

ARTICLE

NET-NEUTRALITY REGULATION IN CANADA: ASSESSING THE CRTC'S STATUTORY COMPETENCY TO REGULATE THE INTERNET

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INTRODUCTION

Established in 1976, the Canadian Radio-television and Telecommunications Commission (CRTC) was conceived as an administrative body concerned with the maintenance of a distinctive Canadian culture and the fostering of a competitive environment for the development of a strong domestic telecommunications industry. Moreover, it was to serve as a regulatory tool to ensure the dissemination of telecommunications and broadcasting services and technologies to all Canadians in a manner that was affordable and reliable.¹ While its initial regulatory purview consisted principally of telephone and broadcasting media, technological advances in the years since its creation have led to new technologies that use these two basic services as a technical foundation, but are distinct in their operations and the content that they provide. Among these, the internet can probably be said to have had the most profound impact on the landscape of mass communication in Canada.

The internet is distinct from prior electronic means of communication for three reasons. First, it is a decentralized medium of mass communication, both in its technical form and in its ownership structure. Unlike broadcasting, the internet does not disseminate its content from a restricted number of hubs. There are no significant points in its architecture from where it can be centrally organized and ownership of the internet and its content is highly dispersed. Second, it is user-centric. In contrast to the mono-directional nature of traditional broadcasting and the single-use function of telephones, the internet is interactive and malleable in its form. Third, the content of the internet is beyond the capacity of any one jurisdiction to effectively regulate.² The networks which form the substructure of the internet are transnational in scope. The origins of the internet as a United States Department of Defence initiative in the late 1960's to

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1. CRTC, *CRTC's role in regulating broadcasting and telecommunications systems*, online: <<http://www.crtc.gc.ca/eng/backgrnd/brochures/b29903.htm>>.
2. McTaggart, Craig, "Net Neutrality and Canada's Telecommunications Act" (Paper prepared for the Fourteenth Biennial National Conference on New Developments in Communications Law and Policy, Law Society of Upper Canada, Ottawa, 25-26 April 2008) [unpublished] at 10-7.

create a computer network capable of surviving catastrophic nuclear attacks is reflected in its current form as highly dispersed and liberated from dedicated infrastructure for its operations. This is unlike traditional telephony and broadcasting media that rely on fixed, central production and transmission infrastructure that is easily subjected to regulation.

As the prevalence of the internet as a form of mass communication has increased, so have calls for the application of regulations to preserve the openness and integrity of the internet in its current form.³ While it is not practical for the nature of the content transmitted across the internet to be regulated, the operation of the internet across existing telecommunications infrastructure means that the treatment of this information by telecommunications operators can theoretically be subject to regulation. Proposals for so-called “net-neutrality” regulation have emerged which seek to place constraints on the ability of telecom network operators to either constructively or destructively interfere with data traffic on their networks. This proposal has gained significant traction in North America and, in particular, the United States, where the Federal Communications Commission (FCC) has acknowledged the vital importance of such regulation in protecting the essential nature of the internet.⁴ In Canada, while public support is strong for net-neutrality regulation, the CRTC has yet to seriously consider it as either necessary or effective. Though this stance is partially informed by the CRTC’s established deference to the market in regulatory matters relating to new technologies, it is also influenced by a pervasive belief within the commission that the organization lacks the legal authority to regulate the internet in this way.⁵ The CRTC’s primary constating statute, the *Telecommunications Act*,⁶ makes allowances for the regulation of emergent communications technologies not contemplated when the act was written.⁷ Nonetheless, the commission has consistently taken a narrow view to this latitude, characterizing the decision that it would have to make in this instance as one of law that it does not have the capacity to assess. This position has been bolstered by a recent American court decision which found that the FCC did not have the legal jurisdiction to implement net-neutrality regulations.⁸

This paper takes the position that it is likely that the CRTC does indeed have the legal jurisdiction to make such a regulatory decision. This will be evidenced by the Canadian courts’ historically deferential approach to the CRTC on matters of substantive review. Through an analysis of the relevant issues and of the case law concerning the regulatory breadth of the CRTC, this paper will demonstrate that the implementation of net-neutrality regulations would likely be treated by the courts as being within the commission’s legitimate mandate.

The paper will pursue this argument by first outlining the two theoretical perspectives which will guide its structure: Dialogue Theory and Law and Economics. These perspectives contextualize the legal, economic, and social factors that define the purpose and operation of the CRTC. It will then move into an analysis of the role of the CRTC in regulating Canada’s telecommunications industry and a discussion of the issue of net-

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3. Barratt N & Shade LR, “Net neutrality: Telecom policy and the public interest” (2007) 32:2 Canadian Journal of Communication 295 at 296.
 4. Julius Genachowski, FCC Chairman, *Remarks on preserving internet freedom and openness*, online: <<http://www.openinternet.gov/speech-remarks-on-preserving-internet-freedom-and-openness.html>>.
 5. CRTC, *Public Notice CRTC 1999-197*, online: <<http://www.crtc.gc.ca/eng/archive/1999/pb99-197.htm>>.
 6. *Telecommunications Act*, SC 1993, c 38.
 7. *Ibid*, s 2 “telecommunications” & “telecommunications service”.
 8. *Comcast Corporation v. Federal Communications Commission and United States of America*, 08-1291 (DC Cir Ct App 2010).

neutrality. Subsequently, the paper will delve into the general attitudes displayed by the judiciary towards the CRTC on matters of substantive review through the analysis of four significant cases. Finally, the principles and positions elicited through these cases will be applied to the net-neutrality issue to ascertain whether the courts would likely treat such regulation as being within the purview of the commission.

