

6 Chapter 6 Social Regulation



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In this report, the term “social regulation” refers to regulatory policies and practices designed to achieve social policy objectives that may not be met through competitive market forces or economic regulation alone.

The statutory objectives recommended in Chapter 2, Policy Objectives and Regulation, have a significant social dimension. They reflect the Panel’s view that social objectives should continue to have a central place in Canada’s telecommunications policy. In Chapter 3, Economic Regulation, the Panel sets out the reasons it believes that market forces and new forms of economic regulation should be relied on to the maximum extent feasible to achieve Canada’s telecommunications policy objectives, including those that have a social dimension. However, the Panel also believes there will be a continuing need for social regulation.

The Panel’s policy objective as set out in Recommendation 2-2 — “to promote affordable access to advanced telecommunications services in all regions of Canada, including urban, rural and remote areas” — clearly has a social dimension. The Panel is convinced that in most parts of the country, competitive market forces operating within the new regulatory framework recommended in Chapter 3 will provide Canadians with affordable access to advanced services. However, the Panel also believes there are rural and remote areas where competitive market forces are unlikely to achieve this objective in the foreseeable future. To ensure affordable access to advanced services in some of these areas, it may be necessary to maintain traditional forms of economic regulation, at least for a period of time. In other areas, other forms of government intervention may be required.

Social regulation is not a matter for rural and remote areas of the country only. The third statutory policy objective of the Panel as set out in Recommendation 2-2 is “to enhance the social well-being of Canadians and the inclusiveness of Canadian society by facilitating access to telecommunications by persons with disabilities; maintaining public safety and security; contributing to the protection of personal privacy; and limiting public nuisance through telecommunications.” The Panel believes new regulatory policies and arrangements are needed to achieve these goals, as well as to protect the interests of citizens and consumers, in the technologically transformed and increasingly competitive telecommunications environment described in Chapter 1, The Need for Change.

The achievement of social policy goals through government and regulatory intervention has been a central aim of telecommunications policy in the past. The Panel believes effective social regulation will remain a necessary complement to economic regulation in Canada’s overall telecommunications policy as telecommunications markets become more innovative and competitive. The two should progress hand in hand as telecommunications becomes an increasingly important enabler of economic and social activities for all Canadians, and a key infrastructure for the delivery of government and public services.

However, just as economic regulation should be reformed, so should social regulation. The Panel recommends several new initiatives including:

- ensuring that affordable and reliable broadband services are ubiquitously¹ available in all regions of Canada, including urban, rural and remote areas, by 2010 at the latest
- codifying an obligation for all incumbent telephone companies to provide basic telephone services in areas where they have available network infrastructure, unless or until the CRTC has determined that universal access to basic telecommunications services is likely to be achieved through market forces
- establishing a new “ombuds office” to be called the Telecommunications Consumer Agency (TCA) with authority to resolve complaints from individual and small business retail customers of any telecommunications service provider
- establishing a new “consumer right of access” to Internet applications and content.

The initiative to provide ubiquitous access to broadband telecommunications services is discussed in Chapter 8, Connectivity. The other recommended initiatives are described in the following sections. In addition, this chapter addresses the relationship between the CRTC and the Privacy Commissioner.

The Obligation to Serve

Existing Obligations

In the past, the obligation of incumbent monopoly service providers to provide service to all customers in their territories was a central element of public utility regulation. In markets that have become increasingly competitive, the question arises whether an “obligation to serve” should continue to be placed on former monopoly service providers. More generally, the question arises whether the incumbent telephone company in every serving territory should be legally obliged to provide basic telecommunications services subject to the availability of network infrastructure.

The CRTC addressed this question when it established a framework for local competition in 1997.² The Commission concluded that it would not be appropriate to designate one carrier as having “carrier of last resort” responsibilities in markets characterized by effective facilities-based competition. However, the Commission also concluded that market forces alone would not achieve the statutory objective set out in ss. 7(b) of the *Telecommunications Act* “to render reliable and affordable telecommunications services of high quality accessible to Canadians

¹ As discussed in Chapter 8, Connectivity, the challenge of achieving ubiquitous access to telecommunications networks is ongoing and for the purposes of ubiquitous availability of broadband service, the Panel believes Canada should aim to realize levels comparable with the achievements in voice telecommunications.

