

THE FEDERAL CLAIM TO JURISDICTION OVER ONLINE STREAMING SERVICES

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Online streaming services are increasingly displacing domestic radio and television as the source of the audio and audio-visual programming consumed by Canadian audiences. The enactment of the Online Streaming Act in 2023 invests the federal broadcasting regulator, the CRTC, with authority to require these entities to contribute to the achievement of the objectives of Canadian broadcasting policy in a manner similar to traditional broadcasting media.

But did Parliament have the constitutional authority to enact the new legislation? The federal claim to jurisdiction over online streaming services appears to rest on the proposition that they are engaged in “broadcasting” and therefore fall under federal jurisdiction under either section 92(10) (a) of the Constitution Act, 1867, which gives Parliament authority over communications undertakings that connect the provinces; or, alternatively, section 91, which empowers Parliament to make laws for “the Peace, Order and good Government” of Canada where a matter qualifies as one of “national concern”. But analysis of the case law casts considerable doubt on whether either section 92(10)(a) or the national concern doctrine supports the federal claim to jurisdiction over online streaming services asserted in the new legislation.

Les services de diffusion continue en ligne surclassent de plus en plus les radios et les télévisions nationales en tant que source d'émissions sonores et audiovisuelles consommées par les publics canadiens. L'adoption de la Loi sur la diffusion continue en ligne en 2023 donne à l'organe de réglementation fédéral sur la radiodiffusion, le CRTC, le pouvoir d'exiger de ces entités qu'elles contribuent à la réalisation des objectifs de la politique canadienne de radiodiffusion de la même façon que les médias de diffusion traditionnels.

Toutefois, le Parlement a-t-il le pouvoir constitutionnel d'adopter la nouvelle loi? Le gouvernement fédéral soutient avoir compétence sur les services de diffusion continue en ligne, prétention qui semble reposer sur la proposition selon laquelle ces entités offrent des services de « radiodiffusion »

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et relèvent donc de la compétence fédérale en vertu de l'alinéa 92(10)a de la Loi constitutionnelle de 1867, qui donne au Parlement le pouvoir sur les entreprises de communication reliant les provinces ou, subsidiairement, de l'article 91, qui autorise le Parlement à faire des lois « pour la paix, l'ordre et le bon gouvernement » du Canada lorsqu'une affaire est décrite comme revêtant un « intérêt national ». Cependant, l'analyse de la jurisprudence jette un doute considérable sur la question de savoir si l'alinéa 92(10)a ou la doctrine de l'intérêt national appuie la revendication par le gouvernement fédéral d'une compétence sur les services de diffusion continue en ligne indiquée dans la nouvelle loi.

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1. Introduction

Online streaming services—that is, entities such as Netflix, Spotify, Crave and Tou.TV that deliver audio and audio-visual content over the internet—play an increasingly important role in the creation, production and distribution of the programming consumed by Canadian audiences, eclipsing the role of the television, radio, cable and satellite services that have traditionally served Canadians [traditional broadcasting media].²

The *Broadcasting Act* states that the Canadian broadcasting system should “serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.”³ Regulation of traditional broadcasting media is one of the key instruments through which Canadian broadcasting policy has been implemented. These entities have long been subject to obligations imposed by the Canadian Radio-television and Telecommunications Commission [CRTC or Commission] that require them, depending on the nature of their undertakings, to contribute a percentage of their revenues to funds devoted to the development of Canadian programming;⁴ comply with CRTC-mandated Canadian content requirements;⁵ and to observe certain programming content standards.⁶ In the case of cable companies, there is an obligation to carry certain programming of Canadian television service providers.⁷

The *Online Streaming Act* [OSA],⁸ which came into force on April 27, 2023, invests the CRTC with the power to impose regulatory obligations on online streaming services—referred to in the new legislation as “online

² In 2017, the percentage of Canadians subscribing to online streaming services exceeded for the first time the number subscribing to conventional pay-tv services (cable, satellite, fibre optic): see Broadcasting and Telecommunications Legislative Review, *Canada’s Communications Future: Time to Act, Final Report* (Ottawa: Innovation, Science and Economic Development Canada, January 2020) at 120, Figure 3-3, citing Media Technology Monitor, *Fall survey 2011–2018*, online: <<https://tinyurl.com/554uryyv>> [perma.cc/X4YN-JCWP] [*Time to Act*]. The most recent data indicate that 78% of Canadians subscribe to an online streaming service versus 66% for pay-tv: see Kévin Deniau, « [Les 5 dernières tendances en matière de consommation des médias au Canada](#) » (29 May 2024), online: <<https://tinyurl.com/2bbn8y8h>> [perma.cc/7LGJ-EQDL].

³ SC 1991, c 11, s 3(1)(d)(i).

⁴ See *Broadcasting Distribution Regulations*, SOR/1997-555, s 34–58 [*BDU Regulations*].

⁵ See, e.g., *Television Broadcasting Regulations, 1987*, SOR/87-49, s 4 [*TV Regulations*]; *Discretionary Services Regulations*, SOR/2017-159, s 2.

⁶ See, e.g., *TV Regulations*, *supra* note 5 at s 5.

⁷ See *BDU Regulations*, *supra* note 4 at s 18.

⁸ SC 2023, c 8.

undertakings”—so that they also will be required to contribute in an appropriate fashion to furthering the *Broadcasting Act’s* objectives.

The OSA is a major component of the government’s “digital agenda”⁹ and reflects its conviction that the technological shift toward the distribution of content through the internet presents a threat to important Canadian cultural values, and that regulation is the appropriate response. This view is a controversial one and has provoked strong reactions, both supportive and critical.¹⁰ It is not my purpose, however, to join in the debate about the validity of the government’s judgment that legislative intervention is merited, or the particular response the government has adopted. In this article, I focus instead on a fundamental issue that has so far attracted limited attention:¹¹ Did Parliament have the authority to enact the new legislation, or does the OSA intrude in a constitutionally impermissible way on matters that fall within provincial jurisdiction? The *Constitution Act, 1867*,¹² which distributes legislative authority between Parliament and the provincial legislatures, predates the invention of the telephone, and provides no straightforward answer to that question. The federal government has not revealed the legal rationale on which it bases its claim to jurisdiction over online undertakings; and provincial

⁹ Other legislative initiatives that comprise part of the current government’s digital agenda include the *Online News Act*, SC 2023, c 23 and Bill C-63, which would enact the *Online Harms Act*.

¹⁰ These competing views were reflected in the hearings before the Parliamentary committees charged with examination of Bill C-11, the bill that became the OSA, as it passed through Parliament. The House of Commons Standing Committee on Canadian Heritage, for example, received 52 submissions on the bill and heard testimony from 80 witnesses representing a wide spectrum of viewpoints. The Senate Standing Committee on Transportation and Communications received 67 briefs and heard from 138 witnesses. See Bill C-11, *An Act to Amend the Broadcasting Act and to Make Related and Consequential Amendments to Other Acts*, 1st Sess, 44th Parl, 2021 (assented to 27 April 2023), online: <<https://tinyurl.com/32rt4sd8>> [perma.cc/Z6PM-Z25A]. The “Parliamentary theatre” is vividly described, and the competing interests presented and analyzed, in Howard Law, *Canada vs California: How Ottawa Took on Netflix and the Streaming Giants* (Toronto: James Lorimer & Company Ltd, 2023).

