 2016 U.S presidential election in the United States and the United Kingdom Brexit referendum, Canada was concerned about the integrity of its own elections. At the time, there was a sense that social media had facilitated foreign interference and played an important role in the election of Donald Trump

1 Heritage Canada, ‘Differences between C-18 and the Australian model’ (13 February 2022), <<https://www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/standing-committee/pablo-rodriguez-bill-c18/differences.html>>. Accessed 9 January 2024.

2 Meta, ‘Sharing Our Concerns With Canada’s Online News Act’ (21 October 2022), <<https://about.fb.com/news/2022/10/metass-concerns-with-canadas-online-news-act/>>. Accessed 9 January 2024.

3 Meta, ‘Changes to News Availability on Our Platforms in Canada’ (1 June 2023), <<https://about.fb.com/news/2023/06/changes-to-news-availability-on-our-platforms-in-canada>>. Accessed 9 January 2024.

4 Google, ‘An update on Canada’s Bill C-18 and our Search and News products’ (29 June 2023), <<https://blog.google/intl/en-ca/company-news/outreach-initiatives/an-update-on-canadas-bill-c-18-and-our-search-and-news-products>>. Accessed 8 January 2024.

5 *Online News Act Application and Exemption Regulations*, SOR/2023-276.

as well as the victory of the Leave campaign in the U.K. While authoritative studies have since shown that social media's role in these results wasn't as significant as first thought⁶, there was a real sense of urgency at the time and a sincere belief that the integrity of Canada's elections hinged on regulating digital platforms.

Therefore, in the year leading up to the 2019 Canadian election, significant efforts were made to modernize the law that governs the electoral process at the national level in Canada. These efforts led to the adoption of the *Election Modernization Act* that makes amendments to the *Canada Elections Act*. This dense and technical reform had much broader impacts than only regulating digital platforms but given that one of its goals was to protect Canadian democratic institutions from cyber threats, it introduced two measures directly targeting the platforms⁷.

The first one was to make it an offense to sell advertising space to a foreign entity, a measure driven by the fear of having foreign actors, namely actors operating from Russia, interfering with Canadian electoral campaigns. The second measure is a requirement that online platforms maintain a registry of certain kinds of political advertisement. The idea behind the registry is to increase the transparency of political advertising online and ensure a certain oversight of micro-targeted advertisement. The hope here is that increased transparency will discourage advertisers from engaging in problematic campaigns—trying to deter black voters from voting in a US presidential election, for instance.

Under this new obligation, large platforms have the obligation to create a registry in which they store a copy of every political and partisan ads posted on their platforms, as well as information about the identity of those who authorized the publication of the ad. This information must be available to the public on each platform for a period of more or less two years after the end of an election. The failure for a platform to comply with the obligation can result in fines going up to 50 000 Canadian dollars and imprisonment terms of up to three months. And as to the latter sanction, the fact that the platform didn't have the intention to breach the law is irrelevant because the offense is what is called a "strict liability offense", i.e. an offense for which people can be prosecuted even though they're not aware they're breaking the law.

This raised concerns for the platforms, or at least for some of them. Here, interestingly, Facebook—that's how Meta was called, before its rebranding in 2021—didn't object to the law. It straightforwardly cooperated with the government by launching the Ad Library, a searchable, web-based archive of political ads run on Facebook.

Google and Twitter, however, took different approaches.

Twitter took a middle ground approach. It banned election advertising in the pre-election period but

6 **With respect to the 2016 Presidential Elections**, see: Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press, 2018) "[N]one of these actors—Russians, fake news entrepreneurs, Cambridge Analytica, Facebook itself, or symmetric partisan echo chambers—were the major cause of the epistemic crisis experienced within the US during the 2016 election or since." ; **With respect to the Brexit** see: Letter from Elizabeth Denham, UK Information Commissioner reporting on Information Commissioner's Office investigation into use of personal information and political influence: "[O]ur view on review of the evidence is that the data could not have been used in the Brexit Referendum as the data related to US registered voters" (cleaned up), <https://ico.org.uk/media/action-veve-taken/2618383/20201002_ico-o-ed-l-rtl-0181_to-julian-knight-mp.pdf>. Accessed 8 January 2024.

7 *Canada Election Act*, S.C. 2000, c. 9, s. 282.4 (5) and 325.1.

allowed it in the election period. This strategy had two advantages. First, it gave Twitter time to develop an ad registry that complied with C-76 requirements. Second, having to maintain the registry only during the 36 days of the campaign made it possible for Twitter to set up a "site integrity team" tasked with monitoring "the activities on the platform, look for any problems and ensure that users have a really good, positive experience"⁸.

Google, for its part, claimed that its ad serving was different and more complicated than that of other platforms and that it didn't have enough time to create an ad registry that would be precise enough to include all political advertising without facing risks of liability under the new law. Therefore, it pulled out of the election advertising market in Canada altogether.

