INTERNET REGULATION UNDER THE CANADIAN CONSTITUTION

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In January 2020, the Broadcasting and Telecommunications Legislative Review Panel issued its report [1]. Among its 97 recommendations was “that all media content undertakings that benefit from the Canadian media communications sector contribute to it in an equitable manner.” This would include internet streaming services like Netflix which up to now have been exempted from regulation.

The Government has now introduced amendments to the *Broadcasting Act* that would specifically allow internet programming services like Netflix to be regulated, as called for in the Panel Report. Undertakings for the transmission of programs over the Internet would be referred to as “online undertakings” and would be subject to a separate regulatory regime under the Act.

But would this be constitutional?

The Internet Society Canada Chapter (ISCC) doesn’t think so.

It is not a surprise to see this group oppose any regulation of the internet, since its views are largely driven by the laissez-faire aims of its US counterpart.

[1] *Canada’s Communications Future: Time to Act*, Final Report of the Broadcasting and Telecommunications Legislative Review Panel, January 29, 2020 (“Final Report”). The author of this essay was a member of the Panel.

However, the ISCC goes further. It argues that federal jurisdiction does not apply to internet content providers like Netflix. Its argument was made in the following terms:

> The Panel's move to regulate online content providers invites a major constitutional challenge. Broadcasting is not a head of power assigned to the federal government by the Canada Act 1867. Audio-video content is not inherently within the scope of federal regulation. The provinces have always regulated cinemas—the original audio-video content disseminator. The seminal case concerning broadcasting, the *Radio Reference* of 1932, put broadcasting under federal regulation only because the means of its dissemination— radio waves, inherently cross inter-provincial and international boundaries. Broadcasters were thus found to be interprovincial undertakings—an exception to the general rule that the provincial powers over property and civil rights and local undertakings take precedence to federal legislative powers.
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> The federal jurisdiction over broadcasting was thus dependent on the technology of dissemination—radio waves. This rationale was affirmed in decisions recognizing federal legislative power over cable television. However, the bulk transport of data through the Internet does not rely on their transmission of radio waves. Online content providers do not have the means of delivering programing to the public. Their transmissions are made through telecommunications common carriers—which are inter-provincial undertakings within the federal legislative power. It is thus the view of ISCC that the federal government lacks the jurisdiction to legislate with regard to online content providers. It would appear to us that the whole schema proposed by the Panel falls on this issue. Not only is it unusual and unwise to attempt to regulate online content providers as broadcasters—it is unconstitutional for the federal Parliament to do so.

So is there any merit in the ISCC argument? One might expect the ISCC to refer to court cases in support of its position. But it chose not to do so.

This memorandum explores this issue by looking at the jurisprudence, including the relevant court cases. And it becomes clear that the ISCC argument is completely mistaken. In fact, it is quite clear that online content providers like Netflix would be subject to federal jurisdiction in Canada.

PROVINCIALLY REGULATED UNDERTAKINGS

In carrying out any analysis, it is important to understand what we are talking about. Many commercial enterprises in Canada have a website and make incidental use of the internet. But that does not make them federally regulated undertakings. For example, it has been held that "a retail store operator whose regular day-to-day activities are the sale of retail goods to customers at its stores and through its website" would fall under provincial jurisdiction, despite its use of the website [2].

[2] *Papouchine v. Best Buy Canada*, 2018 FC 1236 (CanLII)

Film and television production companies also generally fall under provincial jurisdiction even though they may sell their programs to federally regulated broadcasters [3]. However, this does not apply if the production activity is integrated with the broadcasting operation. In that case, the whole entity falls under exclusive federal jurisdiction [4].

In the Report of the Broadcasting and Telecommunications Legislative Review Panel, it was stated that its recommendations should not apply to undertakings whose distribution of content on the internet was only ancillary to a different primary purpose. As noted in the Report, "Examples of excluded content include travel sites, real estate sales sites, hospital health provision sites, and the myriad of e-commerce sites that send media content to the public via telecommunications as part of a different business [5]." Many of these undertakings would likely fall under provincial jurisdiction.

But undertakings like Netflix whose primary purpose is to distribute content on the internet are quite different.

FEDERAL JURISDICTION OVER INTERNET UNDERTAKINGS

The ISCC concedes that the telecommunications carriers that distribute the internet, like Bell, Telus and Rogers, fall under exclusive federal jurisdiction since they are clearly interprovincial undertakings under section 92(10)(a) of the *Constitution Act*. That provision gives exclusive federal jurisdiction to "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." In that connection, the Supreme Court of Canada has ruled that internet service providers fall under the *Telecommunications Act*, rather than the *Broadcasting Act*, since ISPs take no part in the selection, origination or packaging of content [6].