¹¹ Philip Palmer, who appeared before the House of Commons committee that considered Bill C-10, *An Act to Amend the Broadcasting Act and to Make Related and Consequential Amendments to Other Acts*, 43rd Parl, 2nd Sess, 2021, an earlier version of the legislation that became the OSA, was one of the few to question the constitutionality of government’s plans for regulation of online streaming services. For his written submission to the committee, see *C-10 and the Constitution: A Submission to the Standing Committee on Canadian Heritage* (16 February 2021); online: <<https://tinyurl.com/55b3rfe9>> [perma.cc/5D4A-SZEL]. Palmer concluded that “Bill C-10, in so far as it purports to legislate with reference to online, on demand streaming services is unconstitutional as being beyond the legislative competence of the Parliament of Canada.”

¹² (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

governments have, so far, remained largely silent on the jurisdictional issues despite the implications of the legislation for matters of traditional provincial concern.¹³

I proceed as follows. I begin in Part 2 by outlining the scheme for the division of legislative jurisdiction between Parliament and the provincial legislatures established by the *Constitution Act*, focusing particular attention on the application of the two provisions of the Act that provide a potential juridical foundation for federal authority—section 92(10)(a), which divides authority between Parliament and the provinces over transportation and communications undertakings; and the power conferred on Parliament by section 91 to make laws for “Peace Order and good Government” of Canada [POGG] in respect of matters of “national concern”. In Part 3, I describe the regulatory approach to online streaming services in place prior to the enactment of the OSA and proposals for reform of the regime. I then summarize the relevant provisions of the OSA itself.

In Parts 4 and 5, I turn directly to the question I have posed—Did Parliament have the authority to enact this new legislation? In Part 4, I note that in considering whether Parliament has jurisdiction to enact any piece of legislation, the case law requires us to determine first what the “matter” or “pith and substance” of the relevant legislation is. I propose, based on an examination of the text of the OSA, that the pith and substance of the OSA is the regulation of undertakings that deliver audio and audio-visual content over the internet for reception by the public. I then consider whether that matter falls within federal jurisdiction under section 92(10) (a). In Part 5, I undertake a similar analysis of whether streaming falls within federal jurisdiction under POGG. In Part 6, I summarize the preceding discussion and set out my conclusions.

2. Constitutional Framework

It is useful to begin by recalling some of the basic features governing the distribution of legislative authority embedded in sections 91 and 92 of the *Constitution Act*. Section 91 confers on Parliament the authority to make laws “for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects ... assigned exclusively to the Legislatures of the Provinces.”¹⁴ Section 91 then lists 29 subjects assigned to Parliament. Section 92 is the provinces’ counterpart to section 91. Section 92 provides that “[i]n each Province the Legislature may exclusively make Laws in relation to Matters coming within the

¹³ But see *infra* note 112.

¹⁴ *Constitution Act*, *supra* note 12.

Classes of Subjects next hereinafter enumerated.”¹⁵ A list of 16 Classes of Subjects assigned to provincial legislatures follows.

Of all of these items, only one deals specifically with communications. Section 92(10)(a) assigns to the provinces the authority to legislate in relation to the following Subject:

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]

The courts have interpreted the reference to “Telegraphs” as wide enough to embrace all modern modes of communication. It has been held to embrace telephone carriers,¹⁶ over-the-air broadcasters,¹⁷ and cable companies that receive and distribute over-the-air signals.¹⁸ The CRTC has said that it also includes internet service providers [ISPs].¹⁹

What is significant about section 92(10)(a) for present purposes is the exception it provides for. While “local” works and undertakings fall within provincial jurisdiction, communications (and transportation) undertakings that connect the provinces or extend beyond their boundaries are excluded from provincial jurisdiction. Authority over these rests with Parliament by virtue of section 91(29), which includes in the federal list “[s]uch Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”²⁰

¹⁵ *Ibid.*

¹⁶ *Alberta Government Telephones v Canada*, 1989 CanLII 78 (SCC) [AGT]; *Téléphone Guèvremont Inc v Quebec (Régie des télécommunications)*, 1994 CanLII 130 (SCC) [Guèvremont].

¹⁷ *Reference re Regulation and Control of Radio Communication*, 1931 CanLII 83 (SCC) [Radio Reference (PC)], rev’g 1931 CanLII 83 (SCC) [Radio Reference (SCC)].

¹⁸ *Capital Cities Comm v CRTC*, 1977 CanLII 12 (SCC) [Capital Cities]; *Public Service Board v Dionne*, 1977 CanLII 207 (SCC) [Dionne].

¹⁹ In *Review of the Internet traffic management practices of Internet service providers*, Telecommunications Regulatory Policy CRTC 2009-657, the CRTC asserted jurisdiction over “primary” ISPs; that is, ISPs that own facilities. In *Procureur général du Québec c Association canadienne des télécommunications sans fil*, 2021 QCCA 730, at para 121, leave to appeal denied 2022 CanLII 21658 (SCC), the Quebec Court of Appeal stated (in obiter) that « la compétence fédérale exclusive en matière de télécommunications, ... , doit logiquement s’étendre aussi à l’émission, la réception et la retransmission de signaux Internet ».

²⁰ *Constitution Act*, *supra* note 12.

Section 92(13) is also relevant to the inquiry that follows. That section vests jurisdiction over “Property and Civil Rights in the Province” in provincial legislatures.

3. Federal regulation of online undertakings

A) The CRTC’s 1999 *New Media* decision

The federal assertion of jurisdiction over online streaming services is not new and in fact predates the OSA by more than twenty years. In 1999, the CRTC concluded that what it termed “new media”—that is, services and products that make use of video, audio and graphics, or a combination of the former (but excluding alphanumeric text, such as text messages) delivered by means of the internet²¹—met the definition of “broadcasting” in the *Broadcasting Act* of 1991,²² and as a consequence fell within the Commission’s jurisdiction under that legislation. The CRTC said that this definition “was intended to be technologically neutral” and, accordingly, “the mere fact that a program is delivered by means of the Internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of ‘broadcasting’.”²³ The CRTC was concerned in its decision entirely with the scope of its statutory jurisdiction; potential constitutional constraints on federal authority were not adverted to.

It was argued by some participants in the CRTC proceeding that led to the *New Media* decision that new media undertakings provided access to programming but did not engage in “transmission” of content, and as such could not be said to be engaged in “broadcasting” as defined in the 1991 Act. The CRTC responded that “[t]he fact that an end-user activates the delivery of a program is not, in the Commission’s view, determinative,”²⁴ and that there is no explicit or implicit statutory requirement that broadcasting involve scheduled or simultaneous transmissions of programs and that the ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting.²⁵ It concluded that “on-demand delivery is within the scope of the definition of ‘broadcasting’.”²⁶

²¹ *New Media*, [Broadcasting Public Notice CRTC 1999–84](#) [*New Media*], at paras 14–15, 33–46. The CRTC documents referred to herein are available online on the CRTC website <www.crtc.gc.ca>

²² I use the terms “*Broadcasting Act* of 1991” and “1991 Act” to refer to the *Broadcasting Act* prior to its amendment by the OSA.