² *Local Competition*, Telecom Decision 97-8, May 1, 1997.

in both urban and rural areas in all regions of Canada.” In other words, the CRTC concluded that an obligation to serve should continue to be placed on incumbent carriers in markets where effective facilities-based competition had not developed.

Although the CRTC continues to impose an obligation to serve³ on incumbent carriers in non-competitive markets, only Bell Canada has an explicit statutory obligation, which is set out in s. 6 of the *Bell Canada Act*.⁴ The CRTC has not applied the obligation to serve to new entrants.⁵

What exactly is entailed in the obligation to serve?

In 1999 the CRTC set out the following basic service objective for local exchange carriers⁶:

- individual line local service with touch-tone dialing, provided by a digital switch with capability to connect via low-speed data transmission to the Internet at local rates
- enhanced calling features, including access to emergency services, Voice Message Relay service and privacy protection features
- access to operator and directory assistance services
- access to the long distance network
- a copy of a current local telephone directory.

In making this determination, the CRTC noted that the basic service objective may change over time as service expectations evolve.⁷ However, there have been no changes to date.

³ The incumbent telephone carrier's obligation to serve is not absolute. It is generally obligated to provide service in areas where it already provides service, but the CRTC-approved Terms of Service set out qualifications where an incumbent telephone carrier does not have to provide service to potential customers applying for service. Bell Canada's tariffs state the following with regard to exemptions from the obligation to serve:

- Bell Canada would have to incur unusual expenses for which the applicant will not pay; for example, securing rights-of-way or for special construction
- the applicant owes amounts to Bell Canada that are past due other than as a guarantor, or
- the applicant does not provide a reasonable deposit or alternative required pursuant to the Terms of Service.

⁴ Subsection 6(2) of the *Bell Canada Act* provides exceptions to the obligation to serve where:

- the premises for which the service is requested are not fronting on a highway, street, lane or other area along, over, under or on which the Company has a main or branch telephone service or system; and
- the telephone on the premises would be situated more than 62 metres or such other distance as the Commission may specify from the highway, street, lane or other area.

⁵ There is a reference with regard to the obligation to serve in the tariffs for the interconnection services of competitive local exchange carriers (CLECs). Since the introduction of local competition, CLECs have been required to file tariffs that set out the rates, terms and conditions for the provision of interconnection services to other telecommunications service providers. In this regard, a model tariff was developed for use by CLECs. While the CLEC tariffs are limited to the interconnection services that CLECs are required to provide to other local exchange carriers, interexchange service providers and wireless service providers (pursuant to *Local Competition*, Telecom Decision CRTC 97-8, May 1, 1997), there is a reference in the tariffs that such services are provided pursuant to an obligation to serve. The most recent version of the model tariff, version 24, is available on the CRTC's website at: http://www.crtc.gc.ca/cisc/COMMITTEE/C-docs/clecv24_e.doc

⁶ *Telephone Service to High-cost Serving Areas*, Telecom Decision CRTC 99-16, October 19, 1999, para. 24. Available online at: <http://www.crtc.gc.ca/archive/eng/Decisions/1999/DT99-16.htm>

⁷ *Ibid.*, para. 25.

Codifying the Obligation to Serve in a Competitive Environment

Historically, the central goal of social regulation — universal access to affordable services — was achieved by imposing an obligation to serve on incumbents and funding this obligation through a complex set of cross-subsidies within the telecommunications industry. Today, only residential service in high-cost serving areas is subsidized through a national, revenue-based contribution collection mechanism that applies to all telecommunications service providers (TSPs).⁸ This approach is designed to pursue the social objective of universal access at affordable prices while minimizing the costs in terms of lost efficiencies.⁹

The Panel believes the *Telecommunications Act* should be amended to impose a clear obligation for all incumbents to serve, subject to the availability of network infrastructure. An incumbent should be relieved of its obligation to serve only with the permission of the regulator. Before authorizing the removal of the obligation in any given market or location, the regulator should consider the social impacts as well as the availability of adequate substitutes from other service providers.

In cases where permission to discontinue an obligation to serve includes the abandonment of existing service provision, the Panel sees merit in adopting a regulatory approach used in the rail transportation sector. Under this approach, the CRTC could direct an incumbent telephone company wishing to abandon service to an area to offer its facilities for sale to other service providers or new entrants.

In cases where the CRTC rejects a proposal from an incumbent local exchange carrier (ILEC) to discontinue service but determines that continuing to provide the service would be uneconomical, the Panel considers it appropriate for the CRTC to allow the ILEC to recoup the net losses incurred as a result of continuing to provide service from the existing contribution regime.

