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CROSSING GUARDS ON THE ELECTRONIC HIGHWAY: THE BASIS FOR FEDERAL JURISDICTION OVER CONVERGENCE TECHNOLOGY

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New communications technologies have emerged that involve the convergence of television, computer, cable, telephone and satellite. Proponents of these new technologies envision an explosion in the number of different channels which can offer programming. As well, convergence technology "is expected to make TV sets interactive, ushering in an era of 'pick-and-pay', do-it-yourself programming."¹ This development has been described in the popular media as an "electronic highway."² When such "highways" function as conduits of programming for the general public they are best characterized as broadcasting.

The controversy regarding jurisdiction over the electronic highway has been highlighted in the proceedings of recent CRTC hearings on the streamlining of telecommunications regulations.³ The anticipated incursion of telephone companies into broadcasting-type services has engendered concern in the cable industry. Telecommunications companies hope to escape the supervision of the CRTC, to which cable companies are subject, because of the different technologies each utilizes.

Federal jurisdiction over broadcasting has been based on the exception to exclusive competence over local works and undertakings found in the combination of ss. 91(29) and 92(10)(a) of the

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¹ C. Harris, "CRTC to pick specialty channels. Decision will be step toward transformation of television" *The Globe and Mail* (14 February 1994) A1.

² D. Flavelle, "Paving the Way for an Electronic Highway" *The Toronto Star* (24 October 1993) G1.

³ H. Enchin, "CRTC heads down new road. Hearing weighs competing interests of the information highway" *The Globe and Mail* (1 November 1993) B1, B8.

Constitution Act, 1867.⁴ Electronic highways may simply use different technologies to do that which has historically been conceived of as broadcasting. Accordingly, they should fall within the jurisdiction of the federal government. The fact that this technology has a national dimension to it makes federal control all the more appropriate.

Changes to the *Broadcasting Act*⁵ suggest that electronic highways used to disseminate programming are a "broadcasting" activity as defined by s. 2(1) of that Act. The historical evolution of the *Broadcasting Act* indicates that Parliament has adopted, in the present version of the Act, an expanded approach to the definition of broadcasting which removes the previous limits on the technology involved. This suggests that federal involvement in the regulation of new broadcasting technology is consistent with previous federal mandates.⁶

In the 1968 version of the *Broadcasting Act*, "broadcasting" was defined to mean "any *radiocommunication* in which the transmissions are intended for direct reception by the *general public*" [emphasis added].⁷ In 1991, the new *Broadcasting Act* redefined the term as referring to

any transmission of programs, whether or not encrypted, by radio waves *or other means of telecommunication* for reception by the public by means of a broadcast receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place [emphasis added],

and 2(2) goes on to say:

For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or

⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91(29), 92(10)(a); *Radio Reference*, [1932] A.C. 304 (P.C.); *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191.

⁵ *Broadcasting Act*, S.C. 1991, c. 11 as am. by the *Telecommunications Act*, S.C. 1993, c. 38, s. 81.

⁶ *Canadian Voices: Canadian Choices* (Ottawa: Queen's Printer, 1988). See also S. Scott, "The New Broadcasting Act: An Analysis" (1990) 1 M.C.L.R. 25 at 26-27.

⁷ *Broadcasting Act*, R.S.C. 1985, c. B-9, s. 2.

other electromagnetic system, or any similar technical system.⁸

The expansion of the definition of "broadcasting" within the *Broadcasting Act* to refer to an increased scope of technology has been a calculated and purposeful endeavour. In 1986, the Task Force on Broadcasting Policy maintained that:

The Act should broaden the definition of broadcasting and related concepts to cover all types of program reception and distribution whether by Hertzian waves or through any other technology [emphasis added].⁹

Parliament clearly wanted to ensure that no undertakings were excluded from the definition of broadcasting simply because the technology used was innovative or unprecedented.

Changes in the Act to notions of what comprises the viewing audience further ensure that electronic highways are not excluded from the definition of broadcasting.

Jurisprudence decided under the old *Broadcasting Act*¹⁰ held that broadcasting required an intention to transmit directly to the general public in order to come within the meaning of "broadcasting" under that Act.¹¹ Because transmissions over fibre-optic wire, unlike radio communications, cannot be intercepted and can be limited to exclusive groups of users, a requirement for a broad audience could have taken some applications of convergence technology out of the realm of the old *Broadcasting Act*. The significance of cases which imply that the public, in the context of broadcasting, is "the general public," and represents large numbers of people,¹² has been undermined by changes to the definition of "broadcasting." Arguably, Parliament was reacting to such cases when it removed both the requirement for intention, and the word "general," modifying "public," in the new *Broadcasting Act*.¹³ This

⁸ *Supra* note 5.

