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Free Speech Limitations and Canada's Online Streaming Act

Ethan Shortinghuis[1]

I. Introduction

The Canadian government has been determining what Canadians can watch and listen to for decades.[2] The regulation of broadcast media is the primary means by which the government seeks to preserve a distinct sense of Canadian cultural identity. Protecting this identity from being overwhelmed by the influence of the United States has long been a significant concern for many Canadians, both inside and outside of the government. The United States' proximity, similar demographics, and larger size and industry have often raised questions as to whether the culture of Canada is its own or simply a product of its southern neighbor and others.[3] To avoid this, the Canadian government seeks to influence the types of content

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1 Ethan Schortinghuis is a junior at Brigham Young University majoring in Psychology. He would like to thank the editor of this paper, Jacob Christensen, a Political Science major, for his help refining ideas and streamlining the format of this paper.

2 With a few exceptions for niche-genre stations (e.g., broadcasting only music recorded pre-1956), radio stations are required to include Canadian content for a minimum of 30-50% of their programming, depending on their content.
Canadian Content Requirements for Music on Canadian Radio, Canada Radio-television and Telecommunications Commission, https://crtc.gc.ca/eng/cancon/r_cdn.htm (Dec. 7, 2022).

3 Douglass Tood, *Is Canada a Blank Slate With No Culture? Many Beg to Differ*, Vancouver Sun (Mar. 14, 2015), https://vancouversun.com/news/staff-blogs/is-canada-a-blank-slate-with-no-culture-many-beg-to-differ.

produced, discovered, and consumed within Canada. One of their primary strategies is to require that television and radio broadcasters within Canada include content deemed sufficiently "Canadian"[4] as a certain percentage of their programming.[5]

In early 2023, the government of Canada passed the Online Streaming Act, formerly known as Bill C-11, extending federal influence over media to the more recently developed online streaming platforms. The Online Streaming Act gives federal authority to the Canadian Radio-Television and Telecommunications Commission (CRTC) to regulate Canadians' access to content from online streaming services such as YouTube, TikTok, and Netflix. This legislation aims to further protect Canadian cultural identity by supporting the creation of "certified Canadian content" and increasing its discoverability on the aforementioned digital platforms.[6]

While seeking to unify Canadians and foster a sense of common identity is not a nefarious goal, the methodology employed by the Canadian government to create and sustain this common identity is ill-suited for the task. In an attempt to accomplish this goal, the Online Streaming Act allows the government to regulate the production, distribution, and discoverability of specific types of content on online platforms, raising concerns that these objectives are being pursued at the cost of the fundamental freedoms of speech and expression.[7] While much of the public debate surrounding this

4 The certification process for "Canadian content" (also referred to as "CanCon"), evaluates different aspects of the creative work, such as the nationality of the artist, where the work was performed or recorded, and the nationality of many people who contributed to the work in question. This process does not, however, give much weight to the content of work, so that a documentary about Canada may not be considered "Canadian" if an insufficient number of Canadians worked on it. See *So What Makes it Canadian?* Canadian Radio-television and Telecommunications Commission, https://crtc.gc.ca/eng/cancon/c_cdn.htm (Oct 10, 2016).

5 Online Streaming Act, S.C. 2023, c. 8.

6 Online Streaming Act, S.C. 2023, c. 8.

7 *Canada's Liberals set sights on taxing online streaming, expanding rural broadband in federal budget,* CBC News, https://www.cbc.ca/news/politics/c11-online-streaming-1.6824314(Apr. 27, 2023, 11:19 AM)

legislation is centered merely on the inclusion of online platforms under the already controversial regulations of the CRTC, there are more subtle problems with the Act. Whether by intention or honest mistake, the Online Streaming Act leaves open the possibility of further infringement on Canadian freedoms in every part of the broadcasting process, from writer to audience. Furthermore, the Act itself is worded vaguely enough that no actionable policies are even put forth, instead relying entirely on the extra-governmental body of the CRTC to determine how the objectives and guidelines will be implemented and enforced. The CRTC would be placed in a position to exercise these powers solely at their discretion and not as a fair application of the law, as there is not enough real law to apply.