I. THEORETICAL PERSPECTIVES

This paper's arguments will be informed by two theoretical perspectives: Dialogue Theory and Law and Economics.

A. Dialogue Theory

First proposed by Peter Hogg and Alison Bushell, Dialogue Theory conceives of the legislative and judicial branches as being engaged in a dialectical relationship with one another.⁹ This relationship causes each body to be responsive to the actions of the other in an ongoing cycle of statute development and judicial rulings. Both parties work mutually to guide legislation toward effectively addressing policy concerns while maintaining fidelity to the precepts of the Constitution. Hogg and Bushell assert that Dialogue Theory is an important normative underpinning of the ability of the courts to engage in judicial review.¹⁰ While this statement was made in regard to the review of legislation that engages *Charter* rights, the general notion that judicial review is part of an ongoing process of dialogue between the two branches serves to legitimate the substantive review of administrative decisions as well.

This theoretical perspective provides a foundation on which the essential nature of this paper's thesis can be understood. The question of whether the CRTC has authority to enforce net-neutrality regulation is premised, in part, on the ambiguity of the articulations made by the judiciary on the breadth of the commission's authority. While the CRTC has adapted its practices to accommodate the limits defined by the courts, the absence of clarity in the courts' communications as to how internet regulation is likely to be treated has prevented the CRTC from confidently moving forward on this endeavour. In this instance, the so-called dialogue between the courts and a delegated decision-making authority has yielded uncertainty due to the absence of a clear signal from the courts to which the CRTC could respond. Despite this lack of a definitive signal, however, this paper will argue that the CRTC already has the legal competency to enter this new regulatory arena.

B. Law and Economics

The paper will also employ theoretical assumptions originating from the Law and Economics school of thought. Drawing from the work of Richard Posner, the Law and Economics theory yields valuable insight as to the relationship between a society's legal structures and its economic practices. It is founded on the assumption that the principal dynamic underlying the evolution of the law is the accommodation and institutionalization of the dominant economic system.¹¹ The means by which the law is expressive of economic concerns is both direct and indirect. In the areas of law which directly touch upon matters of explicit economic concern, such as contracts and torts,

9. Peter Hogg and Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 *Osgoode Hall LJ* 75.

10. *Ibid* at 79.

11. Richard A Posner, *Economic Analysis of Law*, 6th ed (New York: Aspen Publishers, 2003) at 3.

this relationship is obvious. But in legal disciplines more grounded in social or political regulation, this relationship is also evident, albeit more implicitly, as a result of the social norms and values perpetuated by the hegemonic economic structure finding expression in judicial decisions on these matters. For example, the tendency of the courts to adopt individualist and market-based solutions to questions of economic concern can be said to reflect the progression of Canada's political economy towards market liberalism.

This theoretical perspective will be used in this paper to explain the approach of the courts towards the substantive review of CRTC decisions over time. While the courts have traditionally granted significant deference to the CRTC, this deference has nonetheless been constrained by the interest of the courts in maintaining the primacy of the market as the principal ordering mechanism in this important industrial sector.

II. THE CRTC AND NET-NEUTRALITY

A. The CRTC: Background

The CRTC was established in 1976 to consolidate the various federal regulatory bodies which had jurisdiction over electronic communication media. Since 1993, its authority has been vested in two federal acts: The *Broadcasting Act* and the *Telecommunications Act*. For the purposes of net-neutrality regulation, the latter act is the most relevant. The 2010 Supreme Court of Canada decision in *Re Broadcasting Act*¹² effectively ruled out the possibility of finding justification in the *Broadcasting Act* for regulations concerning the internet.

Section 7 of the *Telecommunications Act* outlines the broad policy objectives pursued by the Act and, by extension, the CRTC, in the field of telecommunications. These objectives are premised on the acknowledgement by Parliament that the telecommunications industry is a vital component of the integrity and maintenance of Canadian sovereignty: "...telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty."¹³ Academics, such as the eminent Canadian economic historian, Harold Innis, have asserted that the historical importance of the communications industry to Canada has been a function of the country's highly dispersed population and close proximity to the United States, the global cultural hegemon.¹⁴

12. *Broadcasting Act (Can.) (Re)*, [2010] FCJ no 849 (QL).

13. *Telecommunications Act*, *supra* note 6 at s 7.

14. Innis, Harold, *Essays in Canadian Economic History* (Toronto: University of Toronto, 1956), edited by Mary Q Innis at 220.

Section 7 enumerates nine specific objectives.¹⁵ These goals can be distilled into two broad overarching themes: (i) the effective provisions of telecommunications services to the consumer, and (ii) the facilitation of a robust domestic telecommunications industry. On the first theme, subsections (a), (b), (h), and (i) empower the CRTC to promote the development of consumer services that are affordable, reliable, respectful of privacy and social needs, and which provide reasonable levels of service to all areas of Canada's geography. On the second theme, subsections (a), (c), (d), (e), and (g) direct the CRTC to act to preserve domestic control over the industry, enhance the national and international competitiveness of the sector, and stimulate research and innovation. Section 7 grants regulatory jurisdiction to the CRTC to ensure that these interests are met, but constrains this jurisdiction by way of subsection (f), which asserts the intention of Parliament "...to foster increased reliance on market forces for the provision of telecommunications services." Regulation is intended to be minimalistic and focussed on instances where the market is patently unable to achieve the desired ends of the Act.

The regulatory tools that the CRTC is vested with to implement these objectives are various, ranging from the setting of rates for consumer services, the granting of licenses to telecommunications operators, and the creation of guidelines for the operation of these companies.

