



C- 10 AND THE CONSTITUTION

A Submission to the Standing Committee on Canadian
Heritage

Abstract

The extension of the Broadcasting Act to online, on demand internet streaming services is unconstitutional as being beyond the power of Parliament to legislate either with respect to interprovincial undertakings or to legislation of national concern within the Peace, Order and Good Government clause of the Constitution Act..

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Purpose of this Submission

1. This submission is made to the Standing Committee on Canadian Heritage in the context of its pre-study of Bill C-10. It examines the constitutionality, if Bill C-10 is adopted, of the extension of the *Broadcasting Act* to online, on demand streaming services. In effect, this submission seeks to explore whether Parliament has the legislative competence to make laws respecting online, on demand services.

Canadian Charter of Rights and Freedoms

2. Bill C-10 may give rise to a host of issues that implicate the *Canadian Charter of Rights and Freedoms*. However, those issues are only likely to arise if Bill C-10 is adopted substantially in its present form. They are likely to take substantial form during the implementation of the legislation by the CRTC. It is too speculative to consider those issues at present.

Broadcasting vs. Narrowcasting

3. The use of the term “broadcasting” to describe a means of communication is metaphorical. The term broadcasting derives from agriculture, where it describes the scattering of seed over an area. Its counterpart is narrowcasting: a controlled planting of seed in rows or drills.
4. When translated into the world of communications, broadcasting describes the communication of one to many: the dissemination of meaning by the originator to anyone who may be reached by the radio signals carrying the message. Narrowcasting, by contrast, is the communication by the originator to one or a limited number of persons. Online, on demand streaming services constitute the extreme end of narrowcasting. The message (program) is only made available to the recipient at his or her request, and at the time of their choosing. On demand communication contrasts starkly from broadcasting.
5. Bill C-10 seeks to erase the legal distinction between broadcasting and narrowcasting with respect to online, on demand services. Under C-10, on demand services are to be regulated as broadcasting, and subject to the Broadcasting Policy for Canada set out in s. 3(1) of the *Broadcasting Act*, as well as to the regulatory powers of the CRTC set out in ss. 9, 9.1, 10 and 11 of the Act. The move to bring online, on demand services under the *Broadcasting Act* raises significant constitutional issues. It is the purpose of this submission to briefly consider the constitutional law challenges posed by C-10.

Factual Background

6. The constitutional power to legislate with respect to a given subject depends on the factual situation to which a law is to apply. For that reason, we are setting forth the key facts that determine how the courts would analyze the constitutionality of C-10.

i. Traditional Broadcasting

7. Over-the-air broadcasting involves the transmission of content (programs in the language of the *Broadcasting Act*) from the originator (programming undertaking) to the public by means of telecommunications. The transmission can be direct by means of radio waves or other telecommunications carriage, or indirect, through a 'broadcasting distribution undertaking' (BDU) that 'receives and retransmits' broadcasting by means of telecommunications. The recipient of the transmission can listen to it on a radio receiver or view it on a television or computer screen (broadcasting receiving apparatus). The recipients have no control over what is communicated to them. It is the broadcaster who decides what is to be communicated and when it is to be communicated. Traditional broadcasters transmit even if no one is listening.
8. A recipient, displeased with what they hear or see, can change the channel to receive what another broadcaster has to offer, or can turn off their radio or television. What they cannot do is choose what the broadcaster will transmit to them.
9. The broadcaster, whether a programming undertaking or a BDU, singly or between them, controls the content and the communication path of the transmission. A programming undertaking controls every aspect of the content of the transmission that carries the programming. The programming undertaking is assigned either exclusive radio frequencies that may cross provincial and international boundaries or exclusive channel capacity on a BDU. A BDU *retransmits* an over-the-air signal or *transmits* signals sent to it by a programming undertaking that does not broadcast over-the air (e.g., specialty channels).

ii. Online, On demand Streaming Services

10. The online, on demand streaming services, which Bill C-10 seeks to capture, are but an infinitesimal portion of the millions of applications and other content streamed over the Internet. What we call streaming services are more akin to a digitized jukebox or video store. The streaming service maintains on its servers databases composed of a mix of programs: music, films, comedy, drama, series, specials. A subscriber sends by telecommunications a request to view or listen to chosen content. The streamer's servers verify the identity of the subscriber and then transmits the program from its computers to the subscriber by means of telecommunications. Unlike traditional broadcasting, there is no "programming" of content, and no transmission of content until requested by the subscriber.
11. There is a fundamental difference between, on one hand, passively selecting and receiving one-way radio and TV signals and, on the other hand, actively accessing content on demand from a catalogue. The former puts the 'broadcaster' in control. The

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latter is a form of electronic commerce – a transaction – between the user and the service provider.