While the wording of the Online Streaming Act is vague, some may argue the CRTC would never actually abuse the power given by it in a way that infringes on Canadians' fundamental freedoms. While this is a matter of speculation and subject to debate, it is also irrelevant to the issue discussed here. Even if a law is not being used to limit the freedom of Canadians, or if it seems unlikely that such a power would ever be used, it is the responsibility of lawmakers to ensure that such powers and possibilities do not exist as far as possible. Even if the clear problems it presents mean it is unlikely to ever be employed, it is a legislative failure to have passed into law an act that clearly aims to restrict freedom of speech and expression, as will be shown hereafter.

II. Background

A. Free Speech in Canada

The protection of speech and expression in Canada is found in the Canadian Charter of Rights and Freedoms (the Charter). The Charter states: "Everyone has… freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[8] This statement has been interpreted very broadly, with nearly every possible form of expression having been found by

8 Canadian Charter of Rights and Freedoms, s. 2(b), Can.

the Supreme Court to be covered under free speech protection.[9] Even forms of expression such as hate speech, child pornography, and public speech for the purpose of engaging in prostitution are considered protected based simply on the principle of whether the content can be considered a form of expression.[10] Instead of debating whether a type of expression should qualify as protected or not, the decision left to courts typically revolves around whether infringing on the protected status of the expression can be justified under the first section of the Charter. This particular section makes the provision that the rights and freedoms guaranteed in the following sections may be restricted or withheld if such limitations can be "justified in a free and democratic society."[11] Such justification requires that a law be clearly created in the interest of upholding the principles of freedom and democracy that the laws of the country are meant to serve. The passing of laws that limit constitutional freedoms is relatively common, but to determine if such limits are justifiable, they are subjected to the "Oakes Test," as outlined below.

B. The Oakes Test

On December 17, 1981, David Oakes was arrested for the possession of eight vials of cannabis resin for the purpose of trafficking, which is a violation of the Narcotic Control Act (NCA).[12] However, the Court was only able to prove beyond a reasonable doubt that he was in possession of a narcotic, which is still a violation of the NCA but is a lesser offense than possession for the purpose of trafficking. In order to convict for the latter offense, the court relied upon section 8 of the NCA, which presumes that if the accused is found to be in

9 Thomson Newspapers Co. v. Canada (Attorney General), 1 SCR 100 (SCC 1998).

10 R. v. Keegstra, [1990] 3 SCR 697 (Can.). Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), [1990] 1 SCR 1123. *R. v. Barabash*, [2015] 2 SCR 522, 2015 SCC 29.

11 Canadian Charter of Rights and Freedoms, s. 1, Can.

12 Regina v. Oakes, [1986] 1 SCR 103 (Can.). Narcotic Control Regulations C.R.C., c. 1041, s. 4(2).

possession of a narcotic, it is for the purposes of trafficking and allows the accused to establish otherwise on the balance of probabilities.[13]

Instead of providing evidence that the possession was not for the purpose of trafficking, Oakes brought a motion challenging the constitutional validity of section 8, seeing that it lays the burden of proving innocence on the accused.[14] This violates the Charter-guaranteed right for any person charged with a criminal offense to be presumed innocent until proven guilty.[15] This motion was held in his trial but was appealed and brought before the Supreme Court of Canada. The question posed on appeal to the Supreme Court was whether the conflict between section 8 of the NCA and the Charter resulted in the former being unconstitutional and therefore "of no force and effect."[16]

The Supreme Court dismissed the appeal and answered the question in the affirmative. In order to come to this conclusion, the Court found it necessary to determine if the NCA's restriction of the presumption of innocence was justifiable since, as explained above, the government may pass legislation restricting charter-guaranteed rights if such a restriction can be deemed justifiable in a fair and democratic society. To accomplish this, the court outlined a set of criteria and considerations that could be used to determine whether such infringement could be justified, and which has been adopted as the de facto test for all such determinations in constitutional law.[17] It has come to be known simply as the "Oakes Test" and is composed of two main parts:

1. Pressing and Substantial Objective
The objective being served by the limitation must be significant and important enough to justify limiting an otherwise

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13 Narcotic Control Regulations C.R.C., c. 1041.