Although the internet as a mode of popular communication was not contemplated at the time of the constating statute's formation and is therefore not mentioned specifically in the Act as a regulated medium, section 7 grants flexibility to the CRTC to discern the appropriate regulations to be applied to new technologies. Putting aside, temporarily, the question of whether the constating statute grants sufficient flexibility to enforce net-neutrality, academics have proposed that the technical grounds for the enforcement of net-neutrality can be found in section 36 of the Act.¹⁶ Section 36 provides an explicit statement against the ability of infrastructure operators to interfere with the content transmitted over their systems on behalf of the public.¹⁷

15. *Telecommunications Act*, *supra* note 6 at s 7:

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(d) to promote the ownership and control of Canadian carriers by Canadians;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services; and

(i) to contribute to the protection of the privacy of persons.

16. Adeyinka, Alexander J, "Avoiding 'dog in the manger' regulation – A nuanced approach to net neutrality in Canada" (2008-2009) 40 *RD Ottawa Law Review* 1.

17. *Telecommunications Act*, *supra* note 6 at s 36:

36. Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

B. Net-Neutrality Defined

Historically, telephone networks were heavily regulated in North America by national regulators so as to ensure adequate competition and to foster innovation in the development of new technologies. In Canada, the CRTC and its predecessor agencies used provisions allowing for the prohibition of network operators to interfere with the content moving across their systems to create a “neutral” environment for the growth of new enterprises and technologies.¹⁸ Under this regulatory model, incumbent telecommunications operators such as BCTel and Bell Canada were prevented from discriminating against traffic on their proprietary networks belonging to smaller operators who did not have the resources to construct networks of their own. This promoted diversification in Canada’s telecom industry and prompted the development of novel voice and data services by these smaller industry players.

With the proliferation of the internet, however, network operators have called for the restriction of these provisions to solely voice traffic.¹⁹ Voice traffic is in contrast to data traffic, which has expanded exponentially since the popularization of the internet in the late 1990’s. Telecommunication operators have argued that this increase has severely strained the capacity of their networks and has diminished the quality of service that they can provide. They have argued that the traditional network neutrality rules that have applied to voice communications are functionally and legally incompatible with data communications.²⁰ Unlike voice, data traffic is heterogeneous, meaning that it is comprised of multiple types of transmissions which can be prioritized, such as worldwide web traffic and traffic emanating from file-sharing applications like BitTorrent. They also argue that current laws do not grant sufficient discretion to regulatory bodies to regulate data transmissions in the same way as voice transmissions.²¹ In regards to the CRTC’s competency on this matter, they note that such regulation would, in fact, contradict the broad objectives of the CRTC as enumerated in section 7 of the *Telecommunications Act*. Specifically, they point to subsections (b) and (f), which address consumer interests and regulatory minimalism, respectively.²²

C. Methods of Regulating Data Traffic

Without a definitive statement from regulators indicating an intention to extend the traditional neutrality provisions to cover data services, four options have emerged which enable network operators to influence the traffic on their networks with the goal of making them more efficient.²³

The first involves the outright blocking or degradation of content and applications using the network. The possibility of this occurring was made apparent in 2005, when TELUS blocked public access to the then-striking Telecommunications Workers Union’s (TWU) website because it contained pictures depicting company employees crossing the union’s picket lines.²⁴ TELUS justified this action by arguing that the display of such pictures jeopardized the safety of those depicted. While this is an extreme example of an operator directly impinging on the content transmitted over a network, it nonetheless indicates that it is well within the technical capacity of an operator to do so and that operators consider this form of interference as a valid option to deploy on their networks.

18. Barratt, *supra* note 3 at 297.

19. Adeyinka, *supra* note 16 at 18.

20. Barratt, *supra* note 3 at 296.

21. McTaggart, *supra* note 2 at 10-28.

22. Barratt, *supra* note 3 at 297.

23. Adeyinka, *supra* note 16 at 14.

24. *Ibid* at 18.

The second option involves the implementation of discriminatory network management practices. This option concerns the preferential treatment of specific classes of data. Without a definitive stance on net-neutrality by the CRTC, Bell Canada has already implemented a technology called Deep Packet Inspection (DPI) to interrogate and classify data on its network. According to Bell Canada's submissions to the CRTC, this technology is specifically targeted at data produced by peer-to-peer file sharing programs, which Bell Canada and other major networks argue are consuming a disproportionate share of network bandwidth relative to the small number of customers actually using it.²⁵ Once identified, the speed at which this data is transferred over the network is reduced to accommodate conventional internet traffic. Comcast, the largest provider of internet services in the United States, has also implemented this technology on their network.²⁶

The third option involves the prioritization of a network operator's own applications and services on its network, thus reducing the amount of bandwidth consumed by non-proprietary applications. It is suspected that this practice has already been adopted by Shaw Communications, which Vonage Canada has accused of "de-throttling" its voice over IP (VOIP) solution in favour of Shaw's own service.²⁷

The fourth option that would enhance the ability of network operators to manage their networks is the creation of a tiered service structure. Although this model has not yet been pursued by network operators and internet service providers (ISPs) in Canada, it would allow these companies to exert the greatest control over how their networks are utilized and would be the most lucrative of the four options. Alexander Adeyinka, Vice President of Regulatory Law & Policy at Rogers Communications Inc., proposes that this option would alter the character of the internet.²⁸ While the basic structure would remain the same, specialized content would be compartmentalized. The provision of the internet to consumers would resemble the way in which cable television is currently provided; access to certain areas of the internet and higher bandwidth utilization caps would be contingent on what tier a customer subscribed to. Davina Sashkin, noted American communications lawyer, remarks that several American telecommunications providers are already actively considering the creation of such a "two-tiered" model for internet delivery whereby content providers would be charged additional fees to have their content made available on the higher speed broadband tier.²⁹

D. Arguments in Favour of Net-Neutrality

Proponents of net-neutrality argue that the internet has only developed into its current form because of the now-waning assumption that data traffic was protected by the traditional network neutrality principle. They argue that the assumed neutrality of data networks has facilitated the innovation and entrepreneurship which has come to typify the internet.³⁰ With network operators being unable to intervene in the content or form of data traffic, no party has been able to exert holistic control over the development of the medium. Unlike more centralized media such as television and radio, where ownership and editorial control can be concentrated, the internet is open to anyone as a platform for communication and innovation. Innovative companies such as Google have only been able to emerge because of the absence of entry barriers, such as expensive

25. *Ibid* at 19

26. *Comcast*, *supra* note 8.