At the time, Taylor Owen, Elizabeth Dubois and Fenwick McKelvey presciently wrote that:

Canada is a canary in the coal mine for the rest of the world trying to govern big tech. If Google leaves a market for an issue as small and relatively straightforward as a political advertising registry, how can we expect it to fix the even bigger challenges ahead? How will it react if governments regulate artificial intelligence, democratize smart cities, modernize their competition policies, tax the platform economy, or bring in new data privacy laws?⁹

They were right. Pulling out of a national market (or threatening to do so) is now part of the digital platform's negotiations toolbox¹⁰. After Google withdrawal from the political ad selling business in 2019, Facebook briefly banned news content on its platforms in Australia as a means of opposing the Australia bargaining code. WhatsApp (a subsidiary of Facebook) threatened to leave the UK if the Online Safety Bill was passed. OpenAI floated the idea that it could stop operating in the European Union if the Act was too stringent, and as we've just seen both Google and Facebook used this tactic to influence the *Canadian Online News act*.

As a canary in the coal mine, we believe that the case of the *Election Modernization Act* can teach us valuable lessons about what strategic collaboration between states and platforms should look like. One of the reasons this example is particularly interesting to study is that post-mortem hearings were held, which allow us to draw informed conclusions about the conflict. To take advantage of this, the remainder of this chapter will focus on the conflict over bill C-76. Specifically, we will analyze the transcripts of two hearings¹¹ in

8 Elizabeth Thompson, 'Twitter banning political ads in Canada until election campaign' CBC News, (Ottawa, 26 June 2019), <<https://www.cbc.ca/news/politics/twitter-online-advertising-election-1.5190465>>. Accessed 8 January 2024.

9 Taylor Owen, Elizabeth Dubois and Fenwick McKelvey 'What have we learned from Google's political ad pullout?' (Policy Options, 10 April 2019), <<https://policyoptions.irpp.org/magazines/april-2019/learned-googles-political-ad-pullout/>>. Accessed 8 January 2024.

10 BBC, 'Facebook blocks Australian users from viewing or sharing news' BBC News (London, 17 February 2021), <<https://www.bbc.com/news/world-australia-56099523>>, accessed 9 January 2024 ; Stephanie Stacey, 'What if WhatsApp really does leave the UK?' *TechMonitor* (London, 7 August 2023), <<https://techmonitor.ai/policy/privacy-and-data-protection/what-if-whatsapp-really-does-leave-the-uk>>, accessed 9 January 2024 ; James Vincent, 'OpenAI says it could 'cease operating' in the EU if it can't comply with future regulation' *The Verge* (New York, 25 May 2023), <<https://www.theverge.com/2023/5/25/23737116/openai-ai-regulation-eu-ai-act-cease-operating>>, accessed 9 January 2024.

11 See Appendix for details.

which Google testified before the Canadian Parliament. The first hearing took place before the Senate. In this hearing, Google testified to propose amendments to the bill shortly before it receives royal assent. The second hearing was convened by the Standing Committee on Access to Information, Privacy and Ethics after the bill was passed into law. Google is then given the opportunity to explain why it is withdrawing from the Canadian election advertising market.

Our goal in documenting the debate surrounding Google's exit from the Canadian election advertising market is to provide concrete examples to support hypotheses regarding how to promote collaboration between states and platforms. In part 2, we use the example of Bill C-76 to show the relevance of the recommendations Yamamoto makes regarding transparency and international alliances. And in Part 3, we use Google's testimonies to illustrate how principles derived from the literature on conflict prevention mechanisms could apply to the context of digital platforms.

2 Ensuring the Democratic Legitimacy of Modern Concordats

In his chapter, Yamamoto calls for a more cooperative relationship between states and platforms. However, he adds a caveat. The goal of strategic cooperation between states and platforms is to better protect the rights and freedoms of citizens. The fact that platforms lack democratic legitimacy could hinder this goal. To mitigate this problem, he recommends the inclusion of two key elements in modern concordats.

First, he calls for increased transparency. He recommends that all politically significant commitments between the states and the platforms be publicly accessible. Second, he calls for international alliances between states—in other words, states should join forces and face the platforms together in certain negotiations. In the next two subsections, we illustrate the relevance of Yamamoto's recommendations by showing how they could have made a difference in the conflict between Google and the Canadian government over Bill C-76.

(1) Transparency of Deliberation between States and Platforms

As we just mentioned, Yamamoto's first recommendation for updating concordats to better reflect the realities of the relationship between states and platforms is to "make the process and outcomes of diplomatic negotiations between states and [platforms] as visible as possible to expose them to democratic criticism". The idea is that transparency will allow citizens, and their representatives from the media and civil society, to ensure that the deals concluded are legitimate and conducive to the freedom and security of users/citizens.

At the moment, negotiations often take place behind closed doors and in certain circumstances the opacity of deliberations allows parties to distort reality to their advantage, to the detriment of the success of regulatory initiatives and the best interests of citizens. The following example regarding the *Election Modernization Act* shows that ensuring transparency in the deliberations between states and platforms would be a real improvement over the current situation.