12. The content that is transmitted by the streamer is like any other application on the Internet. The content, whether we call it TV or movie, is understood in Internet terms as an application. It might just as well be an interactive game, a book, an operating system, or any other kind of software. The streamer acts as a specialized kind of software distributor that uses telecommunications to transmit its content to the end user. The streamer is not distinguished technically from other distributors of software, but by the kinds of content that it offers its subscribers. C-10 may unwittingly capture many other forms of content and application distributors, as for instance, the websites of established cultural institutions such as the Stratford Shakespeare Festival, Le Theatre du Nouveau Monde, and Cinema Quebec – all of which stream audio-visual content.
13. Two aspects of online, on demand streaming distinguish it from broadcasting, as it is legally understood.
14. First, subscribers are free to select what programs they want to watch or listen to, and when they will enjoy it. The subscribers act as their own programming curators: they control the content they receives and its scheduling. This is a much greater freedom than to switch among a limited number of licensed broadcasting channels that provide fixed menus.
15. Second, the content streamer does not choose or control the communications path between itself and its subscribers. The selected content is transmitted by telecommunications carriers over their facilities by means of digital packets that are disaggregated during transmission and then reassembled at the recipient's end. Telecommunications carriers transmit the chosen content across provincial and international boundaries to the program consumer¹. There is no 'dedicated channel' — physical or otherwise — between the streamer and the end-user. Indeed, if a million people are watching the same program from the same streamer at the same time, there will be a million discrete streams, each one controlled by the user who may pause, rewind or terminate the transmission at will.

Division of Powers

i. Interprovincial and International Works and Undertakings

16. There is no mention of broadcasting in the Constitution Act, 1867 – the use of radio waves for communications had not yet been discovered. Telegraphy and post were the prevalent means of distance communication, and both were assigned by the then British North America Act to Parliament. It was ultimately up to the courts to determine whether

¹ In some cases, streaming services may have telecommunications facilities that cross provincial or international boundaries. It is understood that those facilities are used for enterprise-internal communications only and are not used to communicate programs to the public.

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Parliament or the provincial legislatures had the competence to legislate with reference to broadcasting.

17. The *Radio Reference*² of 1932 is a decision of the Judicial Committee of the Privy Council that determined that Parliament has legislative authority over broadcasting. That decision rests on the authority of Parliament to legislate with reference to interprovincial and international works and undertakings (section 91(29) of the *Constitution Act, 1867* as being a matter excluded by paragraph 92(10)(a) from matters of provincial legislative authority³). Section 92(1)(a) reads as follows:

10. Local Works and Undertakings *other than* such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, *Telegraphs*, and other *Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province . . .* [emphasis added]

18. The Privy Council found that radio waves do not respect provincial and international boundaries and that the transmission of radio waves was similar in concept to telegraphs (as conveying intelligence at distance). On that basis, the Privy Council found broadcasting to constitute an interprovincial or international work or undertaking subject to the exclusive legislative authority of Parliament.⁴ Importantly, they also held that both the transmission and reception of broadcasting was within the legislative competence of Parliament.⁵

19. The arrival of cable television presented a potential technological challenge to Parliament's competence to legislate with reference to programing content. Cable television involves the capture of over-the-air radio signals and their redistribution through coaxial cable to subscribers. It was possible to conceive of cable systems as consisting of a federally regulated radio reception undertaking and a provincially regulated distribution undertaking. However, in both *Capital Cities*⁶ and *Dionne*⁷ the Supreme Court of Canada rejected the contention that cable networks could be so divided. . The Court found that the radio reception aspect of cable carriers could not be divided from the retransmission by coaxial cable of those signals⁸, thus retaining the interprovincial undertaking character and ensuring the continued legislative competence of Parliament over cable networks.

