

Communications Law Bulletin

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Canadian Telecom Policy Review Panel Report – March 22, 2006

Background

On March 22, 2006 the Canadian Telecommunications Policy Review Panel released its report. The 400-page report contains detailed analysis and 127 recommendations comprising the first significant review of telecommunications policy in Canada in almost 30 years. Technological change, international experience with competition and markets, and the significance of information and communications technologies in economic competitiveness and productivity led the Panel to conclude that it was time to make fundamental changes to Canada's telecom policy.

A summary of the principal recommendations is set forth below.

Regulation

Policy Objectives

The nine current telecommunications policy objectives set forth in Section 7 of the *Telecommunications Act*, 1993, were viewed as being outdated as well as conflicting in certain respects. The Panel proposed that they be refined to focus on three objectives:

- promoting affordable access to advanced telecom in all regions of Canada;

- enhancing the efficiency of the telecommunications markets and the productivity of the Canadian economy; and
- achieving certain specific social objectives.

In the context of those objectives, two further fundamental changes in regulatory approach are proposed by way of specific guidelines:

- Regulatory and governmental actions should only be undertaken in this sector where:
 - (i) market forces will not achieve the objectives within a reasonable timeframe; and
 - (ii) the costs of regulation do not outweigh the benefits.

That is, market forces, rather than regulatory prescription, should be the governing feature of this sector.

- Consistent with the foregoing approach, the regulatory presumption should be reversed. Rather than endeavour to regulate everything within the sector except where there has been a specific forbearance (e.g., internet activities should be unregulated except in specific circumstances where necessary to protect consumers or maintain competition.

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Economic Regulation

The Panel's recommendations approach mandatory and regulated services from the perspective of a market power and market restriction analysis. Review should be initiated on complaints from market participants, rather than the regulator itself and, on any such review, an initial determination should be made as to whether existing competition law is adequate to deal with the activity in question. Only if such current law is inadequate, and if there is "significant market power" by the party complained of, should there be economic regulation by the telecom regulator.

Similarly, markets and activities which are subject to economic regulation should be reviewed on the request of any affected participant and, where there is no longer any significant market power, price restrictions and similar measures should be discontinued.

Significantly, the Panel recommended that all forms of economic regulation which are adopted should be applied "symmetrically to all telecommunications service providers having significant market power". The Panel identified considerable convergence in the methods by which a particular content is ultimately delivered to its end user, regardless of the specific medium or technology employed, and concluded that regulation should focus on the market activity rather than on the mode of delivery. A further refinement is the recommendation that economic regulation of retail services, where necessary, should be by way of a price cap rather than by other economic models. Again, primary deference is given to market forces. These are recommended to be coupled with additional specific standards for consumer protection and control of anti-competitive conduct.

The Panel proposed that a category of "essential facilities" be created which would be subject to a regime of mandated supply at regulated rates. There

are ancillary recommendations with respect to the identification of such essential facilities, a frequent periodic review and transitional measures. It is proposed that existing mandatory arrangements, such as wholesale facilities, reselling, and similar matters, should be subject to a transition period of three to five years. At the end of that transition period those current mandatory arrangements which did not fall into the "essential facilities" category, or which did not require an additional transition period to amortize high initial start up costs, would essentially cease to be mandatory. The intention is that only "essential facilities and interconnection services" would be subject to mandatory access and price regulation.

An interesting approach is taken in recommendation 3-26 regarding interconnection arrangements and interoperability between public networks. The Panel proposes that the CRTC have authority to mandate such arrangements, but only where:

- there is significant public interest to be served; and
- market forces and commercial negotiations are "unlikely to result in efficient interconnection and interoperability on reasonable terms and in a timely manner."

Disputes in these areas should primarily be resolved with the CRTC.

In order to continue to foster competition at the local exchange level, recommendation 3-30 suggests that resellers who wish to undertake the obligations of a competitive local exchange carrier (CLEC) should have all of the regulatory rights and obligations applicable to a CLEC. This may facilitate the provision of comparable functionality to end users by those parties who elect to establish their business as resellers rather than building a separate network and infrastructure.

Telecommunications Competition Tribunal

Consistent with the Panel's view that telecom should only be regulated where necessary, and that most of the determination of 'necessity' should be based upon market power and competition analysis, the Panel has proposed the creation of a "telecommunications competition tribunal" ("TCT"). The TCT would draw staff and resources, as well as jurisdiction, from each of the CRTC and the Competition Bureau and is intended to combine the industry expertise of the CRTC with the market power analytical capabilities of the Bureau, as well as minimizing regulatory overlap. Recommendation 4-14 contemplates the TCT having "exclusive jurisdiction" for:

- applications for deregulation of telecom services;
- complaints of anti-competitive activities in telecoms, other than terminal equipment;
- determination of services to be subject to mandated wholesale access, and the relevant regulatory regime;
- applications for re-regulation of telecom services where significant market power is alleged; and
- merger review of telecom services providers.

Additional recommendations with respect to financing, resources, interagency coordination and similar matters are proposed to facilitate the workings of the TCT and to provide a more streamlined regulatory competition analysis for the industry.