Recommendation 6-1

The *Telecommunications Act* should be amended to impose a clear obligation on incumbent telephone companies to provide basic telephone service in areas where they have available network infrastructure. Approval by the CRTC should be required for an incumbent telephone company to abandon such basic telephone service.

⁸ The current contribution regime was implemented by the CRTC in *Changes to the contribution regime*, Decision, CRTC 2000-745, November 30, 2000. Available online at: <http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DT2000-745.htm>

⁹ This issue is discussed in greater detail in Chapter 3, Economic Regulation.

The Telecommunications Consumer Agency

Why a New Agency Is Needed

Over the years, the telecommunications industry has evolved from one in which a relatively limited range of services was provided, mainly by monopolies, to one in which an expanding array of services are provided by an increasing number of competitors. As discussed in Chapter 2, many of the services provided by Canada's telecommunications industry are not currently subject to the CRTC's jurisdiction.

In a competitive environment, a customer who has a problem that could not be resolved with a service provider may be expected to simply switch to another service provider. In the case of a serious dispute, the customer may seek redress from the courts. However, there are a number of reasons why consumers may be unable or unwilling to do this. Contracts with service providers may require payment of substantial charges in the event of early termination. Many Canadians are reluctant to go to the courts, either because of the time and expense involved or because they find the judicial process confusing and intimidating. In addition, in today's complex, competitive telecommunications environment, new kinds of consumer problems are arising that are not specific to particular service providers, but may affect the industry as a whole and its customers. These new problems involve issues such as email spam, computer viruses, "spyware" and "phishing."¹⁰

Telecommunications services are becoming more pervasive and increasingly complex for consumers, whether they involve wireline or wireless voice communications, or Internet services. The Panel believes a new agency, to be called the Telecommunications Consumer Agency (TCA), should be established to protect the interests of Canadian consumers in this new environment. With the structure, mandate and resources described below, the TCA will have the powers and capabilities required to address these issues effectively without duplicating the roles and responsibilities of existing organizations, and without increasing the regulatory burden on the telecommunications industry.

Recommendation 6-2

A new Telecommunications Consumer Agency should be established with authority to resolve complaints from individual and small business retail customers of any telecommunications service provider.

¹⁰ This issue is discussed in Chapter 7, Information and Communications Technology Policy.

Establishing a Telecommunications Consumer Agency

Current Mechanisms

In recent years, the CRTC has made significant progress in reducing the time it takes to resolve disputes between competing TSPs, notably through its expedited dispute resolution process. This has won well-deserved praise from the industry.

The Panel believes similar improvements should be made to mechanisms for resolving complaints from individual and small business retail customers, including not-for-profit organizations. This will be an increasingly important concern as Canada's telecommunications policy places greater reliance on market forces and *ex post* forms of regulation.

When the CRTC receives a complaint from an individual customer, it forwards the matter to the affected service provider for explanation and possible resolution. If the complaint concerns a regulated service, such as local telephone service, CRTC staff also attempt to assist in the resolution of the problem. If these mechanisms are unsuccessful, a more formal proceeding involving the commissioners can be launched. However, this can be a time-consuming and expensive process. It may be intimidating for a customer and may not be an efficient way to allocate resources for an authority whose mandate is focused on the regulation of service providers and not on the investigation of consumer complaints. Moreover, the cost of this relatively cumbersome process may be out of proportion to the relief that is being sought, which may involve nothing more than an apology or the correction of a billing error. In addition, under the current legislative regime, any remedies mandated by the CRTC are generally limited to future actions rather than to the redress of past grievances.

The Panel believes the TCA will help resolve customer complaints and related disputes with service providers. A properly designed ombuds office should be less intimidating to customers and should resolve disputes in a less formal and less time-consuming manner than current arrangements. Over time, it could develop an expertise not found in the courts. Unlike the CRTC, the TCA could focus on specific complaints from individuals and small business retail customers. In addition, the TCA's mandate could include unregulated telecommunications and telecommunications services offered by entities that are not subject to CRTC jurisdiction.