In its testimonies, Google complained that it didn't have the opportunity to comment or respond to the

ad registry provisions to ensure that they were adapted to its technical realities¹²—implying that this lack of consultation was a determining factor in its withdrawal from the Canadian election advertising market¹³. The claim does not seem to have been disputed. Some even suggested that in order to bring Google back into the Canadian ad serving market, the law would likely need to be amended to accommodate the capabilities of each online platform¹⁴.

The reality, however, is that Google has had several opportunities to comment on Bill C-76.

While it’s true that, unlike Facebook and Twitter, Google did not testify before the House of Commons committee responsible for examining the bill, it did testify before the Senate. Moreover, a cross-index of Hansard with the Lobbying’s Register shows that Google had 14 election-related meetings with lawmakers in about a year. The content of these meetings is confidential, but some excerpts from Hansard provide clues as to what was discussed. According to Google spokespeople, the company had the opportunity to “engage robustly with the minister’s office to identify some of the concerns [they] had and to develop proposed amendments that would resolve those concerns.”¹⁵

As for the nature of the proposed amendments, Google is elusive. It seems to acknowledge, though, that it discussed the removal of a criminal offense associated with the failure to include certain ads in the registry¹⁶—a request that wouldn’t have been popular with Canadians who were hoping that the government would intervene to force the platforms to “fix the problem they had created in our political system”¹⁷.

Now, whether Google deliberately avoided the committee hearings and instead made a strategic decision to lobby the government privately remains unclear. But staying out of the public eye certainly gave it room to make claims that would have been much harder to make otherwise. This observation confirms Yamamoto’s hypothesis: modern concordats should include transparency mechanisms that allow public scrutiny of the parties’ negotiations. In addition, transparency could discourage governments from misrepresenting reality and help prevent secret handshakes between governments and platforms that would conflict with the interests of citizens/users.

(2) International Alliances between States for Negotiations with Platforms

Yamamoto’s second recommendation for updating medieval concordats and adapting them to the realities of digital platforms is to create international alliances in which states unite and negotiate with the platforms as a group rather than individually. The example of Bill C-76 shows how states, platforms and citizens could benefit from this.

For some Canadian lawmakers, Google’s response to the *Election Modernization Act* suggests that

¹² See Appendix.

¹³ See Appendix.

¹⁴ Michael Pal, ‘Social Media and Democracy: Challenges for Election Law and Administration in Canada’ [2020] *Election Law Journal* 200 at p. 210.

¹⁵ See Appendix.

¹⁶ See Appendix.

¹⁷ Ryerson Leadership Lab, ‘Rebuilding the Public Square’ (2019), <<https://static1.squarespace.com/static/5fec97c81c227637fcd788af/t/5fefffd29d513670e34daca7/1609564139555/Rebuilding+the+Public+Square+Report+2019>>, p 2. Accessed 8 January 2024.

Canada is “not important enough for Google to take us seriously.”¹⁸ They believe that Google would not have pulled out of the American or the Chinese markets if a similar conflict had arisen in those jurisdictions¹⁹. Google, of course, vigorously denies these allegations²⁰. But whether it’s true or not, experience has shown that larger players seem to be in a better position to regulate platforms effectively—the most telling example of this might be the success of the European Union, which managed to pressure the platforms to adopt the *General Data Protection Regulation* as their worldwide standard²¹. In light of this, states like Canada or Japan should consider forming alliances with like-minded countries to negotiate with platforms as a single entity. This would level the playing field and allow them to negotiate on a more equal footing.

Not to mention that such alliances could benefit platforms as well. Rather than having multiple states come up with their own specific laws and requirements, international alliances could come up with unified requirements that platforms could meet with a single solution. This is something platforms are asking for. Google, for instance, claimed that it couldn’t comply with the *Election Modernization Act* quickly enough because the bill didn’t “reflect international practices²²”. This claim is questionable for a few reasons, but the complexity of complying with a patchwork of regulations is not one of them. In fact, the complexity of complying with several different laws is an issue that Twitter also raised. Although it said that it would abide by “whatever decision” the government would make recommendations regarding the ad registry, it added that with “38 legislations worldwide next year”, requests from individual governments to re-engineer Twitter’s existing Ads Transparency Centre for different markets could prove “extremely difficult²³”.

Finally, if states banded together to negotiate collectively, it could also lead to better laws, as states could learn from each other to improve their respective regulations. That’s another point that emerged from Twitter’s testimony. Drawing on its international experience, Twitter suggested that Elections Canada issue unique identification numbers for each advertiser as the Federal Election Commission does in the United States²⁴. The proposal didn’t make it into the law, but if it had, Canadians would have had a more reliable way to verify the identity of advertisers, and it would have been easier for them to track advertisers across platforms because they could have used a single number to query multiple registries.