14 Regina v. Oakes, [1986] 1 SCR 103 (Can.).

15 Canadian Charter of Rights and Freedoms, s. 11(d), Can.

16 Regina v. Oakes, [1986] 1 SCR 103 (Can.).

17 Egan v. Canada, [1995] 2 SCR 513 (Can.).
Vriend v. Alberta, [1998] 1 SCR 493 (Can.).
Canada (Attorney General) v. Hislop, [2007] 1 SCR 429 (Can.).

guaranteed right or freedom. If challenged, the Supreme Court will look for this objective to be "pressing and substantial" to the needs and operation of a free and democratic society. In R. v. Oakes, the objective of decreasing drug trafficking in general was found to be a self-evidently important goal and may, in some cases, have been adequate to justify the limitation of some rights and freedoms.[18]

2. Proportionality
The second portion is a 3-part proportionality test. [1] This test requires that the measures applied to achieve the objective are *rationally connected* to the objective itself. They cannot be arbitrary or found to be aiming at some other goal. [2] The law in question must be *minimally infringing*, being shown to restrict the guaranteed right or freedom as little as reasonably possible. [3] The negative outcomes of the measure, as it regards the right or freedom in question, must be *proportional* to the significance and positive outcomes of the objective.

C. The CRTC

In 1968, the Broadcasting Act was passed, declaring that "the Canadian Broadcasting System should serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[19] To fulfill this mission, the CRTC was formed. The CRTC is a public organization appointed by and operated independently from the Canadian government. The organization monitors and regulates the entirety of the Canadian Broadcasting System by issuing broadcasting licenses, developing policies and regulations for broadcast content and practices, and enforcing such policies through fines,

18 Regina v. Oakes, [1986] 1 SCR 103 (Can.).

19 Broadcast Act, SC 1968-69, c 54 (Can).

revoking licenses, and court orders.[20] The CRTC is perhaps best known for mandating that certain minimum percentages of broadcast content be composed of "Canadian" content, as determined by the organization. The Online Streaming Act amends the original Broadcasting Act to extend the regulatory powers of the CRTC to include online streaming platforms such as Netflix and YouTube, the regulation of which constitutes the infringement of constitutional freedoms this paper attempts to address.

Before the Online Streaming Act can be applied in any substantive way, the CRTC must create its own specific policies and plans for how it will use the new powers granted by the legislation. As such, it should be acknowledged that there may not be adequate grounds for an actual constitutional challenge at this moment as the current text of the law, absent the more specific policies to come, does not directly or clearly violate any fundamental freedoms. However, it does provide the opportunity for such violations to occur in the future. It is these vulnerabilities and the consequences of the legislation's overall poor workmanship that will be explored in the following section.

III. Proof of Claim

The argument presented in this article is this: Besides laying the groundwork for potential infringement on freedom of expression, the Act is likely to be ineffective and even counterproductive to its intended objective due to its vague writing and misguided measures. It is for these reasons that it should be repealed on constitutional grounds.

While infringement of freedoms by legislation is not uncommon, it must be found to be justifiable in a "free and democratic society" as stated in the Charter.[21] Whether the infringement of these guaranteed freedoms can be justified will be determined through the

20 Monica Auer, *The CRTC's Enforcement of Canada's Broadcast Legislation: 'Concern', 'Serious Concern' and 'Grave Concern'*, 5 Can. J.L. & Tech. 3 (2006).