Models from Other Jurisdictions

Both the Australian and United Kingdom telecommunications industries have ombuds offices — in fact, the U.K. has two separate and competing agencies. Membership in the Australian office is compulsory for all telecommunications carriers and eligible service providers. In the U.K., membership in an ombuds office is voluntary. However, every service provider, including Internet service providers (ISPs), must offer independent alternative dispute resolution (ADR) to its residential and small business customers, and the ADR scheme must be approved by the regulator.

In the U.S., at the federal level there is a bureau within the Federal Communications Commission (FCC) that carries out many of the functions of an ombuds office. Similar in-house organizations operate within a number of state telecommunications regulators.

In Canada, the Ombudsman for Banking Services and Investments (OBSI) is an independent organization, established to investigate unresolved complaints from small business customers and retail customers of banks, investment dealers, mutual fund dealers and investment fund companies.

After reviewing these models, the Panel concludes that they contain a number of useful features that should be included in the design of the TCA.

Status

The Panel considers that a self-funding, independent, industry-established agency, created specifically to address customer complaints, is the most appropriate model.¹¹ Greater reliance on the private sector for dispute resolution is one of the themes of this report; an independent industry office is consistent with that approach.

The Panel envisages an agency whose governing board includes representation from the industry, consumer groups and independent individuals and is headed by an independent chief executive officer. However, the Panel recommends leaving the issue of how best to achieve the TCA's independence up to the CRTC to determine. It notes that the CRTC has had considerable experience in the broadcasting sector in determining whether various production funds were independent of the broadcasters that established them.

Recommendation 6-3

The proposed Telecommunications Consumer Agency should be a self-funding, independent, industry-established agency. The agency's structure and functions should be determined by the CRTC.

The Panel believes that, in order for the TCA to be effective, membership in it should be compulsory for all TSPs. The Panel recommends in Chapter 2 amending the *Telecommunications Act* to grant the CRTC jurisdiction over all TSPs. This amendment should enable the CRTC to require TSPs to become members and to comply with the rules of the TCA.

Recommendation 6-4

All telecommunications service providers should be required to be members in good standing of the proposed Telecommunications Consumer Agency.

¹¹ This was the model adopted in the recently enacted telecommunications legislation in both Australia and the U.K. The Panel considers s. 52 to 55 of the U.K. *Communications Act 2003*, 2003 Chapter 21, to be a good starting point for such an approach (available online at: <http://www.opsi.gov.uk/acts/acts2003/20030021.htm>). The issue of funding is addressed below.

Funding

The Panel believes an industry-established agency should also be funded by the industry, rather than by taxpayers generally or from a portion of the CRTC's annual budget. If TSPs are responsible for the cost of administering the agency and paying compensation awards that it grants, it is reasonable to expect that members will be vigilant in addressing systemic problems or repeated claims against specific TSPs. In addition, industry funding maintains the arm's-length relationship between the TCA and the CRTC.

There are a number of funding options that could be considered, ranging from membership assessments based on gross revenues from telecommunications services, to assessments based on claims made to the agency, to a combination of both models. In addition, the industry may wish to consider funding that promotes good customer relationships and rapid resolution of disputes. How the agency is funded can be decided by the industry. However, the CRTC should be satisfied that funding is sufficient for the TCA to operate and to carry out its mandate.

Authority

The Panel recommends giving the TCA authority to respond to complaints involving any telecommunications service provider, with respect to all services offered by them. This includes regulated and unregulated telecommunications services, as well as services offered by ISPs that are not currently subject to CRTC jurisdiction. It is important to note that, in the Panel's view, ISPs and other service providers that are not currently subject to CRTC regulation should not, by virtue of the proposed TCA, become subject to any regulatory requirements other than those necessary to ensure compliance with any decision made by the TCA.

The Panel envisages that the TCA will focus principally on complaints from individual customers concerning the non-price aspects of telecommunications services. It will not have authority to consider:

- matters relating to telecommunications equipment
- matters of a more general regulatory or policy nature, such as the universal service obligation, inside wiring or tariff approvals
- content
- matters falling under the jurisdiction of another body (e.g. anti-competitive practices).

In the event that complaints to the TCA indicate systemic problems within the telecommunications industry or a pattern of problems with respect to the services provided by a specific operator, the TCA should present these findings in its annual report. Furthermore, it should refer to the CRTC significant or recurring problems that cannot be satisfactorily resolved based on complaints from individual consumers. To assist the TCA in tracking and analyzing patterns of complaints, the agency should be empowered to conduct research and analysis into significant or recurring consumer problems.