27. *Adeyinka*, *supra* note 15 at 15.

28. *Ibid*.

29. Sashkin, Davina, "Failure of imagination: Why inaction on net neutrality regulation will result in a de facto legal regime promoting discrimination and consumer harm" (2006) 15:1 *CommLaw Conspectus* 261 at 265.

30. *Ibid* at 266.

infrastructure or the domination of restrictive ownership conglomerates. Therefore, proponents of network neutrality argue that the continued evolution of the internet as a tool with seemingly infinite applications is driven by the absence of established structures otherwise prohibited by network neutrality regulations.³¹

Proponents also argue that the regulation of data networks by their operators would constrain innovation by positioning network operators as the principal architects of the internet.³² With only a handful of operators controlling the networks over which the internet predominantly exists, decisions as to the further development of the internet and the applications on it would be made by a concentrated set of interests.³³ For innovations to be successful in this environment, they would have to accord with the interests of the operators in order to receive favourable placement and treatment on the internet. The interests of internet users would still be relevant, albeit filtered through those of the operators. Thus, the growth of the internet would likely be less spontaneous and more homogenous, with spaces for innovation and niche interests being reorganized to agree with the profit motive of the operators.

Proponents of net-neutrality have also argued that the advantages of deregulation proposed by network operators are, in fact, contradictory. Specifically, the arguments made by operators that deregulation would promote greater innovation in content and delivery services are considered by proponents to be untrue for the aforementioned reasons.³⁴ Proponents contend that the concentration of control and ownership, which would likely occur in the case of a deregulated internet, would suppress innovation and that efficiency arguments are a distraction from the underlying interest of operators to avoid the expense of having to increase network capacity. Sashkin argues that the absence of public regulation would facilitate the emergence of a private regulatory paradigm in which network operators would self-regulate. Industry self-regulation would exclude interests contrary to those of the operators and jeopardize the free-market character of the internet otherwise protected by ensuring that network operators remain neutral entities in the transmission of information.³⁵

E. The CRTC's Position on Net-Neutrality

While the CRTC currently lacks a coherent policy position on net-neutrality, it can be deduced from the commission's decisions on internet regulation and policy positions on the internet, generally, that it presently does not favour regulation in this area. This position stems, in part, from the historical predilection of the commission to defer to market forces and the increasing prevalence of a neo-liberal ideology in government that eschews economic regulation.³⁶ But, also contributing to this position is a belief held by the CRTC that its constating legislations do not grant it the jurisdiction to regulate in the way required to enforce net-neutrality.

This sentiment was expressed in its well-known "New Media" policy paper released in 1999.³⁷ In it, the CRTC defined its likely jurisdiction as covering only audio and visual services on the internet. This notably excluded primarily alphanumeric services. Given that the bulk of services over the internet at that time were alphanumeric, this lent itself

31. *Ibid.*

32. *Ibid* at 276.

33. *Ibid* at 278.

34. Barrett, *supra* note 3 at 297.

35. Sashkin, *supra* note 29 at 298.

36. Barrett, *supra* note 3 at 296.

37. CRTC, *supra* note 5.

to a policy orientation that was decidedly passive and which remains unmodified today, even despite the increasing availability of audio-visual media online and the opportunities which this would theoretically present for regulation. This limited definition was in line with the CRTC's organizational competency in regulating solely audiovisual mediums, but it was also crafted in response to previous judicial reviews of CRTC decisions, which the board believed limited its discretion to interpret the constating statutes. Their primary concern was that the section 36 constraint on the ability of network operators to interfere in the traffic crossing their networks could only be activated in egregious circumstances, such as where the operator deliberately blocks specific content.³⁸ This reasoning is based on the type of network neutrality traditionally enforced on voice services. Due to the homogenous nature of voice traffic, operators can only regulate it in a binary fashion: it is either admitted or rejected. Data traffic, conversely, is more diverse and is susceptible to more forms of operator regulation as discussed previously, thus making it unsuited to this rudimentary conception of network interference.

This orientation was operationalized by the CRTC in its 2008 decision on an application by the Canadian Association of Internet Providers (CAIP) against Bell Canada.³⁹ The subject of this application concerned a complaint regarding Bell Canada's deployment of traffic-shaping technologies on its network. CAIP argued that this technology discriminated against legitimate voice-over IP and file-sharing applications that used the network.⁴⁰ They advanced the contention that such intervention by an operator in its network was prohibited under section 36 without explicit approval from the CRTC. In its ruling, the CRTC did not provide direct approval of Bell's measures. Instead, they determined that section 36 of the *Telecommunications Act* was not engaged in this instance for two reasons. First, this action did not entail the exercise of editorial control by Bell over the content on its network and, second, the measures were not targeted at excluding the ability of particular applications to access the network.⁴¹ These conditions represent the extreme end of traffic regulation and prevent the regulation of increasingly popular discrete modes of network regulation, such as Bell's DPI technology, by section 36. This narrow interpretation of section 36 was likely founded in the CRTC's belief that it lacked the statutory authority to interpret the legislative intent of the section as it applied to these more discrete, albeit similarly adverse, means of network management. This ruling was not appealed and, to date, no similar cases have appeared before the commission.