21 Canadian Charter of Rights and Freedoms, s. 1, Can.

application of the Oakes test. To argue that the Online Streaming Act is unconstitutional, the first task is to demonstrate that the freedoms of speech and expression enshrined in the Charter are in fact being infringed upon.

A. Determination of Infringement

The protection of expressive content has been broadly interpreted by the Canadian Supreme Court such that "any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian Charter."[22] Furthermore, the protections for freedom of expression extend far beyond the individual or entity that produces expressive content. In *Edmonton Journal v. Alberta (Attorney General)*, it was determined that the right of the press to report on court proceedings regarding marital dissolution was protected; The Court found it necessary to protect the right of the public to access the information made available by the reporters, who were previously restricted in what they could access and report. In *Dagenais v. Canadian Broadcasting Corp.,* [1994], the Court upheld the right of the Canadian Broadcasting Corporation (CBC) to distribute a film despite defendants in a current criminal trial suing for a publication ban of the film due to its content being related to the crime with which they were charged. This affirmed the right of the CBC to produce, transmit, and have their content consumed. These two cases show that freedom of expression protects not only those who create the content, but also those involved in the distribution and consumption of said content.

While the Online Streaming Act focuses primarily on the distribution or broadcasting aspect of the system, the Act clearly impacts the creators and consumers of the content as well. As the types of content produced and promoted are affected, regulations are also placed on distributors of online content, limiting the consumer's access to content that would otherwise be produced and distributed by those platforms.

22 Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 SCR 877 (Can.).

In response to concerns and accusations of censorship, the proponents of this legislation clarified the Act will not prevent anyone from deliberately seeking out and discovering any online content.[23] However, if those who put this bill forward did not think that influencing the discoverability of specific types of content would have an observable effect on the content Canadians ultimately consume, then they likely would not find it necessary or productive to exert such an influence. Therefore, it is clear that in both intent and effect, the Online Streaming Act limits the freedom of expression of Canadian citizens in multiple contexts.

B. Pressing and Substantial Need

Having established that this legislation can indeed result in the restriction of the rights guaranteed in the Charter of Rights and Freedoms, it is now necessary to determine if these restrictions are justifiable in a free and democratic society by the application of the Oakes test. The first requirement for the government to be allowed to violate or limit a guaranteed freedom is that the government must demonstrate that there is a pressing and substantial need for the limitation in question. *R. v. Keegstra*, for example,[24] determined that a limitation of free speech was justified due to the need to prevent hateful speech; the Court found the intent of the questioned expression was far from the values that the Charter has been interpreted to protect: "democratic discourse, self-fulfillment, and truth-finding."[25] Additionally, a "pressing and substantial objective" necessitates sufficient specificity and that the objective is distinct from the means taken to accomplish it.

The primary objective given for the Broadcasting Act, which the Online Streaming Act amended, is to ensure that "the Canadian

23 Canadian Heritage Committee, Evidence of meeting #31 for Canadian Heritage in the 44th Parliament, 1st Session, 6 June 2022, https://openparliament.ca/committees/canadian-heritage/44-1/31/pablo-rodriguez-24/.

24 R. v. Keegstra, [1990] 3 SCR 697 (Can.).

25 Canadian Charter of Rights and Freedoms, s. 2(b), Can. Canadian Broadcasting Corp. v. Canada (Attorney General)

broadcasting system… serve[s] to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[26] The questions of whether the promotion of Canadian culture is a pressing and substantial objective and whether efforts to do so have been successful are, in reality, rather complicated. These questions raise interesting philosophical issues, including the debate between prescriptive and descriptive views of a nation's culture. Is it the job of the government to decide what the culture of its people should be, and subsequently impose that cultural ideal on the citizens? Or should the culture of a people be chosen and defined by the people themselves through their free engagement in activities and content according to their interests? This is likely where much of the divide on legislation like the Online Streaming Act originates, as different people will have different answers to these questions. The stance on these questions held by members of the Supreme Court of Canada would likely have a strong influence on whether the objective-oriented phase of the Oakes test was passed, were this legislation to be brought before them by a constitutional challenge. However, it is due to the subjective nature of the objective that it would be unlikely to pass this test – being subjective and overly broad.