The Panel believes the TCA should have the authority to include any recommendations it considers appropriate when referring a matter to the CRTC. However, any further investigation and enforcement should be left to the regulator. The Panel is concerned that if the TCA is given any broader investigative powers, it might begin to duplicate some of the activities of the CRTC, especially in the areas of quality of service, or to create potentially inconsistent or overlapping compliance regimes. To ensure that a reference from the TCA is promptly addressed, the Panel recommends requiring the CRTC to respond publicly within six months of receipt of the reference.

Complainants

The Panel recommends allowing any individual or small business retail customer, including not-for-profit organizations, to lodge a complaint with the TCA. The agency's primary purpose should not be to assist large business customers, who can generally be expected to have the skills and resources needed to protect their interests before and after entering into a contract with a telecommunications service provider.¹² The Panel would be concerned if large enterprises brought matters to the TCA with the result that the agency's resources were strained, and smaller users were obliged to wait longer times for their complaints to be addressed. Setting a relatively modest limit on compensation, as discussed below, should aid in ensuring that this does not happen. Disputes between TSPs should continue to be addressed by the CRTC.

The TCA should have authority to refuse to accept a complaint on the basis that:

- it shows no apparent cause of action
- it is being adjudicated in another forum
- it is being brought by an entity that should more properly pursue its claim elsewhere.

Process

The Panel recommends requiring TSPs to publicize the TCA service in billing materials on a regular basis and to set out in plain language the process that customers should follow in seeking assistance from the agency. Service providers should also be required to inform their customers that TCA service is free of charge and that there are different ways to contact the agency, such as by toll-free telephone number, toll-free fax line, email, regular post or online access via the TCA home page.

The role played by the TCA should be seen as part of a continuum of activities designed to resolve customer complaints. The first course of action should remain good faith efforts on the part of the affected parties to reach an acceptable resolution without outside intervention. Before accepting a request for assistance from a customer, the TCA should first satisfy itself that this has occurred. Once it has accepted a request for assistance, the TCA should initially play the role of mediator. If matters proceed beyond mediation, the TCA should have adequate

¹² The matter of defining eligible complainants more precisely can be left to the industry to work out in conjunction with the CRTC and representatives of consumer interests.

investigative powers to gather sufficient information to form a complete record upon which to base a decision. Failure by a service provider to cooperate in this process should be grounds for an award in favour of the complainant.

Dispute Resolution Powers

In examining what kinds of dispute resolution powers should be given to the TCA, the Panel considered the following options:

- making non-binding recommendations to the parties
- issuing a decision that is binding on both complainant and service provider
- issuing a decision that is non-binding unless and until the complainant accepts it, in which case it becomes binding on both parties.

The first option is the one adopted by the OBSI and it relies on the powers of moral suasion and potentially adverse publicity if the service provider fails to abide by the recommendation. However, the Panel considers this option as falling short of accomplishing the goal of providing effective relief with respect to customer complaints. Some service providers may be tempted not to treat the process seriously, while others may be indifferent to the prospect of adverse publicity. In those cases, the complainant may well be left with no recourse other than the courts.

The principal drawback of the second option is that potential complainants may be reluctant to bring their cases forward if they perceive that they may be obliged to accept an unsatisfactory binding decision. This could be particularly important if the result also precluded any alternative recourse to the courts.

The third option is the model that has been adopted in both Australia and the U.K. The Panel recommends it as being most in keeping with the concept that the TCA should be a telecommunications ombuds office. It gives the complainant the flexibility to accept a decision and conclude the matter at that point, or to reject it and pursue other alternatives such as court action. It also prevents a service provider from being able to oblige the complainant to take additional steps, such as court action or further appeals, when the practical result may simply be abandonment by the complainant.

The Panel recommends giving the TCA authority to make decisions encompassing both monetary and equitable relief. The latter could include a requirement for the service provider to offer an explanation or apology, or to undertake to do or cease doing specified activities with respect to the complainant (e.g. to correct recurring billing errors). In addition, the TCA should have limited authority to award monetary compensation to the complainant, if justified by the circumstances. The Panel believes there should be a relatively modest limit established for such compensation; the TCA should not have the power to award punitive or exemplary damages, as that is a matter more appropriately left to the courts. Taking into account the U.K. limits on mandatory awards of £5000 and Australian limits of A\$10 000, the Panel believes the TCA should be granted authority to award compensation up to \$10 000.