Up until now, what the analysis of the conflict over Bill C-76 has shown is that Yamamoto’s recommendation that states should negotiate with platforms as a group has several advantages. It also showed that the content of these negotiations should be more transparent. Considering this, it seems that modern concordats should be designed in such a way as to facilitate international alliances and further transparency. In the next

18 See Appendix.

19 See Appendix.

20 See Appendix.

21 The GDPR prompted platforms such as Facebook, Google, Apple, Airbnb and Uber to adopt the EU privacy-policy as the policy they use for all their users. For example, when it updated its privacy policy to comply with the GDPR, Google sent its users a notice saying: “We’re making these updates as new data protection regulations come into effect in the European Union, and we’re taking the opportunity to make improvements for Google users around the world”. See Anu Bradford. *The Brussels Effect: How the European Union Rules the World*, (Oxford University Press, 2019) pp. 143.

22 See Appendix.

23 See Appendix.

24 See Appendix.

title, we explore the literature on conflict prevention mechanisms—more specifically, the literature on partnering—to propose additional features to add in modern concordat models.

3 Fostering States-Platforms Collaboration Through Partnering Processes

Partnering is a dispute prevention mechanism that emerged in the U.S. in the 1980s in response to numerous lawsuits between the government and its private co-contractors on large engineering projects—particularly in the military sector²⁵. One of the interesting things about these processes is that they offer strategies for transforming a relationship between adversarial collaborators into one in which the parties' interests are aligned to maximize positive outcomes. Knowing they can be used to change a deficient relationship history between partners in order to set it back on track, it seems to be a particularly relevant source of inspiration for rethinking the relationship between states and platforms.

Below, we examine two key components of partnering processes that could have had a positive impact to ease out the tensions in the conflict between Google and the Canadian government over Bill C-76.

(1) Mechanisms for the Formalization of Shared Objectives

Partnering processes are often used in complex contexts involving lots of actors. To manage the complexity of these multi-stakeholders settings, partnering processes provide mechanisms for formalizing shared objectives in which all partners have an interest. Getting all partners to share a common objective encourages meaningful collaboration as everyone has something to gain from working together. However, vague inchoate objectives are not sufficient—objectives must be clearly defined and agreed upon and they must be measurable.

To formalize such objectives, partnering processes propose two main mechanisms:

Workshop: First, partnering requires to hold a workshop that brings together key players from each organization to discuss the objectives of the collaboration. Since partnering is designed to be used in contexts where tensions are likely to arise, partners are invited not only to discuss how their organizations' goals might align, but also to identify areas of tension. The workshop is also the occasion to establish clear lines of responsibility for the success or failure of the collaboration, and to agree on conflict resolution strategies, arbitration or mediation, for instance, to be used in the event of conflict. The commitments made during the workshop are documented by the facilitator—a neutral third party whose role we'll explain in the next subsection—and compiled in the partnering charter.

25 For a comprehensive introduction to partnering processes, see: Catherine Régis, 'Le partenariat préventif' in Pierre-Claude LAFOND (ed), *Régler autrement les différends*, (Lexisnexis, 2nd ed, 2018) 215, p. 216 and Catherine Régis, 'L'avenir de la résolution des conflits dans le contexte de l'adoption de nouvelles technologies dans le domaine de la santé' [2016] *Revue de droit d'Ottawa* 473.

Partnering Charter: The partnering charter is the second mechanism used to formalize shared objectives. Once it's ratified by all partnering organizations, it becomes the guiding tool that lays out the basic principles governing the collaboration. It should be circulated to all those involved in the partnering process and made publicly available to promote transparency and accountability.

If these two mechanisms had been employed in the context of Bill C-76, the conflict could have played out differently. In reality, Google and the government were pursuing quite similar objectives. Indeed, in their testimonies, Google representatives reiterated multiple times that they supported the idea of increasing transparency in political advertising—going as far as saying they supported the bill, from a “philosophical point of view²⁶”.

It's on the means to achieve transparency that there was a disagreement²⁷.

Google was hoping for self-regulation²⁸. It had created election ad libraries for the U.S, the European Union and India, and but for Bill C-76, it intended to launch a similar system in Canada²⁹. However, that launch was threatened by the obligations contained in Bill C-76 because complying with the new obligations would require a substantial reengineering of its systems³⁰. For this reason, Google asked the government to remove the new provisions from the bill, arguing that they were not necessary—after all, major platforms were already voluntarily launching registries—and that their adoption could lead to unintended consequences³¹. The government's decision to move forward with the new obligations despite Google's advocacy against them likely contributed to the company's withdrawal from the Canadian election advertising market. The strict liability offense, in particular, was a source of notable concern for Google.

But if early in the legislative process, Google had publicly committed to collaborate with the government to pursue a common goal—creating workable legal obligations to foster transparency in election advertising, for instance—maybe more productive discussions about the scope of the provisions and the timeline for their entry into force could have been possible. And who knows, maybe Google and the government could have reached a compromise. And if the Partnering Charter had included a commitment to go through an arbitration process, in case of stalemate, Google wouldn't have been able to resort to the “walk away strategy”, or at least, not without reputational damage. In conclusion, what this example shows is that partnering, and its mechanisms to formalize shared objectives, could help foster collaboration between states and platforms.