²³ *Ibid* at para 38.

²⁴ *Ibid* at para 39.

²⁵ *Ibid* at para 44.

²⁶ *Ibid* at para 39.

While the CRTC concluded that new media (apart from those services consisting predominantly of alphanumeric text) fell within its statutory jurisdiction, it also decided that regulating persons carrying on new media would not contribute in a material manner to the implementation of the policy objectives set out in the *Broadcasting Act* (concerning which, see Part 3 C), below). It accordingly exempted “[n]ew media broadcasting undertakings [that] provide broadcasting services delivered and accessed over the Internet ...”²⁷

The exemption was amended over time to make it conditional on compliance with some basic requirements, but new media remained otherwise exempt from the other requirements imposed on traditional broadcasting media.²⁸

The exemption resulted in an uneasy truce between the CRTC and some new media providers, especially foreign entities, over the scope of the CRTC’s authority that continued until the enactment of the OSA.²⁹

B) Report of the Broadcasting and Telecommunications Legislative Review Panel

In the last decade or so, the pressure for more extensive regulation of new media, in line with the regime applicable to traditional broadcasting media, has grown. In June 2018, the government appointed an expert panel to consider a range of issues that have arisen as a result of the rapid

²⁷ *Exemption Order for new media broadcasting undertakings* in Public Notice CRTC 1999-197 [the *Digital Media Exemption Order* or *DMEO*]. The exemption order itself appears in Appendix A. The exemption order was repealed as of September 29, 2023, by *Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings*, Broadcasting Regulatory Policy CRTC 2023-331 [BRP 2023-331] and Order 2023-332.

²⁸ The conditions imposed on new media included an undue preference rule; an exclusivity rule (prohibiting the undertaking from offering television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail internet access service); an anti-competitive “head start” rule (prohibiting BDUs from launching a programming service prior to making the service available to other BDUs on commercially reasonable terms); and a dispute resolution rule. See *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, for details.

²⁹ In a manifestation of the on-going nature of these differences, in 2022 some digital media broadcasting undertakings [DMBUs] challenged the CRTC’s authority to require them to participate in a proposed annual survey to gather information on the activities of DMBUs. The CRTC repeated its stance that “[a]ll broadcasting that takes place in Canada falls within the regulatory purview of the Commission”. See *Annual Digital Media Survey*, Broadcasting Regulatory Policy CRTC 2022-47 at paras 20–25.

emergence and expansion of digital technologies, including the disruptive effects these technologies are having on the traditional regulatory mechanisms supporting the creation, production and distribution of Canadian content, and the implications of these changes for Canadian cultural sovereignty. The panel was tasked with making recommendations for appropriate changes to the *Broadcasting Act*, the *Telecommunications Act* and the *Radiocommunication Act* to reflect these developments.

The panel delivered its report in January 2020.³⁰ The panel observed that the steady rise of largely foreign on-demand internet video and audio services has had a significant effect on the way Canadians create and consume content. It concluded that these trends have undermined the effectiveness of current policies supporting the creation, production and discoverability of Canadian media content, and media's critical role in the maintenance of Canada's cultural sovereignty.³¹ These findings led to recommendations for changes to the way in which the government supports the sector and to ensure that online streaming services make "a meaningful contribution to Canadian cultural policy objectives and the production sector,"³² including a new funding framework to support the creation and production of Canadian programming and measures to improve the discoverability of Canadian content online, such as "prominence obligations" and "exhibition requirements".³³

The report also advocated amending the legislation governing the communications sector to bring "all those providing media content services to Canadians ... within the scope of the *Broadcasting Act* and under the jurisdiction of the CRTC."³⁴ The report did not, like the CRTC *New Media* decision, engage with the possible limitations on Parliament's jurisdiction to implement such a regime, arguing that "[a]lthough the *Broadcasting Act* makes much use of the word 'broadcasting,' its statutory meaning parted ways long ago with the term's ordinary sense of one-to-many or over-the-air transmissions."³⁵

One of the key questions considered below is whether the constitutional case law defining the parameters of federal jurisdiction over broadcasting can support a definition of "broadcasting" that is divorced from "over-the-air transmissions" and embraces online streaming services.

³⁰ *Time to Act*, *supra* note 2.

³¹ *Ibid* at s 3.

³² *Ibid* at 13.

³³ *Ibid* at 143–48. "Exhibition requirements" involve mandating the carriage of Canadian content and "prominence obligations" entail requiring electronic programme guides to give prominence to such content.

³⁴ *Ibid* at 11.

³⁵ *Ibid* at 40.

C) Outline of the OSA

The OSA amends the definition of “broadcasting” in the 1991 Act to expressly³⁶ include both scheduled and on-demand programs.³⁷ The definition now reads as follows. The language added by the OSA is italicized.

“broadcasting” means any transmission of programs—*regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not*—by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

“Program” as used in the *Broadcasting Act* (which is not changed by the OSA) means “sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.” “Broadcasting receiving apparatus”, a term that also appears in the definition of broadcasting (also unchanged), means “a device, or combination of devices, intended for or capable of being used for the reception of broadcasting.” A key amendment made by the OSA is that the definition of “broadcasting undertaking” now includes online undertakings. An “online undertaking” is an “an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus.” Recasting these definitions, an online undertaking is an entity that transmits (or retransmits) audio and audio-visual content (such as video on demand and live event programming) to end-users via the internet to the end-users’ connected devices (e.g., computer, set-top boxes and mobile devices).

Online undertakings are to be distinguished from ISPs. Online undertakings, as such, do not own or operate networks. ISPs provide the physical infrastructure that constitutes the internet and provides the means by which end-users access the content streamed by online undertakings.³⁸ Bell Canada, TELUS and Rogers are examples. There are instances where a single entity operates as both an online undertaking and as an ISP, but the roles are conceptually, and legally, distinct.

³⁶ As noted above in Part 3 A), in *New Media*, *supra* note 21, the CRTC concluded that on-demand delivery fell within the definition of “broadcasting” in the 1991 Act.

³⁷ The definitions referred to in this paragraph all appear in section 2(1) of the Act. The amendments referred to were effected by OSA, *supra* note 8 at s 2(1).

³⁸ The distinction is discussed in *Reference re Broadcasting Act*, 2010 FCA 178 at para 13, *aff’d* (without reference to this point) 2012 SCC 4, where the issue was whether ISPs are subject to the *Broadcasting Act*.

The *Broadcasting Act* has a “primarily cultural aim,”³⁹ and the OSA reflects this orientation in the amendments it makes to the Canadian broadcasting policy objectives. Section 3(1) now identifies an ambitious 50 distinct policy goals.⁴⁰ Section 3(1) reads, in part, as follows. The changes effected by the OSA are italicized in the passages from section 3(1) quoted below.

