Bill C-11 and the Consumption of Online Information:

A Sinister Encroachment into Canadians' Freedom of Expression

The 2023 Brandon Langhjelm Memorial Essay Contest

(1,500 words)

I. Introduction

This year, the Trudeau government passed two bills that are unprecedentedly crushing to freedom of expression in Canada: Bill C-11 (the *Online Streaming Act*[1]) and Bill C-18 (the *Online News Act*[2]). This paper focuses on the *Online Streaming Act*, arguing that it is particularly sinister and unjustified due to the covert way it impedes freedom of expression. By empowering the Canadian Radio-television and Telecommunications Commission ("CRTC") to manipulate algorithms in a politically desirable way, Canadians can no longer roam the internet without government interference. The essay (1) provides an overview of key features of the *Online Streaming Act*, (2) argues that the bill is morally and philosophically unacceptable, and (3) considers avenues for arguing that the *Online Streaming Act* is not constitutionally viable.[3]

II. The *Online Streaming Act*

The *Online Streaming Act* amends the *Broadcasting Act*[4] in three key ways. First, it introduces new normative objectives into Canada's broadcasting policy. For example, it provides that the Canadian broadcasting system should:

> "…serve the needs and interests of all Canadians — including Canadians from Black or other racialized communities and Canadians of diverse ethnocultural backgrounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages — and reflect their circumstances and aspirations, including equal rights […] and the special place of Indigenous peoples and languages within that society…"[5]

Second, it declares that "each broadcasting undertaking **shall** contribute to the implementation of the objectives of the broadcasting policy…"[6] In furtherance of this declaration,

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[1] C-11, *Online Streaming Act*, 1st Sess, 44th Parl, 2023 (assented to April 27, 2023), SC 2023, c 8 [*Online Streaming Act*].
[2] C-18, *Online News Act*, 1st Sess, 44th Parl, 2023 (assented to June 22, 2023), SC 2023, c 23 [*Online News Act*].
[3] The *Online Streaming Act* limits freedom of expression in a plethora of ways. For the purposes of this short essay, focus is given solely to the limits which are purportedly justified on the basis of advancing equality.
[4] *Broadcasting Act,* SC 1991, c 11.
[5] *Online Streaming Act*, s 3(3)(iii).
[6] *Online Streaming Act*, s 3(1)(a.1), **emphasis added**.

the bill grants broad new powers to the CRTC. The CRTC may, for example, make orders that impose conditions with respect to "the proportion of programs to be broadcast that shall be devoted to specific genres, in order to ensure the diversity of programming."[7]

Third, the *Online Streaming Act* introduces perhaps the most significant amendment to the *Broadcasting Act* since its enactment in 1991. It introduces "online undertakings," meaning the transmission and retransmission of programs over the internet, as a new class of broadcasting undertakings that are to be regulated by the CRTC.[8]

III. Neither Morally nor Legally Justifiable

a. *What Would Mill Say?*

From a philosophical and moral perspective, the *Online Streaming Act* is nothing short of Orwellian. It is worth hearkening back to perhaps the most influential text on freedom of expression. In John Stuart Mill's *On Liberty*, Mill set out the following principle:

> "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the **only purpose** for which power can be rightfully exercised over any member of a civilised community, against his will, **is to prevent harm to others**."[9]

Mill's principle flows from his concern about the tyranny of the majority.[10] He warned of the "increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation."[11] In Mill's view, free speech is the only way forward with respect to truth-seeking and individual flourishing.[12]

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[7] *Online Streaming Act*, s 9.1(1)(d).
[8] *Online Streaming Act*, s 2(1).
[9] John Stuart Mill, "On Liberty" in Mary Warnock, ed, Utilitarianism *and* On Liberty*: Including Mill's "Essay on Bentham" and Selections from the Writings of Jeremy Bentham and John Austin*, 2nd ed (Blackwell Publishing Ltd, 2003) 88 at 94-95, **emphasis added**.
[10] "On Liberty" at 100, 109, 127.
[11] "On Liberty" at 98.
[12] "On Liberty" at 128, 134.

While Mill was primarily concerned with the overt suppression of speech,[13] the proliferation of the internet makes his concern even more consequential. If Mill were to be given a crash course on modern-day technology, what would he say about the *Online Streaming Act*? He would undoubtedly call it a frightening sign that Canada is no longer free.

The Supreme Court of Canada ("SCC") has recognized that freedom of expression applies to both speakers *and* listeners.[14] Canadians' consumption of online information is a manifestation of freedom of expression. Social media algorithms which prioritize engagement epitomize the free market of ideas that Mill encourages. Viral posts are typically those which people vehemently agree or disagree with—in other words, the posts that people have the most to say about.

The *Online Streaming Act* grants the CRTC power to artificially manipulate the algorithm so that Canadians view curated content.[15] This disrupts the natural process of individual truth-seeking and fulfilment, instead supplanting it with a government-approved experience. Irrespective of one's political leanings, this should be troubling. As Jamil Jivani, lawyer and policy adviser, wrote, "Canadians should not trust Justin Trudeau or any other politician with such power. Partisanship and the power to control media platforms don't mix well."[16]

b. Canada's Freedom of Expression Framework

Section 2(b) of the *Charter* provides that Canadians have "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[17] Three core values underlie the protections in section 2(b): (1) truth-seeking, (2) participation in

