Intelligence MEMOS

From: Philip Palmer

To: Canadians Concerned about Internet Regulation

Date: May 25, 2021

Re: C-10: An Unconstitutional Power Grab

Bill C-10 seeks to amend the *Broadcasting Act* to subject Internet streaming and social media services to regulation by the CRTC.

The existing Act provides a technologically neutral definition of broadcasting as being the transmission of programs (defined as sound or visual images) by any means of telecommunication. The authors of Bill C-10 appear to assume that the definition is consistent with federal legislative jurisdiction, and that the Constitution permits the federal government to regulate the transmission of programs on the Internet. We believe that view to be incorrect, and that C-10 is beyond the legislative competence of Parliament.

At issue in assessing the constitutionality of C-10, which seeks to encompass virtually all images and sound on the Internet – worldwide – is whether the 1991 technology neutral definition of broadcasting is constitutionally valid. In brief, is the purported reach of the *Broadcasting Act* coextensive with the constitutional limits of Parliament's legislative authority?

In short: It is not.

A bit of history is necessary. In 1932, the Privy Council held in the *Radio Reference* that broadcasting was within the exclusive jurisdiction of Parliament. Upholding a Supreme Court of Canada decision, the Privy Council concluded that the transmission of radio waves of necessity involved their crossing provincial and international boundaries. In consequence, broadcasting undertakings were to be categorized as interprovincial undertakings. The Privy Council held that Parliament had exclusive jurisdiction over programs transmitted by radio waves: not over the transmission of programs by other means.

The *Radio Reference* is technologically specific to the employment of radio waves as the transmission technology. The extension of federal jurisdiction to cable television in the 1970's was, again, predicated upon the fact that cable undertakings captured and then retransmitted over-the-air TV and radio signals through terrestrial communications facilities to their customers. The capture and retransmission of radio waves carrying programs coming from other provinces or the United States meant that cable systems were to be categorized as interprovincial undertakings subject to federal regulation.

In 1991, the existing *Broadcasting Act* was adopted with its "technology neutral" definition of broadcasting that includes the transmission of programs by any means of telecommunication. In other words, Parliament adopted as law an extension of parliamentary authority, essentially asserting that programs transmitted other than by radio waves are subject to federal legislative authority.

This extension of the definition of broadcasting had little impact at the time, but arrival of the Internet to challenge pre-existing forms of content delivery has placed that redefinition at the heart of the government's plans to regulate web giants.

Parliament has authority over interprovincial undertakings: undertakings that connect one province to another. Broadcasters and telecommunications carriers are under federal legislative authority because they own and control facilities that enable cross-border communications.

But streaming services do no such thing. They are neither broadcasters nor telecommunications carriers. Their content is transmitted to the public over the facilities owned and controlled by telecommunications common carriers. Telecommunications common carriers are interprovincial undertakings and are subject to federal regulation under the *Telecommunications Act*. At best, streaming services such as Netflix, Britbox, and social media services such as YouTube, TikTok or Instagram are clients of the telecommunications common carriers. Netflix does not own or control the telecommunications facilities that connect Ontario with Quebec: Bell Canada does.

There is no authority in Canadian law for the proposition that a business relying on interprovincial undertakings to transmit messages or carry goods between the provinces are thereby subject to federal regulation. The customers of telephone companies or railways are not subject to federal regulation by virtue of making interprovincial calls or shipping goods by rail. Only the actual telecommunications carrier or goods carrier is subject to federal regulation. A business relying on the services of the carrier, be it a law firm, a national chain store, or an Amazon warehouse are not federally regulated undertakings.

It is evident that the technology neutral definition of broadcasting, which remains the cornerstone of C-10's radical expansion of federal regulatory authority to the Internet, exceeds the constitutional limits of the legislative authority of Parliament. C-10 seeks to subsume to the *Broadcasting Act* a host of entities that are not interprovincial undertakings. Both the current definition of broadcasting, and the attempt to regulate Internet services under the *Broadcasting Act* are unconstitutional.

Years of litigation and uncertainty will be the inevitable result of the legislative overreach of the federal government under the guise of broadcasting legislation. It is unclear how this will help a domestic industry whose business model is threatened by disruption in the present tense.

Philip Palmer is a lawyer and consultant and was a Senior General Counsel with the Department of Justice and worked on communications law issues for much of his career.

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