One reason that specificity is required, and broadness or vagueness of an objective is a problem is that it prevents the measures taken to achieve it from being properly evaluated. In questions of justifying infringement of freedoms, the measures taken must be seen to be distinct from, and rationally connected to the objective, but if the objective is not sufficiently specific or clear, it cannot be properly seen whether or not the measures are sufficiently connected or effective enough to justify the limits being placed on constitutional freedoms.

C. Rational Connection

A significant issue with the Online Streaming Act is the rational connection to its objective. A significant part of the Oakes Test is ensuring that the measures being taken by the legislation in question

26 Broadcast Act, SC 1968-69, c 54 (Can).

are clearly aimed at achieving the objective and seem likely to be successful. This requires that both the objective and the specific measures be sufficiently specific, as a lack of specificity would prevent a clear connection from being made in either direction.

The objective that the Broadcasting Act has held for years is to protect Canadian culture through the creation and consumption of Canadian content. To achieve this, the CRTC sets minimum percentages of radio and television programs that must be composed of content deemed by the CRTC to be sufficiently "Canadian." There are arguments to be made as to the constitutionality of those requirements (to which online content will now be subjected via the Online Streaming Act), but such arguments are not the primary focus of this paper. One issue with the rational connection is that the text of the Act itself is not sufficiently specific to know what the measures to be taken will even be. The Online Streaming Act simply grants general powers to the extra-governmental body of the CRTC to create and enforce policies on the broadcasting industry writ large. Not only does this prevent the legislation itself from being properly evaluated, but it also means that the policies which are developed did not go through a process of legislative or judicial review and can be changed by the CRTC at any time.

Another issue the Online Streaming Act faces regarding its rational connection to the objective of supporting Canadian media is that it broadly seeks to promote content on online streaming platforms in the same way it has sought to promote more classical forms of media. However, the ways these systems operate are fundamentally different. While radio and television are broadcast according to organized and premeditated schedules, online streaming services operate largely on the use of algorithms. Algorithms collect data on what users show interest in and what content generates the most engagement, using that information to recommend or display certain types of content that it estimates the user is likely to engage with. The portion of the Online Streaming Act requiring online platforms to "clearly promote and recommend Canadian programming" would also require these platforms to either alter their recommendation algorithms or circumvent them in some capacities, forcing "certified Canadian content" to be recommended artificially instead of

being recommended based on popularity or interest.[27] Even if the need to extend regulatory influence to online platforms was deemed pressing and substantial, a simple extension of the same policies to these fundamentally different forms of technology does not seem like a rational means by which to achieve its objective.

D. Minimal Infringement

Once it is accepted that the measure being taken to achieve the pressing and substantial objective is rationally connected to the objective itself, the next stage of the Oakes test is to determine whether the constitutional freedom in question is infringed in a minimal capacity. It is not enough for there to simply be an alternative approach to achieve the objective, as the Court accepts a range of minimally impairing approaches. It must be demonstrated that the legislation in question infringes more than is necessary.

For the sake of argument, it will be assumed here that the Online Streaming Act passed the previous two portions of the test, namely, that the cultural need for intervention was deemed pressing and substantial, and the measures being taken were sufficiently connected to the objective. Even with these assumptions, the legislation would fail this portion of the test, as the text itself suggests both infringing and non-infringing measures. The Online Streaming Act describes the requirements for the registered participants in the broadcasting system to make maximum use of Canadian citizens, which means predominant use of Canadians in the roles of creation, production, and distribution of broadcast materials.[28] This is infringing because it limits who can perform certain roles within the production of broadcast content and limits the expression of the writer or primary creator of the content to being expressed through a certain subset of people if that content is to be promoted and consumed. However, in other similar clauses, the writing of the Act merely states that the broadcasting system should "support" the creation of programming centered on Indigenous language and other minority groups. Such

27 Online Streaming Act, S.C. 2023, c. 8, s. 3(1)(r).

28 Online Streaming Act, S.C. 2023, c. 8, s. 3(4)(f).

support could be interpreted quite broadly, including ways in which guaranteed freedoms are not restricted.