² *Re Regulation & Control of Radio Communication in Canada*, 1932 CanLII 354 (UK JCPC), [1932] AC 304, [1932] 2 DLR 81, [1932] 1 WWR 563.

³ *Canada (Attorney General) / Ontario (Attorney General)*, 1937 CanLII 362 (UK JCPC).

⁴ Above, p.5.

⁵ Above, p.5.

⁶ *Capital Cities Comm. v. C.R.T.C.*, 1977 CanLII 12 (SCC), [1978] 2 SCR 141, at p. 159.

⁷ *Public Service Board et al. v. Dionne et al.*, 1977 CanLII 207 (SCC), [1978] 2 SCR 191, at p. 197.

⁸ *Capital Cities*, at p. 159, *Dionne*, at pp. 197-198.

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20. Online streaming services, whether domestic or foreign, do not rely on over-the-air radio signals: they do not transmit by radio (no frequency scarcity concerns apply) and they do not control how their programming reaches consumers. As we have noted above, streaming services are delivered to the public through telecommunications carriers. This distinction is critical to any analysis of the constitutionality of Bill C-10.
21. As we have seen, Parliament's authority over broadcasting derives from paragraph 92(10)(a) of the *Constitution Act* and is factually based on the use of radio waves to carry broadcast programming to listeners and viewers. The courts determined that cable television is an extension of over-the-air broadcasting. All of which was based on the notion that radio waves crossed provincial and international boundaries.
22. Streaming services do not use assigned radio frequencies to reach their audience. Hence, they are not, themselves, interprovincial undertakings. For the delivery of content, online streaming services depend on telecommunications carriers to transport programming across provincial and international boundaries. The mere fact of relying on telecommunications to conduct one's business is not enough to bring an enterprise within federal legislative authority. Netflix and Spotify are not broadcasters: they are, respectively, a digital video store and digital jukebox. Federal legislation has never reached to the regulation of video stores or jukeboxes – or cinemas for that matter. How can the mere fact of digital transmission change the fundamental nature of the underlying undertaking?
23. There are numerous examples of national or international businesses that are beyond the reach of federal regulation. A law firm providing advice across a provincial boundary is not a federal undertaking because it makes use of the post or telecommunications carriers to provide that advice. It has been repeatedly determined by the Supreme Court that, so long as they do not themselves carry goods or operate transmission facilities across provincial boundaries, national and international businesses do not fall under federal legislative competence just because they operate in a variety of jurisdictions. The aspect that attracts the federal legislative power is the actual interprovincial connection: whether railroads, trucking, pipelines, telecommunications systems or bridges. As articulated by Mr. Justice Rothstein in *Fastfrate*⁹:

[43] The common thread among the enumerated *transportation* works and undertakings in s. 92(10)(a) — “Lines of Steam or other Ships, Railways, Canals” — is the interprovincial transport of goods or persons. The enumerated examples are all instruments of or means of facilitating actual transport. There is no reference to, or implication of, third parties connected to the means of actual transport through contract being subject to federal jurisdiction. The genus of works and undertakings contemplated in s. 92(10)(a) as “connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province” consists of those that *physically* connect the provinces through transport, not those

⁹ *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 (CanLII), [2009] 3 SCR 407, at paras.

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that *notionally* connect them through contract. In my view, the basket clause “other Works and Undertakings” should be interpreted in this *ejusdem generis* manner.

[44] I am therefore of the view that a requirement for federal jurisdiction over transportation undertakings is that the undertaking itself physically operates or facilitates carriage across interprovincial boundaries. In my view, this approach best reflects the text of s. 92(10) and preserves the intent of the *Constitution Act, 1867*, which sees federal jurisdiction over both works and undertakings and labour relations as the exception, rather than the rule.