(2) Tech-Savvy Third Parties to Facilitate Discussions

Facilitators are another key component of partnering processes. Their role is similar to that of a conductor in an orchestra—they are responsible for creating a collaborative environment and ensuring that every step

26 See Appendix.

27 See Appendix.

28 See Appendix.

29 See Appendix.

30 See Appendix.

31 See Appendix.

of the partnering process runs smoothly, and when it doesn't, they are also responsible for taking actions to course-correct rapidly. Their tasks namely include guiding the discussions during the workshop, compiling the commitments, writing the partnering charter and monitoring how the collaboration is going all through the active life of the project using a variety of means such as surveys, interviews, meetings or evaluations.

To play their role effectively, they must meet a number of criteria. First, they must be free of conflicts of interest, meaning that they must be truly independent and not affiliated with either the platforms or the government. Second, they must have an integrative mindset rather than an adversarial one. In other words, they should be able to manage tensions constructively and seek creative solutions that can maximize benefits for all³². Third, it is recommended that they have domain-expertise. In the context of states-platforms relationships, it should be someone that computer scientists treat as an equal.

In the case of Bill C-76, having a facilitator trained in computer science could have made a significant difference. According to Google representatives, the main reason why the company pulled out of the Canadian market was that its engineers didn't believe they could comply with the bill's requirements within the timeframe mandated by the government³³. The claim was met with skepticism³⁴. The bread and butter of Google is the development of sophisticated databases, after all. But despite their skepticism, members of parliament weren't capable of getting to the bottom of the issue. Either they didn't have the technical sophistication to ask questions that could have helped resolve the issue³⁵, or they were asking questions in a way that prompted defensive responses from Google³⁶—interestingly, Google's defense strategy when they were faced with aggressive questioning was to insist on how complicated its system was³⁷. Perhaps because it wanted to take advantage of lawmakers' lack of digital literacy.

This is where a neutral third party committed to finding mutually beneficial solutions and able to understand/explain complicated technological concepts to help everyone participate meaningfully in the discussion could have played a useful role. A skillful facilitator could have guided the discussions to help the platforms explain their needs in terms of time frames and propose a reasonable schedule, she could have helped the government better understand Google's objections to the bill, or helped lawmakers assess the veracity of Google's claim about deadlines to ensure that the company was not trying to elude regulations in a deceptive way. In conclusion, a neutral third party with significant technological expertise is another element that could contribute to improving the relationship between states and platforms. In the next section, we bring together all the elements discussed so far to propose a tentative model for a modern concordat model.

32 Jean-François Roberge, *La justice participative - Changer le milieu juridique par une culture intégrative de règlement des différends* (Yvon Blais, 2011).

33 See Appendix.

34 See Appendix.

35 See Appendix.

36 See Appendix.

37 See Appendix.

Conclusion

The analysis conducted in this chapter is not sufficient to come up with a turnkey solution for easing tensions between states and platforms, but it's probably thorough enough to propose a tentative sketch of what a modern concordat could look like. We suggest that it should take the form of a *sui generis* partnering—that is to say, a unique form of partnering—adapted to the realities of the relationship between states and platforms.

As we've already shown, a renewed concordat model should be designed to incorporate the following four components:

1. Mechanisms to promote transparency
2. Mechanisms to further international alliances
3. Mechanisms for formalizing shared objectives
4. Third parties with significant technological expertise to facilitate discussions

But concretely, what would it look like? One possibility would be to set up a partnering process to facilitate the collaboration between a given state—say Canada, for instance—and all the large digital platforms it wants to regulate³⁸. Its goal, broadly speaking, could be to adopt meaningful, workable regulations to govern the digital space while ensuring that citizens do not lose access to the services offered by the platforms. Its mandate could also include following the regulations resulting from the partnering process to ensure that they remain adequate in the face of technological progress. This would be an innovative mechanism to meet the challenge of creating future-proof legislation.

Although we also considered the option of a narrower partnering process focused on specific laws, such as the *Online News Act* or the *Election Modernization Act*, we concluded that a more encompassing framework was preferable. This conclusion is supported by two main elements. First, partnering processes are costly, and setting up multiple processes for individual laws probably wouldn't be financially sustainable. Second, trust and experience build up over time, and long-term partnering processes tend to work better. To begin with, a broader framework would encourage platform's buy-in. Take the example of the *Online News Act*. It would have been hard to persuade Meta to join a partnering process narrowly focused on bill C-18 because the company simply isn't interested in being part of the online news ecosystem. However, getting Meta to join a partnering process in which concessions on C-18 could be traded with concessions from the government on privacy regulations might be easier. Therefore, thinking of the concordat as a larger relationship, rather than a narrowly project-focused collaboration seems like a more promising avenue.