Technical Regulation

To enable wired and wireless carriers to have access to infrastructure, such as rights of way, support structures and buildings (inside wiring and rooftops), to build and maintain their networks, the Panel

makes 13 recommendations. These include broadening powers currently held by the CRTC and transferring powers from Industry Canada to the CRTC, to regulate the location of wireless towers, the situs of infrastructure within public lands, the sharing of infrastructure, access to buildings, resolving disputes between and among carriers and building owners, and the development of a new policy to manage and regulate radio spectrum.

A concern in providing a number of broader powers to the CRTC is that it will directly affect the powers held by Canada's other two levels of government, provincial and local or municipal. Given the opposition which already exists as evidenced by the number of CRTC and court proceedings over the exercise of existing powers, perhaps this is an area where the three levels of government and the private sector need to sit down and come to agreement. It is noted that this coordination is recommended for purposes of implementing ICT and connectivity policies.

Social Regulation

In order to implement the Panel's policy to provide affordable telecommunications services to all of Canada, the Panel recommended that incumbent telephone companies must provide service where they have the infrastructure (which in effect is a restatement of the historical duty of a common carrier) and that all consumers have access, with information required to make informed choices, to publicly available internet applications. Also proposed is a new self-funding Telecommunications Consumer Agency to resolve complaints from individual and small business retail customers, in which carriers must be members.

Access

Reliable and affordable access to modern telecommunications facilities throughout the country was one of the three primary terms of reference of

the Panel, together with a review of regulation and technology adoption. Rather than focus specifically on access matters, the Panel's analysis appears to have led it to the broader conclusion that such access is most likely to be obtained by a way of deregulation and the use of market forces, coupled with specific regulatory and governmental initiatives where the market either would not operate or would not do so on a timely enough basis. This conclusion is in part reflected in the overall structure of the report as well as specific recommendations in the regulatory, social policies and broadband implementation proposals set forth elsewhere in their recommendations. As well, although not within their specific terms of reference, the Panel's analysis reinforced that in the dynamic technological environment for communications, telecommunications and broadcasting are increasingly interconnected and increasingly interchangeable with each other. The Panel view was that it would be inadequate from the perspective of access, as well as other objectives, to focus only on telecom and not also consider broadcasting policy.

Adoption of Information and Communication Technology (ICT)

In addition to the market efficiency objectives to be served by its economic regulation recommendations, the Panel also recommended the pursuit of the objective of enhancing productivity of the Canadian economy through ICT. Additional objectives include social well-being and inclusiveness of Canadian society.

The productivity objective is based upon a recognition that not only do Canadians desire and embrace new ICT, they have also been among world leaders and innovators in the production of ICT products and the delivery of ICT services. The Panel's analysis further concludes that ICT is a fundamental and enabling element of productivity, an area in which Canada is now starting to lag within

the OECD group of countries. The Panel further observed that "it is not just investment in ICT assets as such that drives productivity gains. What matters most is the optimal usage of ICTs in business processes and business operations". Failure to continuously and effectively adopt evolving ICT in our economy could lead to Canada "being squeezed into an increasingly uncomfortable niche between a large, highly productive U.S. economy and a number of large, emerging low-cost economies."

Accordingly a number of recommendations have been made with respect to the implementation of a national ICT "smart adoption" strategy. Those recommendations include matters such as governments leading by example, skills development, facilitating adoption in small and medium enterprises (SMEs), enhanced security of the online environment and the proliferation of broadband network access. In particular, recommendation 7-5 contemplates an enhanced tax credit targeted at SMEs. The credit is intended to relate both to investment in physical assets and to expenses related to ICT adoption. Those adoption costs would include training, organizational change, and process re-engineering.

As a specific governmental initiative, the Panel recommended the deployment of "ubiquitous broadband access" across the country, including in particular those areas which will not be adequately served by market forces by the year 2010. Consistent with the three broad objectives outlined in this area, this initiative is intended to serve not only the productivity gained but also the two related social objectives. Various related recommendations are made to facilitate the adoption of a program on a basis that does not duplicate other market and/or community functionality, has incentives and disincentives for maintenance and enhancement of service functionality and, where subsidies are required, is implemented by way of "least cost subsidy options."

In Chapter 9 of its report the Panel also includes several recommendations designed to reform and streamline the operations of the CRTC. The intent of these recommendations is to reduce the number of commissioners to five, to consolidate and streamline existing regulations, eliminate regulations in various sectors and replace them with a simple registration regime, and to base its proceedings increasingly on expertise, both internal and external, with a reformed approach to public interest group participation and funding for intervention in telecom regulatory proceedings.

Connectivity

The Panel's key recommendation is that Canada has a goal of achieving ubiquitous broadband coverage to over 98% of Canadian households by 2010. This new "Ubiquitous Canadian Access Network" or U-CAN is to be the successor to the current Broadband for Rural and Northern Development and the National Satellite Initiative. The Panel then provided 19 further recommendations on how U-CAN should be implemented, including coordination at all levels of government and the private sector, funding, operation and evaluation.