3(1) It is hereby declared as the broadcasting policy for Canada” that

...

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, *and foster an environment that encourages the development and export of Canadian programs globally,*

...

(iii.2) *support the production and broadcasting of original French language programs,*

(iii.3) *enhance the vitality of official language minority communities in Canada and support and assist their development by taking into account their specific needs and interests, including through supporting the production and broadcasting of original programs by and for those communities,*

...

(iv) *promote innovation and* be readily adaptable to scientific and technological change,

(v) *reflect and be responsive to the preferences and interests of various audiences,* and

(vi) *ensure freedom of expression and journalistic independence.*

³⁹ Reference re *Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 32.

⁴⁰ *Broadcasting Act*, *supra* note 3 at s 3(1), as amended by OSA, *supra* note 8 at s 3.

Online undertakings are expected to contribute to the realization of these objectives along with traditional broadcasting media.⁴¹ Some other objectives are particular to online undertakings. For example,

(r) *online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery;*

Online undertakings that provide the programming services of other broadcasting undertakings should:

(q) ...

(i) *ensure the discoverability of Canadian programming services and original Canadian programs, including original French language programs, in an equitable proportion,*

(ii) *when programming services are supplied to them by other broadcasting undertakings under contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and*

(iii) *ensure the delivery of programming at affordable rates;*

How these policy objectives are to be realized is left largely to the discretion of the CRTC. Section 5(1) of the *Broadcasting Act* directs the CRTC to “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy referred to in section 3(1).” Prior to 2023, the centrepiece of the regulatory regime was a licensing scheme. The CRTC imposed terms and conditions in broadcasting licences designed to further the objectives of the Act. The licensing regime remains in place for conventional broadcast media, but the OSA expressly exempts online undertakings from the licensing requirement.⁴² The regulation of online undertakings will be accomplished instead through a new power vested in the CRTC to “make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission

⁴¹ Recognizing the impracticality of requiring online undertakings to contribute in the same way to the realization of the s 3(1) policy objectives as traditional broadcasting media, and foreign undertakings in the same manner as Canadian undertakings, the *Broadcasting Act*, *supra* note 3 as amended by the OSA, provides that “each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy ... in a manner that is appropriate in consideration of the nature of the services provided by the undertaking”. See OSA, *supra* note 8 at s 3(1), adding *Broadcasting Act* s 3(1)(a.1).

⁴² See OSA, *supra* note 8 at s 24, adding *Broadcasting Act* s 31.1(2).

considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1).”⁴³

4. The OSA and section 92(10)(a)

In considering whether Parliament has jurisdiction to enact any piece of legislation under one of the enumerated heads of power, the case law requires us to follow a two-phase approach. A court must first determine what the “matter” or “pith and substance” of the relevant legislation is (the characterization phase). Having arrived at a proper characterization of a statute’s matter, the court must then classify the matter with reference to federal and provincial heads of power under the *Constitution Act* in order to determine whether it is *intra vires* the enacting legislature (the classification phase).⁴⁴

In the characterization phase, “the focus is the law itself and what it is really about.”⁴⁵ It may include the nature of the services that are the subject of the Act, how those services are provided, and the provisions of the relevant Act itself. The characterization process must not be distorted by looking ahead to the potential heads of power, a process that rightly belongs to the classification stage.⁴⁶

It is important when characterizing a matter to be as precise as possible “because a precise statement more accurately reflects the true nature of what Parliament did and what it intended to do.”⁴⁷ In the *GGPPA References*, for example, the majority rejected the Alberta Court of Appeal’s characterization of the matter of the *Greenhouse Gas Pollution Pricing Act* [GGPPA] as the regulation of greenhouse gas [GHG] emissions⁴⁸ as too broad and concluded instead that “the true subject matter of the GGPPA

⁴³ See OSA, *supra* note 8 at s 9, adding *Broadcasting Act* s 9.1(1). The OSA also amended the CRTC’s regulation-making power to extend it to online undertakings. See OSA, *supra* note 8 at s 10(8), amending *Broadcasting Act* s 10(1). A proceeding is underway in which this matter is being considered: see *The Path Forward—Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*, Broadcasting Notice of Consultation CRTC 2023-138.

⁴⁴ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 1 [GGPPA *References*] at para 47.

⁴⁵ *Ibid* at para 118, citing *Reference re Genetic NonDiscrimination Act*, 2020 SCC 17 at paras 31 (per Justice Karakatsanis) and 165 (per Justice Kasirer).

⁴⁶ *Reference re Impact Assessment Act*, 2023 SCC 23 [IAA *Reference*] at para 65.

⁴⁷ *GGPPA References*, *supra* note 44 at para 69 See also *IAA Reference*, *supra* note 46 at para 64.

⁴⁸ See *GGPPA References*, *supra* note 44 at para 44.

is establishing minimum national standards of GHG price stringency to reduce GHG emissions.”⁴⁹

A) Characterization: Pith and substance of the OSA

To determine the purpose of the challenged statute or provision, the court can consider both intrinsic evidence, such as the legislation’s preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees, and the means chosen for achieving that purpose.⁵⁰

The OSA lacks a preamble but in the speech he made at second reading of Bill C-11, the Minister of Canadian Heritage said the purpose of the bill was to “update Canada’s broadcasting rules to include online streaming services and will require them to contribute in an equitable way to our culture”.⁵¹ In order to do so, the OSA brings online undertakings within the established regime for the regulation of traditional broadcasting media and expands the range of powers at the disposal of the CRTC for that purpose.

Applying these considerations, I suggest that the pith and substance of the OSA is the regulation of undertakings that deliver audio and audio-visual content over the internet for reception by the public.

B) Classification: Assignment of the OSA under sections 91 and 92

I now consider to which head of power the OSA should be assigned.

1) Are online undertakings “broadcasters”?

The fact that the OSA deems online undertakings to be a type of “broadcasting undertaking” regulated under the *Broadcasting Act* is a clear indication that it was the drafter’s intention to position the OSA as an exercise of Parliament’s well-established authority over broadcasting, which is grounded in the 1932 decision of the Privy Council in the *Radio Reference*.⁵² In that case, the Privy Council held that broadcasters are engaged in the provision of “telegraphy” that is interprovincial in character and therefore falls within federal jurisdiction under the exception to section 92(10)(a).⁵³ The *Radio Reference* was concerned solely with

⁴⁹ *Ibid* at para 80.

⁵⁰ *Ibid* at para 51.

⁵¹ *House of Commons Debates*, 44-1, No 032 (16 February 2022) [*Debates*] at 1615.

⁵² *Radio Reference (PC)*, *supra* note 17.