Let's try to sketch out what such a process could look like, in practical terms.

Partnering processes are flexible and can take many forms. However, they generally include four key

³⁸ The *Online News Act* (Bill C-18) and the *Election Modernization Act* (Bill C-76) both had thresholds to determine which platforms were large enough to be subjected to regulation.

steps: the commitment, the workshop (more than one can be organized, if need be), the charter and the monitoring. We've detailed these four steps to see how they could be adapted to reflect the realities of the states-platforms relationship previously discussed:

1. **Pre-Workshop:** The high-level representatives of the partnering organizations discuss the key elements of the partnering, choose the facilitator and disseminate the information about the process within their organization. Since "commitment at the top" is a determining factor of the success of partnering processes, it's important to have high-ranking people involved during this phase. The minister of Justice, the Minister in charge of digital affairs, and relevant deputy-ministers should be seated at the table on the government's behalf. On the platform side, the representatives should also be people holding important positions; the President of Global affairs at Meta is a good example of someone who could play that role. As to the facilitators, they should be selected from a pool of facilitators trained and coordinated by an international organization, such as the OECD in order to facilitate knowledge dissemination and encourage alliances between states.

2. **Workshop:** The facilitator organizes the workshop sessions to discuss targets to meet and difficulties to anticipate, to design a clear communication strategy for the teams involved, and to elaborate conflict prevention and resolution strategies. As discussed earlier, the workshop phase is where the shared objectives formalization process begins. Each partnering organization must articulate its key objectives and interests and listen to those of others—which is a valuable process in itself. At that stage, a mix of people holding decision-making power and people who play a role in the day-to-day progress of the collaboration, such as computer scientists, policy advisors, or lawyers should be involved. Stakeholder groups likely to be impacted by the regulations should also be invited to participate.

3. **Charter:** Based on the results of the workshop, the facilitator writes and sends the partnering charter for final approval and signature to all parties involved in the collaboration. The charter should be written in plain language and made publicly available. It should also outline the reporting mechanisms in place to enhance the transparency of the deliberations between states and platforms—for example, the facilitator could be tasked with producing regular public updates documenting the progress made towards the achievement of the shared objective.

4. **Monitoring:** Finally, throughout the active life of the partnering process, the facilitator monitors whether the relationship is going well and whether adjustments should be made to respond to emerging obstacles or opportunities. This includes producing the public updates we mentioned in the previous paragraph. It could also include conducting confidential interviews with employees to allow them to raise flags without formally becoming whistleblowers, or conducting surveys with the public to see if they're satisfied with the regulations and if the introduction of the partnering process has contributed to making digital technologies more trustworthy.

We started this chapter by saying that Yamamoto's invitation to imagine more fruitful collaboration between Leviathan and Behemoths had struck a particular chord with us, because the conflict over the

Online News Act had made it clear that the strained relationship between states and platforms was no longer sustainable for Canadians. But while we started with a bleak observation, we conclude on an optimistic (yet pragmatic) note. Digital platforms are here to stay—in fact, the behemoth is likely to grow even bigger. As democratic representatives of the public, governments have no choice but to explore new policy options to deal with them. What this chapter has shown is that there is a path forward. Partnering processes are not a silver bullet for easing the tensions between states and platforms. But if it was carefully thought-out—with the right transparency mechanisms, and the right strategies to foster international alliances—a *sui generis* partnering process adapted to the realities of digital platforms would hold real potential for governing the complex relationship that opposes them to states like Canada.

APPENDIX

Transcript of Certain Statements Made during Google's Appearances before the Canadian Parliament

Excerpts from :

- SENATE, Standing Senate Committee on Legal and Constitutional Affairs, Evidences, 42-1, No 54 (29 November 2018), <https://publications.gc.ca/collections/collection_2019/sen/yc24/YC24-421-54.pdf>, accessed 8 January 2024.
- HOUSE OF COMMONS Standing Committee on Access to Information, Privacy and Ethics, Evidences, 42-1, No 148 (9 May 2019), <https://publications.gc.ca/collections/collection_2019/parl/xc73-1/XC73-1-2-421-148-eng.pdf>, accessed 8 January 2024.