Unlike ISPs, online content providers are involved in the selection, origination and packaging of content.But since they do not own the means of transmission themselves, ISCC argues that they would not be regarded as interprovincial undertakings.

What this entirely ignores is the wide meaning of the word "undertaking". As stated in the *Radio Reference*, an undertaking "is not a physical thing but is an arrangement under which of course physical things are used [7]." Thus there is no need for a company to own the means of transmission to be considered an interprovincial undertaking [8]. The real question is what is the nature of the undertaking?

[3] *Canadian Labour Relations Board et al. v. Paul L'Anglais Inc. et al*, [1983] 1 SCR 147, 146 DLR (3d) 202. Also see *Paul L'Anglais Inc. v. Canada (Labour Relations Board)*, 1980 CanLII 2460 (QC CA)
[4] *City-TV, CHUM City Productions Limited, MuchMusic Network and BRAVO!, Division of CHUM Limited*, 1999 CIRB 22 (CanLII); *Writers Guild of Canada v. Canadian Broadcasting Corporation*, 2006 CanLII 24463 (ON SCDC); see also *Island Telecom Inc.*, 2000 CIRB 59 (CanLII)
[5] Final Report, at p.131.
[6] *Reference re Broadcasting Act,* 2012 SCC 4, [2012] 1 SCR 142
[7] *Radio Reference*, [1932] AC 304.
[8] For example, Nortel installers were held to be under exclusive federal jurisdiction even though they did not transmit signals; the actual transmission was done on facilities owned and operated by Bell Canada. See *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1983] SCR 733, 147 DLR (3d) 1.

In that regard, one can point to the undisputed federal jurisdiction over the satellite program providers Shaw Direct (formerly StarChoice) and Bell Satellite TV (formerly Bell ExpressVu). Neither of these entities own their means of transmission, which is entirely provided by Telesat Canada. Yet can anyone seriously argue that these are not interprovincial undertakings?

Similarly, dozens of specialty programming services like TSN or the History Network are licensed by the CRTC but they transmit their programming using carrier facilities rather than through their own assigned radio spectrum. Nonetheless, they clearly qualify as interprovincial undertakings. Why? Because their basic business or undertaking is to arrange for the distribution of programming across boundaries.

In that regard, it is useful to recall the statement by the CRTC in 1993 about its jurisdiction over foreign direct broadcast service (DBS) providers [9].

> With respect to foreign DBS service providers that may wish to enter the Canadian market, the Commission has determined that it would in certain circumstances have jurisdiction over them under subsection 4(2) of the Act. A DBS service provider whose signal is receivable in Canada could be found to be carrying on a broadcasting undertaking in Canada in whole or in part where, for example, it has some or all of the following characteristics:
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> • It acquires program rights for Canada.
> • It solicits subscribers in Canada.
> • It solicits advertising in Canada.
> • It activates and deactivates the decoders of Canadian subscribers.
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> The Commission will apply the appropriate enforcement tools to assert its jurisdiction over these undertakings should they enter the Canadian market without making contributions to the Canadian system as required of all broadcasting undertakings under the Act.

The same factors obviously apply to internet content providers like Netflix, Amazon Prime, Disney+, and Crave. They all acquire program rights for Canada, solicit subscribers in Canada and control access to their programming.Their core business is to send those programs to internet subscribers for compensation, across provincial or national boundaries if necessary.

Like most specialty programming services carried by satellite or cable, those companies do not own the means of transmission but arrange for such transmission on the internet through telecom carriers. However, to suggest that the operations of the online content providers in organizing their business through these arrangements do not constitute interprovincial undertakings under s. 92(10)(a) is to fly in the face of reality.

[9] *Structural Public Hearing*, Public Notice CRTC 1993–74, June 3, 1993.

THE TRADE AND COMMERCE POWER

Internet regulation at the federal level can also be justified under the trade and commerce power given to the federal government in section 91(2) of the *Constitution Act*.

As held by the Supreme Court of Canada in the *General Motors* case in 1989, to fall under the general branch of s. 91(2), legislation must engage the national interest in a manner that is qualitatively different from provincial concerns [10]. Whether a law is validly adopted under the general trade and commerce power may be ascertained by asking (1) whether the law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country. These indicia of validity are not exhaustive, nor is it necessary that they be present in every case.