The Panel believes amendments to the *Telecommunications Act* will be needed to give the CRTC power to create the TCA and to give the agency the power to make binding orders and to award compensation. However, if properly constructed, the TCA will receive its mandate and exercise its authority as a matter of contract with member service providers. Part of the CRTC's role in approving a structure for the TCA could presumably include an assessment of the range of relief that the TCA could award customers of TSPs. Most customer complaints will involve allegations of breach of contract to provide a certain quality of service. If the industry does not give the TCA the right to award a realistic level of compensation for well-founded complaints, the Panel believes the CRTC will be unlikely to conclude that the TCA is sufficiently independent.

Finally, the Panel notes it will be important to ensure that there are effective remedies to enforce compliance with the TCA's orders and awards. The Panel considers it would be appropriate for the CRTC to be empowered to use administrative monetary penalties (AMPs) to enforce compliance, if other remedies are not effective. The Commission's AMP powers are discussed in Chapter 9, Policy-making and Regulatory Institutions.

Reports and Reviews

The Panel recommends requiring the TCA to issue an annual report setting out statistics on the number and type of complaints considered and their disposition. The report should be provided to the Minister of Industry and to the CRTC and should be made available on the TCA's website. In addition, the TCA should have the powers to publish reports as required and to identify issues or trends that in its view warrant the attention of the CRTC. In keeping with the Panel's recommendations regarding a review of legislative instruments, the actual operation of the TCA should be formally reviewed by a person or persons designated by the Minister every five years.

Relationship between the CRTC and the Privacy Commissioner

In its Consultation Paper, the Panel asked whether changes are required to the regulatory framework for protecting privacy relative to telecommunications services. This framework is currently administered by the CRTC and the Privacy Commissioner. The CRTC's authority is set out in the *Telecommunications Act*, which includes both the policy objective of contributing to the protection of the privacy of persons (para. 7(i)) and the CRTC's authority with respect to unsolicited telecommunications (s. 41). The Privacy Commissioner's authority with respect to the private sector¹³ is derived from the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), an act of general application that sets out the privacy rights of individual Canadians.¹⁴

¹³ The Privacy Commissioner's authority with respect to government institutions is derived from the federal *Privacy Act*, R.S.C. 1985, c. P-21, available online at: <http://laws.justice.gc.ca/en/P-21/94799.html>

¹⁴ PIPEDA available online at: <http://laws.justice.gc.ca/en/P-8.6/text.html>

Legislative Mandates

In the Panel's view, the CRTC and the Privacy Commissioner have complementary roles regarding privacy protection.¹⁵ The CRTC has jurisdiction over privacy issues related to the operation of telecommunications networks — an area where knowledge of telecommunications technology and operations is particularly important and may facilitate resolution of issues. Abuses of mobile number databases, which were originally made available to facilitate roaming but which can also be used to keep track of an individual's movements, are one example of the kinds of privacy issues that fall under the jurisdiction of the CRTC. Complaints concerning the identification of callers, either by name or by number, and mechanisms to block such identification are another.

In contrast, the Privacy Commissioner has jurisdiction over issues that arise primarily from abuses of business practices and commercial conduct. For example, the unauthorized collection, use or disclosure of customer information from common commercial sources such as billing records fall to the Privacy Commissioner.

Division of responsibility in this way — according to the respective statutory responsibilities and expertise of the two bodies — is consistent with the Panel's recommendations on institutional arrangements in Chapter 9, Policy-making and Regulatory Institutions.

Changes to CRTC Mandate

Against this background, the Panel believes some changes to the CRTC's mandate are desirable. In Chapter 2, the Panel notes that the CRTC's jurisdiction is largely confined to regulating "Canadian carriers," which by definition excludes TSPs that do not own or operate their own transmission facilities. The CRTC has taken steps to establish an indirect form of regulation over TSPs by imposing certain obligations in the tariffs of Canadian carriers that provide TSPs with underlying services and facilities.

Indirect regulation can be particularly troublesome in the case of privacy. A regulatory breach may cause harm through disclosure that cannot properly be compensated by an award of damages, and indirect regulation may not give the CRTC the ability to take appropriate corrective action.

In the Panel's view, Recommendation 2-6, which states that the CRTC be empowered to directly regulate all TSPs to the extent necessary to implement the Canadian telecommunications policy objectives, will ensure that any such CRTC regulation is direct and more easily enforceable.