Footnote Number	Quotes
n 12	Jason Kee (Google): Essentially, we did not have the opportunity because the amendments were introduced during clause-by clause consideration after the witness list had closed, so we didn't have an opportunity to respond or comment on those amendments and certainly not to propose alternative language (Senate p. 54: 106)
n 14	Colin McKay (Google): The reality, as you said, is that with further consultation and a discussion of the amendments that Mr. Kee tabled, as well as broader consideration of the industry, from both our point of view as well as Canadian businesses and Canadian sites, there may have been a different conversation around the appropriate tool for Canadians that would deliver information to them during this electoral cycle (Commons p. 17)
n 15	Jason Kee (Google): We became aware of the proposed clauses that were being introduced at clause-by-clause at the procedure and House affairs committee, actually when it was reported publicly, at which point we approached the minister's office, first to gather further information, because there wasn't much detail with respect to what those clauses contained, and then to engage robustly with the minister's office to identify some of the concerns we had and to develop proposed amendments that would resolve those concerns. (Commons p. 5)
n 16	Jason Kee (Google): The concern we have is by virtue of being strict liability, essentially you are liable. The only defence you have is due diligence. Pursuant to the conversation we have had today, it's difficult to assess what would constitute due diligence in this context. Would any systems that we built to try to properly identify the advertising or the advertisers here be sufficient to cross the threshold? It is completely uncertain, which is what generates considerable concern from our perspective. Denise Batters (Senator): Absolutely. Was that another issue you brought up to the minister's office, and what was their response? Michele Austin (Twitter): We jointly raised that issue. I feel comfortable just stopping there. Jason Kee (Google): We did raise it with them and that has been the extent of discussions. (Senate 54: 115)
n 18	Nathaniel Erskine-Smith (Member of Parliament): Here's my frustration. You have a company that makes billions of dollars, and looks at a small jurisdiction in Washington state and a small jurisdiction in Canada, and says, "Your democracy doesn't matter enough to us. We're not going to participate." If a big player decided to change the rules, I guarantee that you would follow those rules. We are too small for you. You are too big. You are too important, and we are just not important enough for Google to take us seriously. (Commons p. 4)

n 19	David de Burgh Graham (Member of Parliament): To me, it seems like a difficult but entirely doable system to resolve. As Nate said earlier, if it was the United States, I'm sure it would be fixed already. (Commons p. 9)
n 19	Pierre-Luc Dusseault (Member of Parliament): Given the fact that you have made many investments in other countries to make such registries, for example in the United States and Europe, and also the fact that you have invested millions of dollars in certain markets, such as China, to be able to adapt your search engine to their laws—in China, we agree, the laws are very strict, which you know quite well—I have difficulty understanding why Google isn't able to adapt to Canadian legislation like that in preparation for the next federal election. (Commons p. 6)
n 20	Colin McKay (Google): As Jason just mentioned, the advertising has to be blocked in France. That's the reality. The reality for us here is not a commitment to democracy in Canada. The reality here is the technical challenge we confronted, with the amendments to the Elections Act. The internal evaluation resulted in the decision that we can't implement the technical challenges in time for the election cycle. (Commons p. 4)
n 22	Jason Kee (Google): While we support the objective of greater transparency in Bill C-76, unfortunately the specific provisions regarding online platforms introduced at the Procedure and House Affairs Committee do not reflect international practice or how online advertising actually works across the open web. It will be extremely difficult for both the publishers and platforms to implement in the very short time we have before the new provisions would take effect. (Senate 54: 101)
n 23	Michele Austin (Twitter): We will abide by whatever decision you make with regard to this registry and this bill. However, we would say to you that we have 38 legislations worldwide next year. When you build something like an advertising registry, the engineering in the digital world is similar to engineering in the real world; you have to plan, sequence, and build a system that is workable. For us, especially given our experience with regard to elections and how important they are, this provides excellent information to users both of Twitter or anyone who comes to visit our Ads Transparency Center. (Senate 54: 109)
n 24	Michele Austin (Twitter): On the issue of information integrity, like in the United States, Bill C-76 requires advertisers who want to run political campaign ads to self-identify. In the United States, the identity of the majority of political advertisers is verified by the Federal Election Commission, or FEC. The FEC issues a unique number to organizations such as political parties, political action committees and candidates. The FEC publishes that number on a public database. The unique identifying numbers issued by the FEC allow voters to authenticate the information about the advertiser from a source other than Twitter. The FEC identifier provides an additional layer of certainty to users that a political advertiser is who they say they are. The FEC identifier also makes it easier for voters to find additional information and context about the advertiser and improves the overall integrity of the information available on advertisers. (Senate 54: 99)
n 26	Jason Kee (Google): In line with this, we fully support improving transparency in political advertising. (Commons p. 2)
n 26	Jason Kee (Google): As we have basically expressed before the Senate committee and elsewhere, and also to the minister's office, we are fully supportive of and aligned with the idea of increasing transparency in political advertising, and we had intended to actually bring the registry to Canada. (Commons p. 6)
n 26	Colin McKay (Google): I want to underline that our decision was led by a technical evaluation about whether we could comply. It was not a specific question about the regulatory framework within Canada or our commitment to the electoral process in Canada and helping keep it both informed and transparent. We are on a path in other countries to implement tools like those described in the legislation, to improve those tools and to work on the back-end technical infrastructure to make those tools more informative and more useful for users as well as for all participants in an election. We arrived at a very difficult conversation because we were faced with a constrained time frame with amendments to legislation that are very important within the Canadian context and to us as Canadians, both as electors and participants in the electoral process. And we had to make a decision about whether or not we could comply with the legislation in the time frame allowed, and we couldn't. So our compliance was left to not accepting political advertising. It is in no way a reflection of either our corporate or our personal attitude towards Canada's authority and jurisdiction in regulating this space, and it certainly wasn't meant to be a signal about our opinion about the amendments to the Elections Act. It was very difficult for us, and the decision was driven by the technical challenges and the time frame we were faced with. (Commons p. 6)
n 26	Jason Kee (Google): I would echo those points and make two additional ones. Similarly, we engaged in this process because it's the right thing to do. We engaged in this process because it was abundantly clear that we had to make efforts to make political ads transparency more accessible. This isn't just in terms of creating reports but is also available to the public, researchers and elections regulators so they can examine the niche of the political ads that are available to them. (Senate 54: 110)