If the government were to merely support or fund the creation of a higher volume and quality of content, that could increase its likelihood to be seen online both domestically and internationally due to its quality, rather than needing to be forced into the recommendations of Canadians. The aforementioned issue of algorithmic recommendation that causes the requirements placed on radio and television to be poorly suited to online streaming platforms is the same reason that this non-infringing approach to content promotion could be more effective on these platforms. Since all content exists on the same platforms, the primary factor resulting in its discovery and consumption is quality and popularity. If the content produced within Canada increased in quality, it would stand to reason that the viewership could increase as well. While this is not a guarantee, it is an argument that the proponents of the Online Streaming Act should be required to refute before moving on to the more restrictive measures they have proposed.

E. Proportionality

The final portion of the Oakes test seeks to determine whether the benefits of limiting legislation outweigh the detriments to the freedom in question. One issue with the proportionality of this Act is that while it seeks to promote the production and distribution of Canadian content, there are ways in which it may accomplish the opposite. As the markets in which these streaming services participate are not neatly contained within national borders, these platforms and companies depend on international engagement in addition to domestic engagement with their content. Additionally, the services provided by these platforms are run algorithmically, with the computer algorithms promoting content based on the engagement it receives, among other factors. One of the stated plans of the legislation is to increase the discoverability of Canadian content by promoting it in the suggested content portions of registered

platforms.[29] If this "certified Canadian" content is promoted broadly to all audiences, then it will inevitably be shown to many people who are not interested in engaging with such content. The lack of engagement relative to the exposure the content is receiving will be recorded by the platform's algorithm, suggesting that it should be promoted less. Whether or not the legislation prevents those proportions from affecting the discoverability of the content within Canada, the Canadian government would have no way of preventing that content from being deprioritized internationally due to its unpopularity. Since the international audience of most online content is much larger than the audience residing within Canada, the potential international consequences for the discoverability of content deemed "Canadian" may very well discourage broadcasting entities from producing content of this kind. In this way, the Online Streaming Services Act could ultimately decrease the amount of "Canadian" content produced by these entities, directly opposing the aims of the legislation. Since the proportionality of legislation is typically a measurement of the benefits of obtaining the objective, this legislation could not be justified on this count as the effect of the measures works in opposition to the objective while also having detrimental effects on individuals' freedom of expression.

IV. Conclusion

The Online Streaming Act seeks to modernize Canada's legislation meant to protect Canadian identity and culture but does so by unjustly infringing on the constitutional freedom of expression. Additionally, the Online Streaming Act fails to meet the standard for specificity that would allow it to be properly evaluated or implemented in a non-arbitrary manner. The legislation allows for the CRTC to restrict Canadians' freedom of expression by directly influencing the content Canadians encounter online and indirectly influencing the types of content that will be produced and distributed. The

29 *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239, Canada Gazette, Part II, Volume 157, Number 24, 22 November 2023, https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html.

wording of the Act is also intentionally vague to allow the Canadian Radio-Television and Telecommunications Commission to determine how it will be enforced and whom it will affect. Furthermore, the measures proposed in the Act are ultimately likely to render itself ineffective, and may even act counter to its own objective, removing any argument for the pressing need to restrict Canadians' freedoms. Despite the stated intention of the Online Streaming Act being to provide a service and a protection to the Canadian people, it would be a failure of the legislative system to allow such a broad and needlessly restrictive amendment to stand.