⁵³ The decision in the *Radio Reference (PC)*, *ibid*, may also rest equally on federal jurisdiction under POGG. See *infra* note 88.

the transmission and reception of Hertzian waves, that is over-the-air radiocommunication. It was not until the Supreme Court of Canada's 1977 decision in *Capital Cities* that federal jurisdiction was broadened to include cable companies—at least where the interception of television signals and their retransmission to cablevision subscribers was involved.⁵⁴ But both of these decisions, because they turn on the involvement of the enterprises concerned in the transmission and/or reception of over-the-air signals, provide a very uncertain basis for a conclusion that online undertakings that rely on the internet for delivery of content fall under federal jurisdiction, as a close examination of the *Radio Reference* and *Capital Cities* reveals.

a) Radio Reference

The *Radio Reference* arose out of a reference to the Supreme Court of Canada of a question about Parliament's jurisdiction to enact the *Radio Telegraph Act*, precursor of the current *Radiocommunication Act*,⁵⁵ and the treaty it was intended to implement, the *International Radiotelegraph Convention* of 1927. The Supreme Court of Canada decided, by a 3:2 majority, that radiocommunication is subject to the legislative jurisdiction of Parliament. The majority did not, however, share a common view as to the constitutional basis for that conclusion. Chief Justice Anglin said that the exception to section 92(10)(a), which brings works and undertakings connecting the provinces within federal jurisdiction, provided "a sound basis for holding that 'radio communication' is subject to the exclusive legislative jurisdiction of the Dominion Parliament."⁵⁶ Justice Newcombe, on the other hand, held that "[t]he subject [of radiocommunication] is one which, undoubtedly, relates to the peace, order and good government of Canada."⁵⁷ He made no direct reference to section 92(10)(a). Justice Smith, the third justice who formed part of the majority, was broadly in agreement with Justice Newcombe that radiocommunication as a matter falls within "the general jurisdiction assigned to the Dominion Parliament by s. 91," and stated that he therefore found it unnecessary to discuss section 92(10)(a).⁵⁸

The minority (Justice Rinfret and Justice Lamont) found no basis for federal jurisdiction over radiocommunication under either the exception to section 92(10)(a) or POGG. Justice Rinfret was of the view that radiocommunication was a matter that falls under "Property

⁵⁴ See *Dionne*, *supra* note 18 at para 196.

⁵⁵ RSC 1985, c R-2.

⁵⁶ *Radio Reference (SCC)*, *supra* note 17 at 547.

⁵⁷ *Ibid* at 554.

⁵⁸ *Ibid* at 577.

and Civil Rights in the Province” (section 92(13)) or “Local Works and Undertakings” (section 92(10)(a)). Federal jurisdiction under the exception to section 92(10)(a), in his view, arose only where works or undertakings provided a *physical connection* between the provinces (a point to which I shall return in Part 4 B) 2)). Emergencies aside, he said, federal control over radiocommunication was therefore limited to cases where the heads of power listed in section 91 permitted.⁵⁹ Justice Lamont agreed with Justice Rinfret “that the jurisdiction of the Dominion Parliament over the subject of radio communication is not exclusive,”⁶⁰ and that federal jurisdiction existed only where legislation was “ancillary or incidental, to any of the enumerated heads of s. 91.”⁶¹

While the Supreme Court of Canada was deeply divided on the issue of jurisdiction, the Privy Council entertained no hesitation in concluding that “broadcasting” (a term that the law lords used interchangeably with radiocommunication) is a matter that is within federal jurisdiction because it falls within the description of ‘telegraphy’ as used in section 92(10)(a).⁶² The Privy Council reasoned that “[b]roadcasting as a system cannot exist without both a transmitter and a receiver” and that “[o]nce it is conceded, as it must be ... that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships’ opinion that the receiving instrument must share its fate ...”⁶³

b) *Capital Cities*

The decisions of both the Supreme Court of Canada and the Privy Council were clearly bound up in an understanding of broadcasting as a technology that is defined by the transmission and reception of over-the-air signals that, by their nature, cannot be confined to a province. The advent of cable television tested the conception of broadcasting on which the decision in the *Radio Reference* was based. Cable companies take signals from the air and distribute them over cable infrastructure. One of the questions addressed by the Supreme Court of Canada in *Capital Cities* was whether “the broad sweep of the reasons” in the *Radio Reference*, “stemming from a question that specifically referred to transmission and reception by means of Hertzian waves ... should be limited for the purposes of the present case because the Hertzian waves end at the antennae of the cable distribution systems and the signals carried by such waves are then converted for transmission through coaxial cables

⁵⁹ *Ibid* at 560-1.

⁶⁰ *Ibid* at 566.

⁶¹ *Ibid* at 568.

⁶² *Radio Reference (PC)*, *supra* note 17 at 5.

⁶³ *Ibid* at 5.

to subscribers' television sets."⁶⁴ Some provinces claimed jurisdiction over these companies on the basis that their infrastructure was local in character. The proposition that cable companies constituted local works or undertakings was rejected.⁶⁵ The Supreme Court of Canada decided, by a 6:3 majority, that cable companies, although their works may be located entirely within a province, nevertheless fell within federal authority because their "undertakings ... reach out beyond the province in which their physical apparatus is located."⁶⁶

The court also decided that federal jurisdiction was not confined to regulation of the infrastructure, but included program content, on the basis that "regulation of content is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise."⁶⁷

In light of *Capital Cities*, the definitions of "broadcasting" in the *Broadcasting Act* was amended in 1991 to include not only the delivery of programs directly by means of radio waves, but also delivery of programs "by other means of telecommunications" (such as wires and cables) and "indirectly through distribution undertakings," such as cable companies and satellite.⁶⁸

But neither the narrow understanding given "broadcasting" in the *Radio Reference*, which involves the propagation of radio waves through space between transmitters and receivers, nor the wider meaning given the term in *Capital Cities*, which includes reception and distribution of those signals by cable companies, reflects the operational reality of online streaming. Unlike traditional broadcasting media, online undertakings may not own or operate any transmission or distribution facilities. Their content is typically stored on servers owned and operated by third parties and accessed and delivered over the internet; that is "over-the-top" or "OTT".⁶⁹ Because they do not themselves engage in transmission, reception or distribution of radio waves, it is submitted that they are

⁶⁴ *Capital Cities*, *supra* note 18 at 157.

⁶⁵ *Ibid* at 163. (Chief Justice Laskin noted that "programmes of local origination are not involved in the facts on which the constitutional issue under review has been raised.")

⁶⁶ *Ibid* at 159.

⁶⁷ *Ibid* at 162.

⁶⁸ *Broadcasting Act*, RSC 1985, c B-9, s 2(1), defined "broadcasting" as "radiocommunication in which the transmissions are intended for direct reception by the public". For the text of the definition which replaced it in the 1991 Act, see above.

⁶⁹ The CRTC has stated that it "considers that Internet access to programming independent of a facility or network dedicated to its delivery (via, for example, cable or satellite) is the defining feature of what has been termed 'over-the-top' services": CRTC,

not “broadcasters” in the sense given that term in the case law, and for that reason, do not fall within the class of undertakings that have been recognized in that case law as federal.

2) Do online undertakings “connect” the provinces?