n 26	David de Burgh Graham (Member of Parliament): Do you oppose the changes we have on C-76, or do you support the bill, from a philosophical point of view? Jason Kee (Google): Absolutely. (Commons p. 8)
n 26	Jason Kee (Google): It sets out the basic guidelines that accord with many of the ongoing efforts with the major online platforms. <u>The challenge that I have is not with the principle underlying it.</u> The differences that are specifically being articulated in Bill C-76 and that are substantially different, and even just a few words off, are what will create the potential challenges for us. (Senate 54: 110)
n 26	Jason Kee (Google): Given the tremendous challenges these new provisions pose and that major online advertising platforms are already publishing similar registries voluntarily, we recommend a cooperative approach whereby platforms coordinate on a registry rather than prescriptive obligations that will introduce unintended consequences, reduce flexibility to address political ads issues, and potentially compromise the launch of planned registries. (Senate 54: 103)
n 29	Mr. Jason Kee: In line with this, we fully support improving transparency in political advertising. Last year we voluntarily introduced enhanced verification requirements for U.S. political advertisers, in-ad disclosures for election ads, and a new transparency report and political ad library for the U.S. mid-terms. We deployed similar tools for the Indian and EU parliamentary elections. While we had intended to introduce similar measures in Canada, unfortunately the new online platforms provisions introduced in Bill C-76 do not reflect how our online advertising systems or transparency reports currently function. It was simply not feasible for us to implement the extensive changes that would have been necessary to accommodate the new requirements in the very short time we had before the new provisions took effect. (Commons p. 2)
n 30	Brief circulated during Senate Hearing: “New prescriptive obligations will introduce unintended consequences: [...] compromise launch of planned registries, as imposing specific conditions and requirements. require substantial engineering of ad serving infrastructure, which is not achievable in the short timelines contemplated”
n 31	Brief circulated during Senate Hearing: “Recommendations. Removal of new obligations in favour of co-ordinated regime. Major platforms already voluntarily launching registries in advance of elections, these new obligations were not necessary. New prescriptive obligations will introduce unintended consequences”
n 33	Colin McKay (Google): The decision was driven by the technical challenges <u>and the time frame we were faced with.</u> (Commons p. 6)
n 34	Frank Baylis (Member of Parliament): I want to follow up a little bit on what my colleague Nate was saying. We are clearly struggling to believe you about the aspect of you being able to meet the requirements of Bill C-76. Facebook says they can meet them. Are you aware of that? (Commons p. 11)
n 34	Frank Baylis (Member of Parliament): For a little database for a bunch of legal advertisements to put on...I can't imagine that database is one-tenth of one-tenth of one-tenth of your hardware/software net, but your engineers can't program...? They can do everything. They can catch it and identify it instantaneously, but they just can't put it in a database because that's too complicated? Isn't one of the expertises of Google database management? Am I off here? (Commons p. 16)
n 35	Linda Frum (Senator): As a non-techie, if I distill your testimony, to some extent you're saying that the liability and responsibility for monitoring political ads and putting them on a registry is falling entirely on the shoulder of social media and that you do not have a partner in Elections Canada in helping to monitor what's going on online. (Senate 54: 103)
n 36	Frank Baylis (Member of Parliament): Did your engineering team just say it off the top of their heads, or did they do some type of work? Why are you hiding from this? If you did the work, just say, “Look, Frank, we looked at it; it's going to take us 2.2 years and four months.” Why are you so upset about it? Just tell me. Why are you hiding from it? (Commons, p. 13)
n 36	Nathaniel Erskine-Smith (Member of Parliament): I have to say, I find the answers incredulous, as incredulous as you suggesting that \$1 million is such a wonderful thing when you made \$8 billion in Q4 last year. Not taking this as seriously as you ought to have is a detriment to our democracy, and you should have done better. (Commons p. 11)
n 37	Jason Kee (Google): Simply because the way our advertisement systems work, the fix was not nearly as simple as it might seem on the surface. Again, these are extremely complex systems so that every single time you implement one change it actually has a cascade effect. After robust discussion over many months about the ability to implement these kinds of systems, basically it simply became clear we couldn't do it in time. (Commons p. 12).