⁹ "Report of the Task Force on Broadcasting Policy, September 1986" in R. Bird, ed., *Documents of Canadian Broadcasting* (Ottawa: Carleton University Press, 1988) 704 at 737. See also S. Scott, *supra* note 6 at 33.

¹⁰ *Supra* note 5.

¹¹ *Lount Corp. v. Canada (A.G.)* [1985] 19 D.L.R. (4th) 305 at 311.

¹² *Supra* note 11. See also *R. v. Communicomp Data Ltd.* (1975) 6 O.R. (2d) 680 (Co. Ct.).

¹³ *Supra* note 6.

further supports the position that "highways" ought to be considered within the scope of broadcasting.

The words of the new *Broadcasting Act*, when compared with the earlier definition of "broadcasting" imply that the public is not the general public, but can encompass much less "general" groups. Decisions have held that the meaning of the word "public" must be context specific.¹⁴ It should be acknowledged that a change in legislation will be a fundamental part of that context.

The nature of the Broadcasting system itself is the most significant part of the context, giving meaning to the word "broadcasting" in the definition of broadcasting. Broadcasting in Canada is a system which has many constituent parts reaching different sub-groups of the "general public" who still comprise the "public."¹⁵ An interpretation that the "public" necessarily means a large number of people, broadly situated, frustrates the purpose of the changes to the *Broadcasting Act* to ensure its application to a wide scope of technology. Users of cable services are often limited geographically and in number, yet cable has consistently been characterized as broadcasting.¹⁶ Courts should be reticent to exclude programming undertakings from the ambit of broadcasting merely because of the point-to-point nature of convergence technology they use.

The fact that there may be an eligibility requirement in order to use certain services of an electronic highway, such as paying a fee, or being enrolled in a course, does not mean that "the admitted few lose their identity as members of the public."¹⁷ Indeed, the *Broadcasting Act* contemplates that broadcasting may be connected to other undertakings without ceasing to be "broadcasting."¹⁸

After having established that electronic highways come within the ambit of broadcasting when used for program dissemination, the argument that they should fall under federal jurisdiction is enhanced by an inquiry into the nature and role of the broadcasting system within Canadian society. Legislative jurisdiction over com-

¹⁴ *Atlantic Shopping Centres Ltd. v. Newfoundland (A.G.)* (1988), 71 Nfld. & P.E.I.R. 175. See also *Jennings v. Stephens* (1934), [1936] 1 Ch. 469.

¹⁵ *Supra* note 5, s. 3(2).

¹⁶ *Capital Cities Communications Inc. v. Canada* (CTRC), *supra* note 4.

¹⁷ In *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at 382, the Supreme Court of Canada found that students in universities retained their identity as members of the public in the context of the *Canadian Human Rights Act*.

¹⁸ *Supra* note 5, s. 4(3).

munications is divided between the federal and provincial legislatures through the operation of 92(10) and 91(29).¹⁹ The exception stated in s. 92(10)(a) of the *Constitution Act, 1867* establishes that provinces have the power to make laws in relation to:

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 other of the provinces, or extending beyond the limits of the province.²⁰

Electronic highways fall within this class of exception because the nature of those undertakings is interprovincial, rather than local.

Some would argue that not all applications of convergence technology to broadcasting fall within federal legislative competence. The very nature of fibre-optics, as a closed system of point-to-point communication, allows undertakings to be designed which do not extend beyond provincial borders. Unlike radio, television and existing cable systems, parts of which all include signals external to the system, convergence activities may be entirely self-contained. Therefore, the historical rationale for federal jurisdiction over broadcasting²¹ may not apply to, for example, an undertaking that uses convergence to transmit videos directly to people's homes within a single province. The fact that some of the material offered through such services may have extraprovincial content will not bring it within the interprovincial exception from provincial competence.²²

Nevertheless, a broader ground for federal legislative competence over broadcasting helps articulate why electronic highways do

¹⁹ P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 566-568.

²⁰ *Constitution Act, 1867*, *supra* note 4, s. 92(10)(a).