While the case law to date ties federal authority over broadcasting to its use of radiocommunication, that does not end consideration of section 92(10)(a) as a possible source of federal authority over online undertakings. Section 92(10)(a) applies not only to the modes of transportation and communication specifically mentioned in that section but also to “other Works and Undertakings connecting the Province with any other or others of the Provinces.”⁷⁰ However, online undertakings are a potential addition to the list of entities that fall within the section’s scope only if they can be said to “connect the provinces”. It is not clear whether online undertakings qualify, since they typically operate OTT, or whether it is the underlying facilities providers alone that provide the connectivity required by section 92(10)(a). A similar issue arises when telecommunications services are provided by “resellers”, such as mobile virtual network operators [MVNOs], that purchase access to infrastructure owned and operated by carriers such as Bell Canada, TELUS and Rogers. The courts have never decided whether these service providers meet the essential connectivity requirement.

There is case law in the field of transportation that may provide insight into how the courts may approach the connectivity requirement in section 92(10)(a). In 2009, in *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*,⁷¹ the Supreme Court of Canada considered whether the labour relations of a freight forwarder that consolidated and deconsolidated freight for its customers, handed that freight over to the railways for carriage across Canada, and provided pick-up and delivery services through a chain of terminals it operated throughout Canada, was subject to federal authority. The activities of a freight forwarder are similar to those of a provider of online services in certain respects: Fastfrate did

Results of the fact-finding exercise on the over-the-top programming services (October 5, 2011).

⁷⁰ Hogg says that “[t]he general phrase ‘other works and undertakings connecting the province with any other’, etc., is to be read *ejusdem generis* with the specific examples which precede it, and the specific examples are all modes of transportation or communication”; *Constitutional Law of Canada*, 5th ed Supp, looseleaf (Toronto: Carswell, 2019) at § 22.3 [Hogg].

⁷¹ 2009 SCC 53 [*Fastfrate*]. I consider the application of this decision to the constitutionality of measures regulating resellers of telecommunications services in “Telecommunications and the Constitution: Re-Setting the Bounds of Federal Authority” (2010) 89 Cdn Bar Rev 695 at 706. The discussion here tracks the discussion in that article.

not own interprovincial transportation facilities. It relied instead upon contractual arrangements with interprovincial carriers (in particular, Canadian Pacific Railway) under which it purchased capacity at wholesale rates and marketed the capacity it acquired in smaller units to shippers.

Justice Rothstein, writing for a 6:3 majority, said that it is a requirement for federal jurisdiction over transportation undertakings that the undertaking itself *physically* operates or facilitates carriage across interprovincial boundaries. Construing the text of section 92(10)(a), Justice Rothstein said that “[t]he genus of works and undertakings contemplated in section 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 that *notionally* connect them through contract.”⁷² Referring to Fastfrate’s role, he said that its “presence at both the originating and terminating ends may mean that it can provide a comprehensive *service* to its customers, but this does not change the fact that it is still only a shipper using an interprovincial railway or trucking company.”⁷³ Justice Rothstein concluded that limiting federal jurisdiction over transportation undertakings to those undertakings that physically operate or facilitate carriage across interprovincial boundaries “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.”⁷⁴

Does the reasoning in *Fastfrate* apply to online undertakings? In *Fastfrate*, Justice Rothstein noted that the emphasis in the communications cases is on the interprovincial nature of the relevant services and not simply on the means by which they are provided. He referred in this regard to *Capital Cities* and *Dionne*; cases in which the court held that cable companies whose works were located entirely within a province fell within federal authority because their “undertakings ... reach out beyond the province in which their physical apparatus is located.”⁷⁵ Justice Rothstein emphasized the inherent differences in communications and transportation technologies.

The difference between the communications and transportation contexts [he said] ... is that communications undertakings can *operate* and *provide* international and interprovincial communication services from a fixed point. If one were to focus only or primarily on the *means* by which a communication

⁷² *Fastfrate*, *supra* note 71 at para 43 [emphasis in original].

⁷³ *Ibid* at para 75 [emphasis in original].

⁷⁴ *Ibid* at para 44.

⁷⁵ *Capital Cities*, *supra* note 18 at 159.

undertaking provides interprovincial services to its customers, the result could be that two companies operating and providing identical services would be subject to different jurisdictions depending on their modes of transmission (i.e. whether they send and receive signals from one fixed location or whether they have an interprovincial presence).⁷⁶

The observation that the emphasis in the communications cases is on the interprovincial nature of the relevant services and not simply on the means by which they are provided has particular resonance here. The case law under section 92(10)(a) in which undertakings providing interprovincial communications services have been held to extend to companies whose physical infrastructure is confined to a province, including authorities such as *Capital Cities* and *Dionne*,⁷⁷ all involve companies that are facilities-based, even if those facilities do not cross provincial boundaries. They therefore contribute to the physical infrastructure that supports the provision of interprovincial communications services. No case decided to date has found a communications undertaking that does not own and operate a network is a federal undertaking. The logic of *Fastfrate* casts doubt on whether companies that rely wholly on the infrastructure of others—as telecommunications resellers and online undertakings operating OTT do—“connect the provinces” within the meaning of section 92(10)(a).

5. The OSA and POGG

In light of the uncertainty that arises about whether online undertakings are federal undertakings under section 92(10)(a), I now consider whether POGG provides an alternative basis for federal authority.

A) POGG and matters of “national concern”

The case law establishes that POGG can be invoked as a basis for federal legislation only where matters “transcend the provinces owing to their inherently national character.”⁷⁸ It is a “rarely applied doctrine of Canadian constitutional law” whose “application ... is strictly limited in order to maintain the autonomy of the provinces and respect the diversity

⁷⁶ *Fastfrate*, *supra* note 71, at para 60 [emphasis in original]. Justice Binnie, who delivered a dissenting judgment on behalf of a minority that included Chief Justice McLachlin and Justice Fish, rejected the idea that “the legal focus is different in transportation and communications cases” (*ibid* at para 104) and concluded that “What *Fastfrate* does—the service it provides, its ‘undertaking’—is to move freight from the hands of a customer in one part of the country to the hands of a customer in another part of the country” and that its labour relations are therefore subject to federal regulation (*ibid* at para 118).

⁷⁷ Other authorities include *AGT* and *Guèvremont*, both *supra* note 16.

⁷⁸ *GGPPA References*, *supra* note 44 at para 110.

of Confederation, as is required by the principle of federalism.”⁷⁹ It can be invoked “only in exceptional cases, where doing so is necessary in order for the federal government to discharge its duty to address truly national problems and is consistent with the division of powers.”⁸⁰ The subjects that have qualified as matters of national concern reflect this. They include aeronautics;⁸¹ marine pollution,⁸² because of its predominantly extraprovincial and international character;⁸³ atomic energy,⁸⁴ because of the potential for catastrophic interprovincial and international harm;⁸⁵ the establishment of the national capital region because the objective of the legislation was to ensure that “the nature and character of the seat of the Government of Canada may be in accordance with its national significance;”⁸⁶ and the pricing of greenhouse gas emissions, because of the well-established risk of grave extraprovincial and international harm.⁸⁷ Radiocommunication may also belong on this list.⁸⁸

Assertions of federal power grounded in the national concern doctrine have to be treated with particular caution since “a finding that a matter is of national concern confers exclusive jurisdiction over that matter on Parliament.”⁸⁹ In the *GGPPA References*, Chief Justice Wagner, writing for the majority, tried to contain the possibility that invocation of the national concern doctrine could subvert the division of powers by underlining that “the scope of the federal power is defined by the nature of the national concern itself” and that “[o]nly aspects with a sufficient

⁷⁹ *Ibid* at para 4.