Afterword

Although not expressly mandated to address how changes to telecommunications regulation would affect Canadian broadcasting policy and Canada's restrictions on foreign ownership, the Panel chose to expand the scope of their review to cover these subjects:

a. Technology and Market Convergence

The Panel observed that the technological and market trends affecting fundamental changes in Canada's telecommunications policy also apply to the nation's broadcast policy. Consequently, Canada's broadcast policy should be adapted to

recognize the shift to IP-based communications networks, greater reliance on open network architectures and the convergence of information and communications technologies and content industries. New broadcast policies should, for example, encourage the development of advanced broadband networks by both the cable and telecommunications sectors and allow cultural and content production communities to take advantage of the technological and market trends in order to advance the presence of Canadian content in the converging broadcasting and telecommunications industries.

The Panel did not make specific recommendations for changes to broadcasting or regulation but instead proposed that an independent group of experts review Canada's broadcast policy and regulatory framework to develop a more consistent and competitively neutral regulatory approach to these converging industries. The Panel proposed that the following issues be reviewed:

Within the Legislative Framework

- The merits of adopting unified legislation to deal in a consistent and non-discriminatory manner with all forms of telecommunications.
- Establishing "content rules" that are separate from but compatible with the unified telecommunications legislation.
- Updating the content rules to develop more targeted and effective means of promoting the production and distribution of Canadian content in light of the technological and market trends.

Within the Policy-making Framework

- The advantages and disadvantages of establishing a "converged" policy-making role to cover telecommunications, broadcasting, and other aspects of ICT policy.

- Assigning the converged policy-making role to a separate new “Department of Information and Communications Technologies”, or an existing department, such as Industry Canada or Canadian Heritage.

Within the Regulatory Framework

- Reorganizing the CRTC to develop an increased capacity to handle broadcasting, telecommunications and broader ICT industry implications of decisions related to its “broadcasting” and “telecommunications” mandates.
- Better coordinating the copyright-related functions of government with its ICT policies and regulations, including possibly consolidating the regulatory functions of the Copyright Board and that of the CRTC.

b. Foreign Ownership

The Panel addressed the current policies that restrict foreign ownership and control of telecommunications common carriers and broadcast distribution undertakings and concluded that the same principles of deregulation and greater reliance on market forces should apply. The Panel found that removal of some restrictions on foreign investment will likely increase overall competitiveness, improve productivity and be more consistent with Canadian policies of open trade and investment. Following a review of the general risks and benefits associated with greater foreign direct investment (FDI), the report evaluated the benefits of FDI to the telecommunications sector directly, including a shift toward greater equity capital investment and away from the current reliance on debt capital. Balanced against the desire to expand foreign ownership and investment is the need to ensure that the public interest is served by considering head office location mobility, national security, the maintenance of the

current Canadian supply chains and the impact on broadcasting policy and investment.

Of particular concern to the Panel is the possibility that deregulation could occur under the *Telecommunications Act* but not under the *Broadcasting Act*, creating an asymmetrical liberalization of foreign investment rules and leaving some cable and telecommunications companies at a competitive disadvantage.

To facilitate increased FDI the Panel recommended that a broadcasting policy review be undertaken to separate Canadian broadcasting “content” policy from policies for the “carriage” of telecommunications, thereby ensuring a level playing field for traditional telecommunications carriers and cable/satellite undertakings now operating in the same telecommunications markets. As part of a phased and flexible approach to implementation, market entrants with less than a 10 percent share of relevant telecommunications markets should now be presumed to be in the public interest, with greater liberalization of FDI once a review of broadcasting has been completed.

Governmental Priorities/Implementation

It is expected that the three policy objectives set out in the report will be well received by all parties in the House of Commons. The policy of promoting access to advanced telecom in all regions of Canada will be welcomed by all. This being said, adoption of the legislative framework and regulatory modifications required to implement changes recommended by the Panel constitute a formidable agenda in parliamentary terms. While the overall objectives will be regarded favourably, one can expect divergence of views on a number of issues.

Foreign ownership is certainly one such issue. It will be challenging for the Government to proceed with proposals in this area in a minority parliament situation in view of strong views expressed on the subject by opposition parties. Furthermore, the Panel's view that Telcos without broadcasting properties could enjoy foreign ownership regime changes prior to Cablecos would likely divide the industry. Pure Telcos (if such exist) would seem to gain preferential treatment. Policy on joint broadcasting/Telco/Cableco ownership would have to be sorted out before consideration can properly be given to the issue. It is not likely this issue would receive consideration for inclusion in the parliamentary timetable of a minority government.

One would expect the government to strongly support the deregulation/market force agenda in its public pronouncements and to thoroughly examine which parts of this agenda can be implemented by executive decision/directives to the CRTC or by regulation. As for the far-reaching changes requiring legislation, it is an open question as to how much appeal they would have to the average Canadian, a prime consideration in the mind of a minority government.

Detailed Report

Copies of the Panel's full report can be accessed at the following link: <http://www.telecomreview.ca>.

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