This restrained interpretation of section 36 of the *Telecommunications Act* found further justification in the April 2010 US District of Columbia Circuit Court of Appeal ruling in *Comcast v. FCC*.⁴² The subject of this case was a decision made by the American equivalent to the CRTC (the FCC), preventing Comcast from deploying the same traffic-shaping technology that Bell Canada used in the CAIP decision. Appealing this decision to the courts, Comcast argued that the FCC did not have the legal jurisdiction to expand existing neutrality provisions protecting voice traffic to encompass data traffic as well. The court agreed with this statement and rendered FCC regulations targeted at the enforcement of net-neutrality *ultra vires*.⁴³ While the constating statutes of the FCC and CRTC differ, this case has nonetheless served as a signal to the CRTC of the perils it may potentially face if it pursues the enforcement of net-neutrality.

38. Adeyinka, *supra* note 16 at 40.

39. CRTC(2), *Telecom Decision CRTC 2008-108*, online: <<http://www.crtc.gc.ca/eng/archive/2008/dt2008-108.htm>>.

40. *Ibid* at para 13.

41. *Ibid* at para 5.

42. *Comcast*, *supra* note 8.

43. *Ibid* at para 36.

III. TREATMENT OF THE CRTC BY THE COURTS

Historically, the courts have granted the CRTC broad deference to make decisions and regulations concerning matters under its jurisdiction. However, the question of what constitutes the commission's legitimate jurisdiction is a question on which the courts have yielded mixed results. In this section, four cases will be used to chart the general attitudes of the court in substantive review proceedings concerning the regulatory purview of the commission. Specifically, the courts' treatment of the four factors enunciated in the *Dunsmuir*⁴⁴ test for substantive review will be assessed: (i) the presence or absence of a privative clause, (ii) the expertise of the administrative body, (iii) the purpose of the specific provision, and (iv) the nature of the question as being one of fact or law.⁴⁵ This will assist in determining whether the courts would approve of the use of section 36 of the *Telecommunications Act* to justify the enforcement of net-neutrality.

A. *Canadian Broadcasting Corp. (CBC) v. Metromedia CMR Montreal* ("CBC")

The first case is a Federal Court of Appeal decision called *Canadian Broadcasting Corp. (CBC) v. Metromedia CMR Montreal*.⁴⁶ It concerns an appeal of a CRTC decision wherein the commission rejected the CBC's application for an additional radio station licence in the Montréal market. While the subject matter of this case does not deal with a question of jurisdiction directly, it does serve to outline the general attitude of the courts on two issues that are relevant to the substantive review process as adopted in *Dunsmuir*: expertise and the privative clause.

On the issue of expertise, the Court noted the highly specialized role that the CRTC had in regulating the telecommunications industry in Canada.⁴⁷ Recognizing the importance of this industry to the economic and cultural vitality of the country, the Court acknowledged that the expertise required to make decisions on matters within this area required a high level of expertise which the courts did not possess. The highly nuanced nature of the commission's decisions that often entailed the balancing of important competing factors, namely the goods of the public and of the industry, necessitated that these decisions be vested in an organization which had the capability to gather and assess the broad range of facts relevant to the decision. As well, the position of the CRTC as promoting cultural and economic nationalism meant that its activities were inflected by particular ideological elements which were beyond the competency of the courts to objectively assess.⁴⁸ Because of the significant weight that courts often assign to expertise in the *Dunsmuir* approach, the highly specialized nature of the CRTC's expertise has resulted in a historical deference towards the commission in instances of judicial review.

On the issue of the privative clause, the Court in *CBC* noted the peculiar absence of a negative privative clause in the *Telecommunications Act* shielding the proceedings of the CRTC from judicial review.⁴⁹ They noted that without the explicit intention of Parliament, communicated through the inclusion of a negative privative clause, courts have been considerably less likely to grant such broad deference to administrative bodies. Indeed, the inclusion of a positive privative clause in section 63 of the Act invites the characterization of the CRTC as a quasi-judicial body and thus exposes it to a more

44. *Dunsmuir v New Brunswick*, [2008] 1 SCR 190.

45. *Ibid* at para 64.

46. *Canadian Broadcasting Corp (CBC) v Metromedia CMR Montreal*, [1999] FCJ No 1637 (QL).

47. *Ibid* at para 3.

48. *Ibid* at para 6.

49. *Ibid* at para 3.

rigorous assessment by the judiciary. The Court reconciles this apparent contradiction by emphasizing, once again, the distinctive nature of the expertise possessed by the commission. The weight of this expertise extends to questions of law as well as fact, thereby limiting the viability of section 63 as a successful avenue of appeal.

B. *Barrie Public Utilities v. Canadian Cable Television Association* (“*Barrie*”)

The second case is *Barrie Public Utilities v. Canadian Cable Television Association*.⁵⁰ The 2003 Supreme Court of Canada decision regards a determination by the CRTC that it has the jurisdiction to compel utility operators to accept the connection of telecommunications lines to their transmission poles. The CRTC based this finding on section 43(5) of the *Telecommunications Act* which gives the CRTC jurisdiction over “the supporting structure of a transmission line.”⁵¹ The commission interpreted this to extend to support structures of all types, not just those specifically used to support telecommunications lines. The Court found that the CRTC did not have such jurisdiction and overturned the original CRTC decision involving the litigants, which was based on this false determination.⁵² This case is significant because it demonstrates an important limit to the deference that the courts are willing to grant to the CRTC.