The trade and commerce power supports federal legislation respecting competition policy, including the prohibition of misleading advertising. It also supports federal privacy legislation as well as *Canada's Anti-Spam Legislation (CASL)* [11]. So even local businesses that fall under provincial jurisdiction are subject to these laws, which affect how they utilize the internet.

The application of the trade and commerce power to justify federal regulation of online content providers is also obvious. As Nadon J.A. stated in the recent Federal Court of Appeal decision supporting federal regulation of spam, "When it comes to the genuinely national goals of safeguarding the digital economy from electronic threats that could easily emanate from, and visit their deleterious effects on, any place in the country, federal regulation is essential [12]." Most of the elements listed in the *General Motors* case would apply to online content providers, particularly those operating from outside Canada, as most of them do. So this clearly supports federal jurisdiction.

PEACE ORDER AND GOOD GOVERNMENT

Finally, there is the Peace Order and Good Government (POGG) clause in the constitution. . Under the "national dimension" test, which has been applied to radiocommunication, if the subject matter of legislation goes beyond local or provincial concerns or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of Parliament as a matter affecting the peace, order and good government of Canada [13]. This has also been called the "national concern" test.

[10] *General Motors of Canada Ltd. v. City National Leasing,* [1989] 1 SCR 641
[11] *3510395 Canada Inc. v. Canada (Attorney General),* 2020 FCA 103 (CanLII)
[12] *Ibid.,* at paragraph 126.
[13] *Reference re Anti-Inflation Act,* [1976] 2 SCR 373.

In 1991, the definition of “broadcasting” in the *Broadcasting Act* was purposely expanded beyond the use of radio waves to include the transmission of programs “by wire, cable, radio, optical or other electromagnetic system”. Thus, transmission of programs over the internet clearly constitutes “broadcasting” under the Act.It is also true that just like programs transmitted through radio, programs transmitted through the internet ignore provincial boundaries. Given these circumstances, it is obvious that the same arguments that led to the court declaring exclusive federal jurisdiction over radio in 1932 also apply to the internet.

The relevance of the Peace Order and Good Government clause has recently been underlined in the Supreme Court of Canada in its decision that the federal carbon tax was constitutional [14]. The tax was a key part of the federal plan to address climate change, and the federal government argued that given the national dimension of the issue, its actions were justified under the POGG clause. The court recognized that climate change does not respect boundaries, and that any Canadian response to it would only be effective if it were applied at the federal level.

The same conclusion applies to the regulation of internet program providers. For all the reasons outlined in this essay, online content providers like Netflix, Amazon Prime, Disney+, and Crave would clearly be subject to federal jurisdiction in Canada.

[14] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII).

ABOUT THE AUTHOR

Peter S. Grant is Adjunct Professor at the Schulich School of Business, York University. On May 1, 2020, Mr. Grant retired as Counsel at McCarthy Tétrault LLP in Toronto, after practising law with the firm for over 50 years. He was the past chair of its Technology, Communications and Intellectual Property Group.

Peter Grant is an expert on communications law, entertainment law, copyright law, and cultural and trade policy. In the communications field, he is the co-author of numerous articles and publications, including the *Canadian Broadcasting Regulatory Handbook*, the 14th edition of which was published in 2017. The handbook is the standard reference in Canada on the *Broadcasting Act* (Canada) and the regulations and policies of the Canadian Radio-television and Telecommunications Commission (CRTC). In the copyright field, Peter is the principal author of the *Guide to the Copyright Board of Canada,* published in 2020. He is also the author of *Communications Law and the Courts in Canada*, the third edition of which was published in 2020.

In 2004, Douglas & McIntyre published *Blockbusters* and *Trade Wars: Popular Culture in a Globalized World*, a book co-authored by Peter Grant and Chris Wood. The book focuses on the economics of popular culture, the efforts to provide diversity of expression around the world and the impact of technology and trade law on the dissemination of cultural products. The book has been called "brilliant and sweeping" by the Toronto Star.

In 2013, the Porcupine's Quill published Mr. Grant's autobiography, entitled *Changing Channels: Confessions of a Canadian Communications Lawyer.* The book was called "a must read for law students, lawyers (of all seniority) as well as students and practitioners of public policy" in the Journal of Parliamentary and Political Law.

From 1993 to 2020, Mr. Grant was appointed to act as the Broadcasting Arbitrator in federal elections, with the approval of all parties in the House of Commons.

Mr. Grant was one of six experts appointed by the federal government to the Broadcasting and Telecommunications Legislative Review Panel in 2018. That Panel issued its Final Report on January 27, 2020, entitled C*anada's Communications Future: Time to Act.*