24. The cited paragraphs refer to transportation. In his subsequent discussion Rothstein J., acknowledged there were some aspects of communications undertakings that differed from the transportation cases. However, in the communications cases, all of the entities found to be interprovincial undertakings have been those that actually provide a telecommunications (transport) service¹⁰. In no case has a business been found to be an interprovincial undertaking because it is a client of or dependent on interprovincial or international telecommunications provided by a third-party carrier.
25. Internet streaming services do not provide a telecommunications service – they provide content (such as movies, drama series or music) to individual customers. It is the telecommunication carriers who transport that content. They are the interprovincial undertakings. The streamers – and more particularly the consumers – are but the customers of the interprovincial and international telecommunications undertakings.
26. In short, technology does matter. So too do the relations between the streaming services and their customers. Facts are critical to determining legislative competence. The facts of online streaming services take them outside the class of interprovincial undertakings. Online streaming services are beyond the legislative competence of Parliament under the exceptions to exclusive provincial legislative authority in paragraph 92(10)(a). Online streaming services are not interprovincial undertakings.

ii. Matters of National Concern

27. It may be argued that there are other heads of federal legislative authority that might, in lieu of reliance on paragraph 92(10)(a), serve as a basis for federal legislative authority over streaming services.
28. Foremost among the possible alternative heads of power is the so-called “national concern” doctrine.

¹⁰ See: *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, 1989 CanLII 78 (SCC), [1989] 2 SCR 225, and *Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications)*, 1994 CanLII 130 (SCC), [1994] 1 SCR 878.

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29. The residual legislative competence of Parliament is “to make laws for the Peace, Order and Good Governance of Canada¹¹” (popularly known in legal circles as POGG). The jurisprudence has evolved to posit that POGG is composed of two branches.
30. The first branch is the “emergency power” which certainly includes wartime measures and was interpreted to justify the *Anti-inflation Act*,¹² which extended wage and price controls that overrode provincial powers over labour relations, contracts, and other matters of provincial legislative competence. The emergency power permits Parliament to *temporarily* invade provincial jurisdiction for the duration of the emergency.
31. The second, and more problematic branch, is the national concern doctrine.
32. The national concern doctrine dates to the following remarks of Lord Watson in the *Canada Temperance Act* case¹³:
- Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition, in the interest of the Dominion. But great caution must be observed, in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.
33. In the intervening 125 years there has been much judicial comment on the doctrine, and in the see-saw nature of Canadian federalism, there have been times when the national concern doctrine was ascendent and times when it was out of favour.
34. It has been applied to matters as diverse as aeronautics, the establishment of the National Capital Region, and is currently one of the justifications under consideration in the Supreme Court in its deliberations on the federal government’s carbon pricing legislation. The effect of judicial recognition of a subject matter as being properly a matter of national concern is to *permanently* subject a matter of the exclusive legislative competence of Parliament. As the doctrine is capable of virtually infinite expansion, the courts have been conservative in applying the doctrine so as not to expand federal legislative competence at the expense of the legislative powers of the provinces.
35. It is beyond the scope of this submission to elaborate on the many cases in which the doctrine has been discussed and elaborated. It is sufficient to say that the principal

¹¹ *Constitution Act, 1867*, introductory words of s. 91 that enumerates the powers of Parliament.

¹² *Reference re. the Anti-Inflation Act* [1976] 2 SCR 373 - 1976-07-12.

¹³ *The Attorney General for Ontario v The Attorney General for the Dominion of Canada (Canada)* [1896] UKPC 20 (9 May 1896), BAILI at p. 9.

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elements of the doctrine were articulated by Le Dain, J. in *R. v. Crown Zellerbach*¹⁴ as follows:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. [italics added for emphasis]
36. While broadcasting is certainly a new matter within the sense of paragraph 2 (a matter that did not exist at Confederation), that does not automatically lead to its characterization as a matter of national concern. To fit within the framework of the national concern doctrine, the subject matter must meet the criteria set out in paragraphs 3 and 4 above.
37. Traditional broadcasting is composed of two elements: radiocommunication and programs (content). If the radiocommunication component (the component critical to the interprovincial character of broadcasting) is removed from broadcasting, what remains? Only programs. Can “programs” be a matter of national concern? The following questions arise: What are programs? Are they a new and novel subject matter? Are they a single, distinct, and indivisible subject matter? What would be the effect on extra-provincial interests if a province failed to legislate with regards to programs?
38. Programs are merely a form of artistic or informational expression, composed of many genres, some of which have been present since classical times. Drama, comedy, dance, music, poetry-readings all existed before the employment of radio waves. They all existed at the time of Confederation. They and their more recently evolved forms have all been presented in theatres, concert halls, taverns, tents, band stands, Canadian Legion Halls, burlesques, and cinemas. Informational expression was and continues to be propagated by books, newspapers, posters and handbills.