⁸⁰ *Ibid* at para 109.

⁸¹ *Johannesson v Municipality of West St. Paul*, 1951 CanLII 55 (SCC).

⁸² *R v Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC) [*Crown Zellerbach*].

⁸³ *GGPPA References*, *supra* note 44 at para 106.

⁸⁴ *Pronto Uranium Mines Limited v The Ontario Labour Relations Board*, 1956 CanLII 153 (ONSC); *Denison Mines Ltd v Attorney-General of Canada*, 1972 CanLII 436 (ONSC).

⁸⁵ See *GGPPA References*, *supra* note 44 at para 107.

⁸⁶ *Munro v National Capital Commission*, 1966 CanLII 74 (SCC).

⁸⁷ *GGPPA References*, *supra* note 44 at para 198.

⁸⁸ In the *Radio Reference (PC)*, *supra* note 17, the Privy Council invoked POGG in support of its conclusion that federal jurisdiction over radiocommunication could be based on the federal treaty-making power. While that conclusion was subsequently disavowed by the Privy Council in the *Labour Conventions case*, [1937] AC 327, the general reasoning in the *Radio Reference (PC)* supports the view that radiocommunication falls under federal authority under POGG as well as s 92(10)(a). In *C.F.R.B. Ltd v Canada (Attorney General) (No.2)*, [1973] 3 OR 819, leave to appeal denied by SCC (13 November 1973), the Ontario Court of Appeal stated, at para 14, that “[r]adio communication has attained such dimensions as to affect the body politic of Canada and so under the heading of ‘Making Laws for the Peace, Order and Good Government of Canada’ Parliament is exclusively empowered to legislate as to the control of the radio communication undertakings”.

⁸⁹ *GGPPA References*, *supra* note 44 at para 120.

connection to the underlying inherent national concern will fall within the scope of the federal power.”⁹⁰ Thus, the Chief Justice said, it was “not a foregone conclusion” that labour relations at a nuclear generating station would fall within the federal government’s jurisdiction over atomic energy even though atomic energy had been recognized as a matter of national concern.⁹¹

B) Are online streaming services a matter of “national concern”?

In the *GGPPA References*, Chief Justice Wagner adopted a three-step test to be applied in assessing whether a matter falls within federal legislative jurisdiction under the national concern branch of POGG. As a first step, he indicated that one must consider, as a “threshold question”, whether a matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. The threshold question ensures that the national concern doctrine cannot be invoked too lightly.⁹² Whether a matter attains the required level of importance is essentially an evidentiary matter.⁹³ The onus rests on the federal government to present the court with a “factual matrix” supporting its assertion of jurisdiction.⁹⁴ In the *GGPPA References*, this threshold was met. Canada adduced evidence that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of importance in the effort to control climate change (which all parties agreed posed an existential challenge to Canada and the world). This evidence included the critical role carbon pricing strategies have played in the history of Canadian efforts to reduce GHG emissions and the views of experts that carbon pricing is a necessary tool for efficiently reducing GHG emissions.⁹⁵

In the present case, the 2020 report of the Broadcasting and Telecommunications Legislative Review Panel documents how online streaming services are driving “the unprecedented abundance of content in a global and competitive market, the growing presence and importance

⁹⁰ *Ibid* at para 122.

⁹¹ *Ibid* at para 107.

⁹² *Ibid* at para 143.

⁹³ *Ibid* at para 133.

⁹⁴ *Ibid*, citing *Reference re Securities Act*, 2011 SCC 66 [*Securities Act Reference 2011*] at para 115.

⁹⁵ *GGPPA References*, *supra* note 44 at paras 167–171. The majority reached the contrary conclusion in the *IAA Reference*, noting the failure of the federal government to lead evidence that the effects of such projects on matters of federal jurisdiction justified recognition by the court of a new national concern, or a broadening of the scope of the national concern recognized in earlier case law. *IAA Reference*, *supra* note 46 at para 189.

of foreign companies, [and] the shift by Canadians to consuming content online”⁹⁶ and the disruptive effect these developments pose to Canada’s cultural sovereignty. The report supplies evidence that supports the argument that the emergence of online streaming services presents issues of sufficient importance to Canada to satisfy the *GGPPA References*’ threshold test.

If a matter meets the threshold test, the analysis must proceed to the second step. In *Crown Zellerbach*, Justice Le Dain, writing for the majority, stated that a review of the case law established that for a matter to qualify as a matter of national concern it must satisfy four criteria. The third and fourth are germane here. According to Justice Le Dain,

3. For a matter to qualify as a matter of national concern ... 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 extraprovincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter.⁹⁷

In the *GGPPA References*, Chief Justice Wagner, recognizing that the phrase “singleness, distinctiveness and indivisibility” does not, on its own, amount to a readily applicable legal test, restated that requirement in the form of two principles. The first of these is that, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a “specific and identifiable” matter that is “qualitatively different” from matters of provincial concern. A matter that is “lacking in specificity”, he said, “or is boundless cannot pass muster as a matter of national concern.”⁹⁸ One of the objects of applying this principle is to ensure that the matter is contained within “ascertainable and reasonable limits”.⁹⁹

Chief Justice Wagner’s second principle is that federal jurisdiction should be found to exist only where the evidence establishes “provincial

⁹⁶ *Time to Act*, *supra* note 2 at 115.

⁹⁷ *Crown Zellerbach*, *supra* note 78 at 431–32, quoted in *GGPPA References*, *supra* note 44 at para 105.

⁹⁸ *GGPPA References*, *supra* note 44, at para 147, quoting the judgment of Justice Beetz in *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458.

⁹⁹ *GGPPA References*, *supra* note 44, at para 140.

inability” to deal with the matter.¹⁰⁰ “This means,” according to the Chief Justice, “that the matter at issue is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* that a province’s failure to deal with the matter within its own borders would have grave extraprovincial consequences.”¹⁰¹ The bar is high: “the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction.”¹⁰²

Consideration of the OSA in light of these principles reveals a serious difficulty in accepting the matter addressed in that legislation as one of national concern. The purpose of the OSA, as explained by the Minister of Canadian Heritage in his speech at second reading, is to address the impact online streaming services are having on “the strength and vitality of Canada’s cultural sector”, and in particular Canada’s “cultural sovereignty”.¹⁰³ But “culture” is a matter of shared jurisdiction that is not specifically assigned by the *Constitution Act* to either Parliament or the provincial legislatures,¹⁰⁴ and for that reason cannot be described as “qualitatively different” from matters of provincial concern.