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[13] "On Liberty" at 127.
[14] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1327; *The Attorney General of Quebec v Irwin Toy Limited*, [1989] 1 SCR 927 at 976 [*Irwin Toy*].
[15] *Online Streaming Act*, s 9.1(1).
[16] Jamil Jivani, *Trudeau Is Crushing Free Speech in Canada. Let It Be a Warning to the US | Opinion* (March 2023), online: Newsweek <https://www.newsweek.com/trudeau-crushing-free-speech-canada-let-it-warning-us-opinion-1787480>.
[17] *Canadian Charter of Rights and Freedoms*, s 2(b), Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

social and political decision-making, and (3) individual self-fulfillment and flourishing.[18] These values largely overlap with those articulated by Mill in *On Liberty.*

That being said, the SCC has explicitly rejected Mill's harm principle as being a principle of fundamental justice.[19] The government is free to restrict liberties other reasons besides harm. This ties into the overarching notion that *Charter* rights and freedoms are subject to reasonable limits under section 1. Reasonable limits are those which have a pressing and substantial objective, and are minimally impairing, rationally connected to their objective, and proportionate.[20]

It is not overwhelmingly difficult to prove a *prima facie* infringement of section s 2(b).[21] If a government action, in purpose or effect, impedes an activity that conveys or *attempts* to convey meaning, section 2(b) is infringed.[22][23]

c. An Avenue to Unjustifiability

The *Online Streaming Act* is uniquely sinister because it empowers the CRTC to covertly intrude on freedom of expression under the guise of advancing equality rights. The new objectives of the *Broadcasting Act* are purportedly aimed at advancing equality,[24] as they refer to the uplifting of Black, Indigenous, and other minority voices.[25] The Minister of Justice stated that the amendments "promote the values that underlie equality rights protected by section 15 of the

[18] *Irwin Toy* at 976; see also: *Ford v Quebec,* [1988] 2 SCR 712 at 765-766.
[19] *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 11.
[20] *R v Oakes,* [1986] 1 SCR 103 at paras 69-71 [*Oakes*].
[21] *Charterpedia: Section 2(b) – Freedom of Expression* (July 2022), online: Department of Justice Canada <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art2b.html>.
[22] *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 38.
[23] There are certain activities which, by virtue of their method or location, are excluded from section 2(b) protections. Threats of violence, for example, do not come within the ambit of section 2(b) protection (*Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2099 SCC 31 at para 28). This is not important for the purposes of this essay.
[24] Among several other objectives.
[25] *Online Streaming Act*, s 3(1)(d).

Charter."[26] Presuming that the *Online Streaming* Act violates section 2(b), it would therefore be easy for the government to establish that there is a pressing and substantial objective underlying the bill.

There are arguments to be made, however, that the bill would not survive the remainder of the section 1 analysis.

i. Rational Connection

It is questionable whether there is a logic or reason-based causal connection[27] between exposure to diverse voices and the advancement of substantive equality. As described by the executive director of Digital First Canada, "If they put [content] artificially in front of people who don't want it… that will send it to the abyss."[28] Canadians being compelled to view more diverse content has little to do with the substantive equality of Canadians before and under the law. There is nothing the government can do to change the fact that people do not engage with content that does not resonate with them.

ii. Minimal Impairment

In any event, the *Online Streaming Act* is exceedingly broad and impairs freedom of expression far more than is reasonably necessary.[29] There are alternative means[30] to advance equality that are likely *more* effective than the unfettered power to manipulate algorithms. The bill itself alludes to employment opportunities and the actual creation of programming.[31] Prioritizing

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[26] *Bill C-11:* An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts (April 2022), online: Department of Justice Canada <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c11_2.html>.
[27] This is the meaning of rational connection as defined by the SCC (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, at para 153).
[28] *Bill C-11: Why is YouTube mad at Canada?* (May 2023), online: BBC News <https://www.bbc.com/news/world-us-canada-65420133>.
[29] See: *Oakes* at para 70.
[30] When considering minimal impairment, courts are to consider whether there are reasonable alternatives that are less impairing and equally or more effective (see, for example: *R v Chaulk,* [1990] 3 SCR 1303).
[31] *Online Streaming Act,* s 3(3)(iii).

diversity in these realms is a more concrete way to advance section 15 rights because it confers actual tangible opportunities to minorities. It also impairs freedom of expression significantly less because listeners are still free to browse the internet without interference.

The production of politically desirable, diverse content is one thing. Covertly forcing Canadians to consume content that does not interest them is entirely another.

iii. Proportionality

The last step of the section 1 analysis asks whether the benefits of the infringement on society outweigh the negative effects on individual rights.[32] As described above, there is little to no benefit in allowing the CRTC to decide what content should be discoverable to Canadians. Personalized, engagement-based algorithms serve the needs of all Canadians by facilitating their own individual exploration of online content. All Canadians, including minorities, should be wary of allowing the government to supplant their preferences for those of the prevailing political party.

Even considering the personal benefit to those people whose content gets artificially uplifted by the CRTC, this pales in comparison to the massive impediment the *Online Streaming Act* has on freedom of expression. As explained by Mill, individual truth-seeking and fulfilment is based upon *free* exploration, not government-imposed uniformity.[33] Curating an artificially diverse array of content that is shown to *all* Canadians, irrespective of their *individual* interests, crushes the values underlying section 2(b) in a never-before-seen way.

IV. Conclusion

It is not the government's place to decide what content is worth viewing online. Doing so is the equivalent of the government muzzling some voices on the street and giving megaphones to others. The *Online Streaming Act* is an unprecedented encroachment into the private process by

[32] *Canada (Attorney General) v JTI-Macdonald Corp*., 2007 SCC 30 at para 45.
[33] "On Liberty" at 134-135.

which Canadians pursue truth and fulfilment. On a moral and philosophical level, it should cause all Canadians to shudder. Although the *Charter* allows reasonable limits and the government is given considerable deference at the section 1 stage, there are avenues by which to argue that the *Online Streaming Act* does not pass constitutional muster.

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