¹⁵ The Panel is aware that a mandated review of the PIPEDA is to commence in 2006, which may address issues such as the relationship between the Privacy Commissioner and the CRTC.

The Panel reviewed the existing privacy regime to ascertain whether it is unduly burdensome in terms of impeding regulated TSPs from operating in an efficient manner. One of the Panel's overall themes in this report is to recommend the reduction or elimination of regulation, where it concludes that there is no useful purpose served or that the initial reason for implementing the regulation has disappeared. Another overall theme is to recommend clear distinctions or “bright lines” between the responsibilities of different regulatory authorities wherever it is reasonable to do so. In light of these considerations, the Panel finds no compelling reason to recommend any changes in the legislative mandates of the CRTC and the Privacy Commissioner.

Access to Internet Content and Applications

As discussed in Chapter 1, the widespread adoption of Internet Protocol technology is leading to an increasing separation between the applications and content layers of telecommunications services, as well as between these layers and the underlying network layers that provide physical connections and transport services. The result of this trend has been a fundamental change in the structure of the telecommunications industry. Content providers do not need to be applications or network providers and applications providers no longer need to be network providers.

At the same time as these changes have taken place, there has been a tremendous increase in consumer demand for telecommunications services — particularly for the retail services offered by ISPs that provide access to the enormous range of applications and content available on the public Internet. Customers of these services usually expect to be able to access legally permitted applications and content of their choice. Recently, however, concerns have arisen that this may not always be the case, as a result of the technical capability of network operators and providers of retail Internet services to block or degrade access to certain types of applications or content.¹⁶

In response to these concerns, the U.S. Federal Communications Commission (FCC) recently adopted a policy statement (FCC 05-151, adopted August 5, 2005) outlining a number of principles intended “to encourage broadband deployment and preserve and promote the open and interconnected nature of [the] public Internet.” It includes the principles that:

- consumers are entitled to access the lawful Internet content of their choice
- consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement.

Although a policy statement of this kind does not establish enforceable rules, the FCC has indicated that it will incorporate these principles into its ongoing policy-making activities. The statement also indicated that all of the enunciated principles were subject to reasonable network management considerations.

¹⁶ In this section, we use “blocking” as shorthand to denote both absolute blocking and degradation that is serious enough to affect the desirability of an application or content.

In view of these developments, the Panel believes Canada's telecommunications policy and regulatory framework should include provisions that confirm and protect the right of Canadian consumers to access publicly available Internet applications and content of their choice by means of public telecommunications networks that provide access to the Internet. However, because consumer access issues are complex and rapidly evolving, the Panel also believes it is important to distinguish between various kinds of concerns that arise in relation to consumer access, and to address them through the most appropriate regulatory mechanisms. These concerns include:

- first, concerns arising as a result of anti-competitive conduct
- second, concerns arising as a result of business decisions taken in the context of normal commercial business practices
- third, concerns arising from decisions taken for non-commercial reasons.

The Panel believes the first type of concern should be addressed through the regulatory mechanisms recommended in Chapters 3 and 4 for dealing with other forms of anti-competitive conduct.¹⁷ The usual tests would apply, and no new issues would arise.¹⁸

With respect to the third type of concern, non-commercial reasons for blocking access could include legitimate legal prohibitions, for example, national security, child pornography or other criminal concerns. Restrictions on access might also arise because of copyright. In such cases, the Panel believes that blocking access would be legitimate because the access provider would merely be implementing the law. In other cases, however, the access provider might be engaging in censorship. In a recent example, a large telecommunications service provider blocked access by its Internet customers to websites critical of the company.¹⁹ In general, the Panel believes that blocking access to content and applications should not be permitted unless legally required.

The Panel believes the most difficult regulatory issues related to consumer access are likely to be those arising as a result of normal, ordinary business decisions that effectively limit or deny access to applications or content, even though they do not involve anti-competitive conduct, legally prohibited applications and content, or illegitimate forms of censorship. In some cases, there may be sound business reasons for blocking access to applications and content or degrading service. In other cases, these business practices may exploit customers unreasonably.

¹⁷ For example, refusal to enter into peering arrangements could be treated under the provisions governing interconnection of networks.

¹⁸ For examples where an access provider with significant market power in the market for access might try to leverage that significant market power by trying to control the market for applications, see J. Farrell and P. Weiser, "Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age" (2003), 17 *Harvard J. Law & Tech.* 86 at 107. The authors note that "heavy-handed" regulation of access can itself be an incentive to monopolize related unregulated markets, such as applications.