Passing to the third step in the three-step process, a case for recognition of a matter as one of national concern must demonstrate that the proposed legislation has a scale of impact on provincial jurisdiction that is reconcilable with the division of powers.¹⁰⁵ To satisfy this step, it must be shown that a province’s failure to deal with the matter will have “grave extraprovincial consequences.”¹⁰⁶ Quoting Peter Hogg, Chief Justice Wagner said that by this means one can determine whether a national law “is not merely desirable, but essential, in the sense that the problem ‘is beyond the power of the provinces to deal with it’.”¹⁰⁷

A perusal of the provisions of the OSA reveals that it invests the CRTC with an open-ended power to impose any conditions on online undertakings that it “considers appropriate” for the implementation of

¹⁰⁰ *Ibid* at para 164. Chief Justice Wagner elevates the “provincial inability” criterion from the status of a mere indicium of “singleness and indivisibility” that it was in Justice Le Dain’s judgment to that of a “strict requirement”. *Ibid* at para 156.

¹⁰¹ *Ibid* at para 146 [Emphasis in original].

¹⁰² *Ibid* at para 147.

¹⁰³ *Debates, supra* note 51 at 1615.

¹⁰⁴ In the case of the provinces, “culture” is a matter that falls within s 92(13) of the *Constitution Act*, “Property and Civil Rights in the Province.”

¹⁰⁵ *GGPPA References, supra* note 44 at paras 110, 160–616.

¹⁰⁶ *Ibid* at para 153.

¹⁰⁷ *Ibid* at para 153, quoting Hogg, *supra* note 70 at § 17.3(b). Hogg was in turn quoting D. Gibson, “Measuring ‘National Dimensions’” (1976) 7 *Man LJ* 15 at 33.

Canadian broadcasting policy. When applied to traditional broadcasting media, these conditions have embraced matters as diverse as rates,¹⁰⁸ transfer of ownership,¹⁰⁹ programming content standards,¹¹⁰ and must-carry rules.¹¹¹

Furthermore, there is no evidence that there exist any technical or other practical impediments to provincial initiatives to regulate the matters addressed in the OSA, such as discoverability of programming, in the exercise of their authority over cultural matters,¹¹² and no grounds for concern that the failure of one province to address such matters would erode the ability of other provinces to address similar issues differently.

The issue is not whether federal regulation of online undertakings would be more effective or efficient than separate provincial initiatives. That argument was not enough to sustain the federal case for the establishment of a Canadian securities regulator (a case based on the federal power over the regulation of trade and commerce). The Supreme Court of Canada, while acknowledging that “the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do,” concluded that “as important as the preservation of capital markets and the maintenance of Canada’s financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation.”¹¹³

6. Summary and Conclusions

The rapid rise of streaming services has tested the traditional regulatory model supporting the creation, production and distribution of Canadian programming. The OSA addresses the challenge posed by this new technology by extending the CRTC’s regulatory mandate to include online undertakings and investing the Commission with new powers that will enable it to impose obligations on those undertakings requiring

¹⁰⁸ *Cable Television Regulations, 1986*, SOR/86-831, s 18 (fees for basic service) [repealed *BDU Regulations*, *supra* note 4 at s 57].

¹⁰⁹ *BDU Regulations*, *supra* note 4 at s 4.

¹¹⁰ See, e.g., *TV Regulations*, *supra* note 5 at s 5.

¹¹¹ *BDU Regulations*, *supra* note 4 at s 18.

¹¹² Indeed, Quebec has indicated that it is contemplating introducing measures of that sort. See Peter Menzies, “[Quebec’s plan to introduce its own streaming rules will be a minefield for the CRTC](https://tinyurl.com/yymbt74hw)”, *Globe and Mail* (19 February 2024); online: <<https://tinyurl.com/yymbt74hw>>. See also [La Souveraineté culturelle du Québec à l’ère du numérique : Rapport du comité-conseil sur la découvrabilité des contenus culturels](https://tinyurl.com/2zkejta2) (January 2024); online: <<https://tinyurl.com/2zkejta2>> [perma.cc/E26V-J8VL].

¹¹³ *Securities Act Reference 2011*, *supra* note 94 at para 128.

them to make a meaningful contribution to the achievement of the goals of Canadian policy.

The central question addressed in this article is ‘Did Parliament have the constitutional authority to enact the OSA?’ My analysis suggests that there is considerable uncertainty about the constitutionality of the federal claim to jurisdiction over online undertakings. I focused my analysis on two provisions of the *Constitution Act*: section 92(10)(a) and POGG.

Following the process mandated by the Supreme Court of Canada, I considered the pith and substance of the OSA, which I determined was the regulation of undertakings that deliver audio and audio-visual content over the internet for reception by the public. I then turned to the issue of how to classify that matter with regard to the heads of power in sections 91 and 92. In view of the fact that the OSA deems online undertakings to be a type of “broadcasting undertaking”, I examined whether online undertakings are “broadcasters” within the meaning attributed to that term in the case law defining federal authority under section 92(10)(a). I concluded that neither the narrow understanding given “broadcasting” in the *Radio Reference*, which involves the propagation of radio waves through space between transmitters and receivers, nor the wider meaning given the term in *Capital Cities*, which includes reception and distribution of interprovincial signals by cable companies, reflects the operational reality of online streaming. Online undertakings do not typically own or operate networks. It is ISPs that provide the physical infrastructure that constitutes the internet and the means by which end-users access the content streamed by online undertakings. Although the CRTC in its *New Media* decision, and the Broadcasting and Telecommunications Legislative Review Panel in its report, adopted an extended meaning of “broadcasting” that embraces streaming, neither source addresses whether the term “broadcasting” can, *from a constitutional perspective*, include activities that do not involve over-the-air transmission of signals, which has heretofore provided the touchstone of federal jurisdiction over broadcasting.

While the case law to date ties federal authority over broadcasting to its use of radiocommunication, that does not end consideration of section 92(10)(a) as a possible source of federal authority over online undertakings since that section embraces not only the modes of transportation and communication specifically mentioned, but also “other Works and Undertakings connecting the Province with any other or others of the Provinces.” However, online undertakings are candidates for inclusion in the list of entities that fall within the section’s scope only if they can be said to “connect the provinces”. After the decision of the Supreme Court of Canada in *Fastfrate*, it is unclear whether communications entities that

do not own and operate facilities that *physically* connect the provinces, and merely use the facilities of others, fall within Parliament's jurisdiction under section 92(10)(a).

The second provision of the *Constitution Act* on which I have focused attention in this article is POGG. Applying the three-step test set out in the *GGPPA References*, I question whether the OSA meets all of the requirements of that test; and in particular the second, which requires that federal jurisdiction should be found to exist only where the evidence establishes "provincial inability" to deal with the matter; and the third, which requires a demonstration that a province's failure to deal with the matter would have "grave extraprovincial consequences."

Until these issues are addressed by the courts, the OSA should be regarded as constitutionally suspect. How the federal claim to jurisdiction is ultimately resolved will have important implications for how Canada addresses the challenges the rapid rise of online streaming services poses, not only for the future of federal engagement in the regulation of audio and audio-visual services, but for the federal government's constitutional authority to implement other elements of its digital agenda.