In reaching this verdict, the Court applied the four-factor *Pushpanathan*⁵³ test, which was the accepted substantive review model at the time, to determine the degree of judicial deference that the CRTC was warranted. On the first factor, the presence or absence of the negative privative clause, the Court did not find one.⁵⁴

On the second factor, expertise, the Court ruled that the CRTC lacked the competency to decide on the question of what constituted a supporting structure for the purposes of the *Telecommunications Act*.⁵⁵ While the Court acknowledged the Federal Court of Appeal’s characterization of the CRTC’s expertise in *CBC*, the Supreme Court held that the question in this case exceeded the commission’s core expertise in telecommunications technology. Because utility support structures used for purposes other than supporting solely telecommunications infrastructure are sites of convergence for multiple regulatory arenas, such as electrical and gas, the CRTC’s expertise in telecommunications was insufficient to regulate in the interests of these sectors as well.

On the third factor, the purpose of the provision, the Court ruled that section 43(5) did not induce the commission to make a decision that the character of which was polycentric.⁵⁶ According to *Pushpanathan*, polycentricity is a condition of administrative decision-making whereby the administrative actor balances multiple interests in making decisions. The Court ruled that section 43(5) does not, in fact, empower the CRTC to decide on what constitutes a “supporting structure”; it does not vest the CRTC with a particular duty that requires the consideration of competing interests prior to its application. Rather, the Court interprets the principal function of the section as granting adjudicative authority to the CRTC to hear disputes concerning the access of telecommunications companies to shared telecommunications infrastructure. The duty explicitly given to the CRTC by this provision is to hear these disputes. The implementation of the commission’s discretion as to the balancing of competing interests

50. *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] SCJ No 27 (QL).

51. *Telecommunications Act*, *supra* note 6 at s 43(5).

52. *Barrie*, *supra* note 50 at para 43.

53. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

54. *Barrie*, *supra* note 50 at para 11.

55. *Ibid* at paras 12-16.

56. *Ibid* at para 17.

occurs subsequent to this and is influenced by the relevant provisions engaged in the adjudicative process.

On the fourth factor, the nature of the problem, the Court determined that it is a “purely legal” question.⁵⁷ What constitutes the “supporting structure of the transmission line” is an interjurisdictional decision that requires input from stakeholders from beyond the telecom sector. While Justice Gonthier notes that “...even pure questions of law may be granted a wide degree of deference where other factors suggest the legislature so intended,” the Court determines that the interjurisdictional nature of this decision would place it beyond the legitimate purview of the CRTC.⁵⁸

As a result of this test, the Court determined that a correctness standard was appropriate.⁵⁹ On this basis, the original decision was overturned.

C. *Re Broadcasting Act*

The third case is more recent, having been decided in 2010 by the Federal Court of Appeal. It is entitled *Re Broadcasting Act*⁶⁰ and was a reference case submitted to the Court by the CRTC on the issue of whether the commission could classify network operators and ISPs as broadcasters for the purposes of the CRTC’s other constating statute, the *Broadcasting Act*.⁶¹ The CRTC’s ground for this proposal was that, since the operators support the transmission of television programs through their networks, they are serving a function analogous to broadcasters as defined by the Act. The case is significant because it deals with a scenario similar to that at issue in the net-neutrality issue; namely, the attempt to use existing statutory parameters to classify emergent communications technologies such as the internet.

In this case, the Court ruled that the CRTC cannot subsume the internet under the regulatory parameters of the *Broadcasting Act* because the Act deals with fundamentally dissimilar subject matter. Here, the Court recognizes that the principal distinguishing trait of the internet is the interactive user-experience that it facilitates.⁶² This stands in stark contrast to the mono-directional nature of broadcasting, whereby the user passively receives information transmitted from a central source. Despite the flexibility contained within both of the CRTC’s constating statutes to enable it to respond to emergent technologies, the Court emphasizes that it will only permit the extension of the commission’s regulatory purview where the type of regulation is supported by a concrete statutory foundation.⁶³

D. *Bell Canada v. Bell Aliant Regional Communications (“Bell”)*

In the fourth and final case, *Bell Canada v. Bell Aliant Regional Communications*,⁶⁴ the Supreme Court of Canada provides timely insight into the type of situation where the CRTC can establish new regulatory tools not specifically contemplated by the constating statute. The dispute at issue concerns the legal jurisdiction of the CRTC to use funds collected from a “deferrals” account paid into by telecom carriers for the purposes of

57. *Ibid* at para 18.

58. *Ibid* at para 18.

59. *Ibid* at para 19.

60. *Broadcasting Act (Can.) (Re)*, *supra* note 12.

61. *Broadcasting Act*, SC 1991 c 11.

62. *Broadcasting Act (Can.) (Re)*, *supra* note 12 at para 59.

63. *Ibid*.

64. *Bell Canada v Bell Aliant Regional Communications*, [2009] SCJ No 40 (QL).

subsidizing broadband internet access for targeted disadvantaged groups. On application of the *Dunsmuir* test, the Court determined that a reasonableness standard applied and ruled that the decision to create this new regulatory mechanism was reasonable.

On the questions of the privative clause and of expertise, respectively, the Court found a positive privative clause and determined that the CRTC possessed a higher degree of competency to evaluate this matter than the courts.⁶⁵ The Supreme Court's reasoning on both of these considerations was consistent with that deployed by the Federal Court of Appeal in *CBC*.