¹⁴ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 at paragraph 33.

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39. Is there anything about programs that meets the test of “a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern?” I believe there is not. Uncoupled from the underlying radio carriage, there is nothing that is sufficiently distinct about programs that they can be brought within federal legislative power. Programs are merely cultural and informational expression.
40. No one has yet asserted that, outside the context of broadcasting, the federal government has the authority to legislate so as to regulate culture. Parliament has legislated to create cultural agencies, to appropriate monies to support its cultural policies, and to provide tax incentives that favour expenditures on Canadian culture. While the federal government has been active in supporting various means of cultural and informational expression, it has not regulated the content of that expression.
41. Canada has extensive grant and contribution programs to assist cultural expression. It acts through agencies such as the Canada Council for the Arts, Telefilm Canada, the National Arts Centre, the National Film Board, the national museums, and the Canadian Broadcasting Corporation to encourage and develop Canadian cultural and informational expression in myriad ways. It further provides support for the dissemination of Canadian culture internationally. However, there is nothing singular about the efforts of the federal government.
42. All provinces have active programs to support culture and the arts within their boundaries. This support arises from the inherent powers of the provincial governments. All provinces have laws and policies that are designed to deal with the challenges facing the creators of cultural expression within their boundaries. Provincial tax credits are made available to encourage film and television production within their boundaries.
43. The provinces, subject to the constitutionally protected right to free expression, likewise exercise their legislative powers to regulate and licence cultural expression and the arenas in which culture is demonstrated and voiced. The provinces have regulated cinemas (gradually moving from censorship to classification) and controlled the display of obscene or suggestive matter in live performances. The provinces have prosecuted the display of obscene matter in art galleries and removed seditious books from book shops. They regulate the way in which adult magazines may be displayed to the public. The provinces determine the laws of slander and libel.
44. Finally, what would be the extra-provincial effect of one province failing to legislate with respect to programs? In *Crown Zellerbach*, it was relatively easy to imagine that noxious substances dumped in the territorial waters of a province could have a serious impact on an adjoining province or federal waters. Would there be a similar effect if Ontario did not legislate with reference to websites within or outside its borders? I believe the answer is no. If the purpose of C-10 is to raise revenues for Canadian productions – that can be done by the separate provinces. The failure of one province to demand a percentage of Canadian content would not necessitate the failure of a content requirement in another province. In a

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country as decentralized as Canada, there is no compelling case for the federal government to regulate a matter of local interest and concern.

45. In short, the subject matter “programs” is not one that has arisen since Confederation. The subject matter is not distinguishable from matters the provinces have their powers to regulate. Programs cannot be distinguished from other forms of cultural and informational expression. In my opinion, programs are therefore not a matter of national concern, and so cannot be a matter over which Parliament can exercise exclusive legislative competence.

Conclusion

46. The following summarizes the conclusions reached in this analysis:

- a. Factually, online, on demand streaming services are easily distinguishable from traditional over-the-air broadcasting.
 - b. The critical factual distinction is that streaming services do not transport their content to listeners and viewers. Traditional broadcasters do.
 - c. The transport of content (programs) is key to the status of traditional broadcasters as interprovincial undertakings and so to their being subject to the exclusive legislative power of Parliament.
 - d. Because streaming services do not transport or control the transport of their content, they are not interprovincial undertakings and do not fall within the legislative competence of Parliament on that basis.
 - e. Stripped of the radiocommunication component, broadcasting is merely programs.
 - f. A head of legislative power that could found the basis of Parliament exercising legislative competence over programs is its power to legislate with regard to matters of national concern.
 - g. Programs are not a subject matter that is marked by “singleness, distinctiveness and indivisibility” and so federal legislative authority over programs cannot be justified under the national concern doctrine.
47. Based on the foregoing, it is my submission that Bill C-10, in so far as it is purports to legislate with reference to online, on demand streaming services is unconstitutional as being beyond the legislative competence of the Parliament of Canada.

Respectfully submitted,

Philip Palmer

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