Jay Thomson, "Must Should Can Should Must Should Could Must", Remarks, Rebooting Canada's Communications Legislation, A conference to examine changes to Canada's broadcasting and communications legislation (Ottawa: May22-23, 2015), Session 1

Our topic is whether federal jurisdiction currently extends to online content services and whether it should do so in the future. So we're not questioning the concept of broadcasting regulation, just its scope.

My Power Point summary is this:

Must Should Can Should Must Should Could Must

The Current Situation

Let's start with the current situation.

As I go through this, I'm going to use real life examples. Namely: the Rogers/Shaw-owned online service, shomi; and the Bell-owned service, Crave TV.

Does Parliament have jurisdiction to regulate shomi and CraveTV?

Yes.

Parliament has jurisdiction over Bell/Rogers/Shaw's Internet businesses.

It has jurisdiction over their cable TV, IPTV and satellite businesses.

And it has jurisdiction over their TV programming businesses.

Shomi and Crave TV simply combine these different parts of the Bell/Rogers/Shaw businesses. It follow that if Parliament has jurisdiction to regulate the parts, it has jurisdiction to regulate the sum of those parts.[1]

Is it "broadcasting" jurisdiction (and therefore to be implemented by the CRTC under the *Broadcasting Act*)?

Specifically, are shomi and Crave carrying on broadcasting undertakings within Canada?

Whatever shomi and Crave are doing, it's fair to say they're doing it in this country. So, is it "broadcasting"?

The 4-point test is this: Are shomi and Crave

1. transmitting

[1] As the Supreme Court said in the Dionne case: "the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on."

2. programs

3. by a means of telecommunication

4. for reception by the public?

I say “Yes” to all four.

First, shomi and Crave offer TV shows. TV shows meet the Act’s definition of “programs”.

Second, shomi and Crave use the Internet. The Internet is a means of telecommunication. [Even Tim and Michael agree with that.]

Third, the shomi/Crave business model is based on making their programming services receivable by the public.

Fourth, shomi and Crave “transmit”.

In SOCAN v CAIP, the Supreme Court equated “transmission” with “communication”. It then confirmed that the person who posts the content communicates (or transmits) it.

In the Fee for Carriage Reference Case, the Supreme Court held that the *Copyright* and *Broadcasting Act* s are part of the same interconnected statutory scheme, and so two provisions applying to the same facts are to be interpreted in a manner that favours “harmony, coherence and consistency”.

Thus because shomi and Crave “transmit” in the copyright context when they post content, they also “transmit” that content in the broadcasting context.

The result: shomi and Crave are `broadcasting and thus currently subject to the *Broadcasting Act* and the CRTC’s broadcasting jurisdiction.

The CRTC MUST Do Something

If the CRTC has broadcasting jurisdiction over an undertaking, then it must regulate the undertaking, either through licensing or through the exemption route.

So then the question becomes: *how should it regulate shomi and Crave?*

This is because the objective to be achieved should dictate the form of regulation to be applied.

The objective in the case of shomi and Crave is one the Commission itself identified in 2011 when it established its Group Licensing Framework and re-affirmed in its recent Let’s Talk TV

process. That objective is: to stabilize financial contributions to the creation of Canadian programming in a changing broadcasting environment.

Why is this necessary? Again, as the Commission stated in a Let's Talk decision, "[f]inancial support is required to ensure the necessary resources are available in order for Canadians to create a diversity of programming."

Currently, traditional licensed linear broadcasters account for *two-thirds* of all financial support for Canadian programming.

However, the Commission forecasts that, over the next several years, Canadians will continue to migrate from scheduled and packaged programming services to on-demand programs.

Reed Hastings, who heads a popular shomi/Crave equivalent you may have heard of, puts it more bluntly. With his stock now trading at over $600/share, he recently told happy shareholders that clearly, Internet TV will ultimately replace traditional TV.

In light of these predictions, the Commission has acknowledged that it must devise a regulatory framework that is responsive to ways in which content can and will be delivered.

So here's the picture:

Canadian television programming needs financing to have a future.

Most of that financing currently comes from linear broadcasters.

shomi and Crave will ultimately replace those linear broadcasters.

But who will replace the necessary financing?

It has to be broadcasting services like shomi and Crave. Look around: unless ISPs start contributing, there's nobody else.

<u>Amending the Exemption Order</u>

Now, here's my kick at the "Can".

The Commission can impose a spending obligation on shomi and Crave by simply adding it as a condition of eligibility for the Digital Media Exemption Order.

A more elegant and targeted way would be for the Commission to revise its definition of "broadcasting revenues" for so as to include the revenues Bell, Rogers and Shaw generate online.

The Commission actually tabled that very proposal in the Let's Talk proceeding, as a means to "ensure the presence of compelling Canadian programs on multiple platforms in the future".

Unfortunately, the Commission chose not to implement that proposal. Its rationale – questionable in my view – was that a spending obligation "could stifle innovation".

Fortunately, the Commission nevertheless seemed to indicate that regulating shomi and Crave is not a question of "if" but of "when". That's because it stated that it would not require contributions from those kinds of services <u>at this time</u>."

I take from this statement that the Commission confirmed it CAN regulate shomi and Crave's online services. The remaining task, therefore, is to convince the Commission that it SHOULD do so. And that, for the future of Canadian programming, it MUST do so sooner rather than later.

For all these same reasons, I submit that, if Parliament decided to consider new communications legislation, it <u>should</u> maintain and enforce its jurisdiction over such online services. And that, like now, it <u>could</u> do so. And, if you believe your future programming choices should include Canadian choices, it <u>must</u> do so.

There they are on that slide –

8 key words:

<u>**Must Should Can**</u>

<u>**Should Must**</u>

<u>**Should Could Must**</u>

It`s a simple – and as important – as that.