²¹ Federal jurisdiction over radiocommunication, television and cable undertakings which transmit programs received from the airwaves has been based on the interprovincial nature of broadcasting which uses "the airwaves" which do not respect provincial boundaries. See *Radio Reference*, *supra* note 4; *Capital Cities Communications v. CRTC*, *supra* note 4; *Public Service Bd. v. Dionne*, *supra* note 4.

²² In *N.S. Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, the Supreme Court of Canada found that the display of extraprovincial films was not sufficient to remove the regulation of theatres from provincial legislative competence.

not resemble local undertakings and should therefore not fall within provincial jurisdiction. Although federal jurisdiction over electronic highways may slightly encroach on provincial jurisdiction under 92(10), this incidental effect is essential for the exercise of federal jurisdiction over broadcasting.

The system of broadcasting in Canada is a functional arrangement through which individual undertakings are interconnected.²³ Federal power over local undertakings is essential for the maintenance of that larger national system.²⁴ To this end, although federal jurisdiction over broadcasting has historically been grounded on the extraprovincial nature of a particular undertaking, the extraprovincial nature of broadcasting as a whole indicates that even individual or provincial "highways" must be under federal jurisdiction.²⁵

The composite system of broadcasting in Canada should serve the interests of all Canadians and their need to express themselves in order to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."²⁶ Such interests, and other national policy objectives, are best protected by federal jurisdiction.

If the integrity of the broadcasting system cannot be used to support federal jurisdiction of electronic highways under the interprovincial exception to 92(10), the federal Legislature's residual power to enact laws for the peace, order and good government of the Dominion provides an alternative source of federal jurisdiction.

The "Peace, Order, and Good Government" (P.O.G.G.) power generally refers to matters which have not been enumerated under the heads of federal or provincial jurisdiction in s. 91 or 92 of the *Constitution Act, 1867*. They are thereby conferred on the federal Parliament. If a matter "goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole,"²⁷ then it is established as a matter of

²³ See *Broadcasting Act*, *supra* note 5, s. 3(2).

²⁴ I. H. Fraser, "Some Comments on Subsection 92(10) of the *Constitution Act* 1867" (1984) 29 McGill L.J. 557.

²⁵ *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, *supra* note 4 at 159; *Public Service Board v. Dionne*, *supra* note 4 at 197.

²⁶ *Broadcasting Act*, *supra* note 5, s. 3(1)(d)(i). See also Bird, *supra* note 9 at 739.

²⁷ *Ontario (A.G.) v. Canada Temperance Federation*, [1946] A.C. 193 at 205.

“national concern” and serves as the basis of the P.O.G.G. power.²⁸ Electronic information highways involved in program dissemination may be encompassed by the P.O.G.G. power on the grounds that they are a new area of activity, and a matter of national concern which may be beyond the power of the provinces to deal with.²⁹

The intra-provincial and extra-provincial aspects of “electronic information highways” are not practically divisible. Their use of technology represents a component of a single communications system. That type of system has been described as

the electronic thread knitting the country together over the vast area it occupies, through the sophisticated array of personal, business, and mass communication services it provides to all Canadians.

That system is an important vehicle of national unity. It is a significant creator and carrier of national identity and culture.³⁰

Such an holistic approach to the system of communications in Canada reflects an appropriate basis for policy-making with respect to the regulation of electronic highways and would decrease unnecessary complexity and duplication in regulating systems.

Without uniformity of law throughout the country, one province may fail to regulate such things as the maintenance of, or content of programming on, electronic highways. This would damage the effectiveness of the entire system, and would negatively impact users in other provinces.³¹ It is therefore essential to have uniform legislative treatment of new broadcasting technologies. Without such treatment, there is a danger that these technologies will develop in an incoherent manner and that Canadians may simply become “jaywalkers,” rather than active and full participants on new information highways.

²⁸ *Johnmesson v. Rural Municipality of St. Paul*, [1952] 1 S.C.R. 292.

²⁹ See P. W. Hogg, *supra* note 19 at 435ff: *R. v. Hauser*, [1979] 1 S.C.R. 984. See also *R. v. Crown Zellerbach Corporation*, [1988] 1 S.C.R. 401; *Munro v. National Capital Commission*, [1966] S.C.R. 663.

³⁰ *Canada, Minutes of the Proceedings and Evidence of the Standing Committee on Communications and Culture* (Ottawa: Queen's Printer, 5 November 1991) at 15.4.

³¹ See *R. v. Crown Zellerbach Canada Ltd.*, *supra* note 29.