¹⁹ See CBC News at: <http://www.cbc.ca/story/canada/national/2005/07/24/telus-sites050724.html>

One simple example of the issues involved in distinguishing between acceptable and unacceptable limitations on consumer access arises in relation to applications or content that require large amounts of capacity on the access provider's network, for example, streaming video. If a sufficiently large number of customers access such an application simultaneously, the level of service for everyone may deteriorate to an unacceptable level. Providing additional capacity may not be feasible in the short run. Even in the longer run, extra capacity is costly, and the prices currently paid by access customers may not justify the necessary investments to expand network capacity. In such a case, an access provider might decide for business reasons to block access to the relevant application, or allow access only to those customers prepared to pay a premium for the service.

More generally, some customers may be willing to accept reduced access in exchange for lower prices. Conversely, other customers may be willing to pay a premium for a higher grade of service. It is common business practice to offer a range of levels of service at prices that reflect the differences.

A more difficult example arises when an access provider chooses whether or not to offer its customers access to news groups and, if so, to which news groups.²⁰ Supplying access to news groups entails costs. It requires operating news servers and accommodating the resulting traffic. From the point of view of the access provider, this may be strictly a business decision that turns on whether the cost of providing the service is justified by the added value it offers customers, as reflected in the price they are willing to pay for the service. From the point of view of some customers, however, a decision to omit or drop certain news groups or to raise the price of access may be perceived as high-handed and capricious by customers interested in those particular groups.

Even more difficult questions arise when an access provider enters into an arrangement with an application provider to give preferential access to that provider's applications. For example, an Internet access provider may give priority to instant messages carried by one system and degrade instant messages carried by other systems to the point where they are difficult to use, so as to encourage customers to switch instant messaging systems. Access providers thus leverage their market power in the Internet access market to try to extract more profit, either directly or in partnership with a preferred third party, in the applications market.²¹

²⁰ There are hundreds of thousands of news groups, most of them of purely local or highly specialized interest.

²¹ This situation has some similarities to the long distance market before 1994. To use new entrants' long distance services, customers had to dial special numbers and access codes, sometimes amounting to a dozen or more extra digits than when using the incumbent's long distance service. This difference in ease of access was removed for customers of ILECs and CLECs when these were ordered to provide pre-selection of a long distance carrier, known in Canada as Equal Access. Note that a service provider is not obliged to provide Equal Access to its customers, and mobile service providers in Canada still do not do so, in general. Such a service provider then forfeits the advantages that go with being a CLEC, as discussed in the last section of Chapter 3.

In theory, the marketplace should take care of customers' interests in such situations. If customers feel strongly about restrictions on their ability to access other applications or content, they will make their feelings felt by switching either to another access provider or to a substitute application. However, if all access providers in a market decide to enter into such preferential arrangements, customers may be deprived of a real choice. In such a case, regulatory intervention to ensure a form of equal access to the application in question may be desirable.

The Panel believes in most cases network operators and ISPs will have little or no incentive to interfere with customer access. However, open access is of such overriding importance that its protection justifies giving the regulator the power to review cases involving blocking access to applications and content and significant, deliberate degradation of service.

Given the complexity of this area, the rapid evolution of technologies and the market dynamics, the Panel believes the regulator here should have more discretion than in other areas of regulation. However, the Panel also believes this discretion should be exercised with a view to encouraging reliance on market forces and customer choice as much as possible. For example, there may be situations in which a customer wants an ISP to block access to particular applications or content. In addition, some customers may be willing to accept a reduced degree of access in exchange for a lower price. Such consumer choices should be respected.

In the Panel's view, the purpose of a customer access rule should be consumer protection, and there should be a strong emphasis on ensuring that customers have the information required to make informed choices. In this way, the rule would promote the efficient operation of market forces.

Recommendation 6-5

The *Telecommunications Act* should be amended to confirm the right of Canadian consumers to access publicly available Internet applications and content of their choice by means of all public telecommunications networks providing access to the Internet. This amendment should

- (a) authorize the CRTC to administer and enforce these consumer access rights,**
- (b) take into account any reasonable technical constraints and efficiency considerations related to providing such access, and**
- (c) be subject to legal constraints on such access, such as those established in criminal, copyright and broadcasting laws.**