On the question of the purpose of the governing statutory provision for this regulatory tool, the Court agreed with the CRTC that the relevant provision of the *Telecommunications Act* was section 7(b), which empowers the commission to ensure the "reliable and affordable" provision of telecommunications services to consumers.⁶⁶ The Court also agreed with the commission's assessment that section 7(b) grants it broad authority to balance competing interests in the fulfillment of the objectives put forth by this section. Here, Justice Abella adopts the CRTC's statement in Telecom Decision CRTC 94-19 that "The Act... provides the tools necessary to allow the commission to alter the traditional manner in which it regulates" and interprets a clear intention on the part of Parliament to confer broad authority on matters such as the present one on the CRTC.⁶⁷

Finally, on the inquiry as to the nature of the problem, the Court determined that it was a mixed question of fact and law.⁶⁸ The Court reasoned that section 7(b) necessarily gave the commission authority to devise new regulatory tools not specifically provided for in the wording of the statute and that the creation of these tools was contingent on an expertise which was only held by the CRTC.⁶⁹ The Court goes on to distinguish this case from *Barrie* by pointing to the fact that the present question is not one purely of law and that even if it was, it deals with "...an authority fully supported by unambiguous statutory language."⁷⁰

IV. ANALYSIS OF POTENTIAL FOR NET-NEUTRALITY REGULATION

Before engaging in an assessment of the legal feasibility of regulations protecting net-neutrality, it would be useful to briefly explain the likely reasons for the CRTC's reticence thus far in pursuing such regulation based on the principles articulated through these four cases. In particular, two principles stand out as being most likely responsible for this restraint.

First, as a matter of institutional practice, the courts have tended to restrictively interpret the constating statutes of the CRTC. The nature of the commission as having to regulate a rapidly transforming industry invalidates some of the assumptions historically employed by the judiciary in its approach to interpreting statute law. Despite Driedger's assertion that provisions are to be interpreted broadly and liberally,⁷¹ the type of change evidenced in the telecommunications sector is incompatible with the judicial assumption

65. *Ibid* at paras 37 - 38.

66. *Ibid* at para 45.

67. *Ibid* at paras 46 & 48.

68. *Ibid* at para 38.

69. *Ibid* at para 55.

70. *Ibid* at para 50.

71. *Barrie*, *supra* note 50 at para 20.

that subject matter is largely stable and unchanging. The emergence of the internet has fundamentally altered the disposition of the industry and has caused the rapid displacement of traditional technologies and business norms.⁷² Though provisions, such as section 7 of the *Telecommunications Act*, exist within the CRTC's constating statute to afford regulatory flexibility to the commission, the judiciary seems hesitant to translate this into allowances for expanded authority without a concrete basis for this regulation in existing provisions.

This trend is highlighted in *Barrie* where the Court narrowly construed section 43(5) of the *Telecommunications Act* to apply only to supporting structures used principally for telecommunications purposes. This interpretation was made in spite of the fact that there was no unambiguous specification within the provision qualifying the term "supporting structure" and the otherwise broad regulatory purview given to the CRTC by section 7. This decision does not account for the increasingly common practice of integrating telecommunications infrastructure into hybrid utility systems. Robert Leckey, a leading Canadian administrative law scholar, argues that this interpretation ignored the statutory nuances and technical facts which inflected this decision.⁷³ On the correctness standard established for this case, Leckey contends that the judiciary is inadequately equipped to manage the deliberate ambiguity of the act, let alone the highly technical nature of the considerations which its implementation requires.

The tendency towards restrictive interpretation is also evidenced in *Re Broadcasting Act* where the Court was averse to accommodating the regulation of television broadcasts over the internet under the *Broadcasting Act* on the grounds that the new medium was insufficiently similar to the ones specifically contemplated by the Act at the time of its formation.

The second principle affirmed through these cases that has likely impacted the CRTC's treatment of net-neutrality regulation is the tendency of the judiciary to favour neo-liberal explanations in its understanding of economic phenomena. In one of the seminal cases typifying this tendency, *RJR-MacDonald*,⁷⁴ the Supreme Court of Canada's conceptualization of the role of corporate communication and advertising in society was firmly premised in a neo-liberal understanding of economics.⁷⁵ The assertion by the Court that unimpeded corporate advertising was a public good on which educated consumer decisions could be based reflects the fundamental neo-liberal belief in the superiority of the market in determining consumption habits.⁷⁶ The restrictive interpretation of the statute in *RJR-MacDonald* denotes the historical inclination of the judiciary to defer to market forces in questions of economic allocation that go beyond the unambiguous intention of Parliament.⁷⁷

This trend has been evidenced at various junctures in the judiciary's treatment of the CRTC's regulatory purview. As canvassed previously, the courts have historically interpreted the CRTC's constating provisions in a narrow fashion, allowing for new regulatory initiatives only where there is a concrete statutory foundation indicating an unambiguous parliamentary intention to allow them. This occurs despite the inclusion of provisions which provide for the expansion of the regulatory purview of the CRTC

72. Sashkin, *supra* note 29 at 295.

73. Leckey, Robert, "Territoriality in Canadian Administrative Law" (2004) 54:327 *University of Toronto Law Journal* 327 at 342.

74. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.

75. Schneiderman, David, "A Comment on *RJR-MacDonald v Canada (AG)*" (1996) 30 *UBC L Rev* 165-180 at para 32.

76. *Ibid* at para 2.

77. *Ibid* at para 25.

to cover emerging technologies. It is apparent in cases such as *Re Broadcasting Act* and *Barrie* that the courts de-emphasize these expansive provisions in favour of identifying an explicit statement of parliamentary intent. This is consistent with the historical fashion in which the courts have treated statutes of an economic nature, such as the *Telecommunications Act*.

Despite the deterrent effect of these two principles, the CRTC likely does retain the authority to implement regulations enforcing net-neutrality. On conducting a substantive review of the competency of the CRTC to regulate in this manner under section 36 of the *Telecommunications Act*, the courts would likely determine that it is within Parliament's intention, as expressed through the Act, for the CRTC to do so. Since there are no prior decisions which dictate a standard of review for this particular problem, this decision would be reached on the application of the four factor test affirmed in *Dunsmuir*.

On the first factor, the presence of the privative clause, the court would identify a positive privative clause in section 63 of the Act which allows parties the right of appeal to the Federal Court of Appeal. Despite the absence of a negative privative clause providing an explicit indication of Parliament's intent for a high degree of deference to be afforded to the commission, the court would likely interpret this as it has historically done in cases concerning the CRTC – reducing it to a level of secondary importance relative to the remaining three factors.⁷⁸

On the second factor, expertise, the court would likely determine that the problem engages the highly specialized expertise of the CRTC and is beyond the capability of the courts to decide. The issue of whether section 36 of the *Telecommunications Act* can be construed to serve as a foundation for net-neutrality regulations engages the commission's institutional expertise by requiring the CRTC to make two decisions. First, it requires the commission to engage in an assessment of the interests at stake. It must ascertain whether the interference of operators with data traffic on their networks constitutes a legitimate network management practice and, if so, whether the implications to the public outweigh the benefits of doing so. Second, the CRTC must engage in an interpretive exercise to determine whether net-neutrality regulations can be accommodated within the scope of the provision. Specifically, it must ask whether these network management practices "...influence the meaning or purpose of telecommunications carried [on the network] for the public."⁷⁹ Both of these decisions require the application of highly specialized technical and legal expertise.

While the Court in *CBC* stated that the CRTC is to be granted a wide deference by the courts in its regulatory endeavours on the basis of its highly specialized expertise, *Barrie* qualified this by deciding that, particularly on questions of law, the authority of the commission is circumscribed where it is not otherwise provided for in unambiguous parliamentary language.⁸⁰ *Barrie* can be distinguished from the present case on two grounds. First, unlike the situation in *Barrie*, the question here regarding section 36 is entirely within the regulatory domain of the CRTC. It is a question which strictly relates to matters within the gamut of telecommunications. Second, section 36 explicitly empowers the commission to apply its expertise to a particular problem. This is in contrast to *Barrie* where the Court determined that the impugned provision was principally of an adjudicative character.

On the third factor, the purpose of the particular provision, the court would likely characterize it as highly polycentric and thereby warranting a high degree of deference

78. See *CBC*, for example. *Supra* note 46.

79. *Telecommunications Act*, *supra* note 6 at s 36.

80. *Barrie*, *supra* note 50 at paras 25 and 26.

as it did in *Bell*.⁸¹ As discussed in the previous factor, the CRTC's decision requires that it balance an array of interests in determining the relevance of such regulation to section 36. It must weigh the interests of network operators in maintaining the integrity and efficiency of their systems against the interest that the public has in a neutral internet. Because this assessment has multiple likely outcomes based on the diverse array of inputs into the decision-making process, this factor strongly pushes towards a standard of reasonableness, which lends greater deference to the decision of the commission.

On the fourth, and final, factor in the *Dunsmuir* test, the court will likely find that the CRTC is competent to decide this mixed question of fact and law. As canvassed under the second factor, the question requires that two decisions be made. The first, concerning the balancing of the competing interests is technical, while the second, concerning the accommodation of net-neutrality regulation within the wording of the provision, is legal. On questions of mixed law and fact, the court has typically granted the CRTC significant deference, as in *Bell*, for example. However, the caveat provided by the Court in *Barrie*, that the authority to determine questions of law be premised in either an explicit statutory discretion or "...where other factors suggest the legislature so intended," limits this authority somewhat.⁸² The present situation would nonetheless likely warrant a high degree of deference for two reasons. First, as mentioned previously, the subject matter in the present case is clearly within the domain of telecommunications. This is in contrast to *Barrie* where the interpretative issue at bar impinged on subject matter outside of the field of telecommunications. Second, it is implied throughout the statute and the provision that the CRTC be able to decide questions of law, such as this, which are within its expressed jurisdiction. For example, section 7 empowers the CRTC with broad authority to execute its statutory mandate, recognizing that the subject matter of the regulation is inherently unstable due to the rapidly evolving nature of the industry. Moreover, the Supreme Court of Canada has explicitly acknowledged in *Bell* that the Act provides for the evolution of the CRTC's regulatory facilities as technology changes.⁸³

Cumulatively, the four *Dunsmuir* factors point towards reasonableness as the standard of review for this problem. Given the high degree of deference granted to the CRTC by the courts on the finding of reasonableness,⁸⁴ it is likely that the courts would do the same here and would consequently find that the enforcement of net-neutrality regulation under section 36 of the *Telecommunications Act* would be within the statutory jurisdiction of the CRTC.

CONCLUSION

The dramatic growth of the internet as a medium of mass communication has placed the operators of the networks over which internet traffic flows in a powerful position to influence the integrity and structure of the internet in its current form. As a means of maintaining the vitality and openness of the internet, regulations protecting the neutrality of these networks from interference by their operators have been proposed. While the CRTC has been reluctant to adopt such regulation on the grounds of an absence of political will and legal competency, this paper has demonstrated that the latter is not an obstacle to its implementation. Section 36 of the *Telecommunications Act* likely provides a legally sound basis on which such regulation could be promulgated. With this aspect of the regulatory problem settled, the focus of the debate can thus shift to the policies of the CRTC, itself, and, by extension, of Cabinet on this critical issue.

81. *Bell*, *supra* note 64 at paras 46 & 48.

82. *Barrie*, *supra* note 50 at para 18.

83. *Bell*, *supra* note 64 at para 48.

84. For example, *CBC* and *Bell* where original decisions were unchanged.