

9 Chapter 9 Policy-making and Regulatory Institutions



Contents

Summary of Proposed Institutional Reforms	9-5
Improving the Policy-making Process	9-6
The Policy Development Mandate	9-7
Improving Policy Research Capabilities	9-9
Data Collection and Reporting	9-11
Periodic Review of the Telecommunications Policy and Regulatory Framework	9-13
The Relationship between Government and the CRTC	9-15
Government Policy Direction and Review of Regulatory Decisions	9-15
Improving the Policy Direction Power	9-16
Reforming the CRTC	9-19
Number of Telecommunications Commissioners	9-20
The Selection Process for CRTC Commissioners	9-22
Compensation Levels	9-24
Improving the Regulatory Process	9-26
Service Standards for CRTC Regulation	9-29
The Rule-making Process	9-32
Enforcement of Telecommunications Regulation	9-33
Appeals from CRTC Decisions	9-41
Alternative Dispute Resolution	9-42
Streamlining the Tariff-filing Process	9-43
Increasing Regulatory Transparency	9-45
Consolidating CRTC Regulatory Rules	9-46
Reducing Authorization Requirements	9-48
The <i>CRTC Telecommunications Rules of Procedure</i> and Costs Awards	9-52
Recovering the Costs of Regulation	9-57
Increasing Competitive Neutrality	9-58

The major policy and regulatory changes proposed in this report have necessitated a review of the Canadian telecommunications institutional framework. The Panel has considered whether the current institutional arrangements are the best ones to implement the proposed regulatory framework and to deal with the challenges of the more competitive and dynamic telecommunications markets of the future.

Canada was an early leader in developing modern policy-making and regulatory organizations in the communications sector. Late in the 1960s, Canada was one of the first countries to establish a single communications policy-making institution for telecommunications, broadcasting and other information and communications technology (ICT) matters — the Department of Communications. It was also one of the first countries to establish an independent regulator — the Canadian Radio-television and Telecommunications Commission (CRTC) and its predecessors. In the 1970s, Canada was one of the first countries to recognize convergence and to authorize a single regulator, the CRTC, to regulate both the telephone and broadcasting industries.

In the 1980s and 1990s, the CRTC led most of the world in the adoption of market-based approaches to telecommunications regulation. During this period, it removed barriers to competition and moved away from regulated prescription of the terms and conditions of services and pricing in competitive telecommunications markets. It recognized earlier than most of its OECD counterparts that market forces could achieve better results in telecommunications markets than regulated top-down control of monopolies. A move toward greater reliance on market forces was included in the 1993 *Telecommunications Act*, which granted the CRTC's authority to forbear from regulation in certain circumstances.

During the course of its mandate, the Panel reviewed the telecommunications regulatory regimes and approaches of numerous member countries of the Organisation for Economic Co-operation and Development (OECD). It also had the opportunity to meet and to discuss these approaches with regulatory representatives of many of these countries and related international organizations, including the Federal Communications Commission (FCC) in the United States, the United Kingdom's new regulator, the Office of Communications (Ofcom), France's telecommunications regulator, the Autorité de Régulation des Télécommunications (ART), authorities from Japan, South Korea, New Zealand, Australia, the International Telecommunication Union and the OECD itself.

Based on these discussions, the Panel concludes that there is room for substantial improvement in the effectiveness of the Canadian telecommunications policy-making and regulatory framework. In comparison with leading OECD countries, the Panel considers that there are areas for improvement in both the current Canadian approach to policy making and regulation and in the institutional arrangements that support them. Following are some of the Panel's major areas of concern:

- There is a lack of clarity and separation between the roles of policy making and regulation.

- There is a comparative lack of clear policy direction in Canadian telecommunications laws and other government policy instruments.¹
- There is a comparative lack of policy-making, research and analysis capabilities within the government, the regulator and the sector generally.
- There are increasing inconsistencies and tensions among the institutions, policies, laws and regulations governing various parts of the converging telecommunications, broadcasting and Internet markets.
- Canada has more relatively intrusive, complex and costly regulation of major telecommunications service providers, with more extensive prior regulatory approval requirements and longer regulatory delays.
- The regulatory framework lacks effective safeguards, such as *ex post* review powers and fines, that would permit more timely deregulation of telecommunications markets, while maintaining important oversight capabilities and remedies.
- Canada has an exceptionally large number of regulatory commissioners compared with any other OECD country.
- The CRTC has insufficient authority and capacity to retain highly qualified staff and consulting expertise, compared with some other regulatory agencies.

The Panel's objective in conducting its policy review is not to address problems of the past. Rather, the Panel seeks to fulfil its forward-looking mandate to "make recommendations on how to implement an efficient, fair, functional and forward-looking regulatory framework that serves Canadian consumers and businesses, and that can adapt to a changing technological landscape."

As a result, the Panel proposes some major changes to the structure and operations of Canada's policy-making and regulatory institutions. Broadly speaking, these changes are aimed at achieving the following objectives:

- to better equip these institutions to implement the new policy and regulatory approaches proposed in this report
- to clarify the roles and relationships of these institutions
- to improve the effectiveness, timeliness, cost-efficiency, transparency and accountability of their operations.

¹ As discussed in Chapter 2, the policy objectives currently set out in s. 7 of the *Telecommunications Act* are unclear and inconsistent with each other and generally are silent on the preferred regulatory means of achieving these objectives. No policy objectives are set out in the *Radiocommunication Act*. Although the *Telecommunications Act* authorizes the government to issue telecommunications policy directions to the CRTC, none have been issued.

If the proposed new regulatory framework is adopted, policy-making capabilities of the government will be strengthened and made more flexible to meet the changing telecommunications environment. Regulation will become more focused and better designed to meet certain specific objectives, including important social and technical objectives.

Summary of Proposed Institutional Reforms

This report proposes a number of changes to the structure and operations of Canada's policy-making and regulatory institutions. Many of these changes are dealt with in the context of the regulatory reforms discussed in earlier chapters of the report. This chapter proposes some additional reforms that the Panel considers would be useful to ensure that Canada's regulatory framework is more responsive to the challenges of the more dynamic telecommunications sector — now and in the future.

The following table summarizes the major structural and operational reforms for government institutions that are proposed in this report and indicates the main chapter of the report that addresses them.

Proposed Reforms	Relevant Chapters of Report
Improving the Canadian government's policy-making process for telecommunications and ICTs	<ul style="list-style-type: none"> • Ch. 7. ICT Policy • Ch. 9. Policy-making and Regulatory Institutions
Separating policy-making and regulatory functions between Industry Canada and the CRTC	<ul style="list-style-type: none"> • Ch. 5. Technical Regulation • Ch. 9. Policy-making and Regulatory Institutions
Reducing CRTC economic regulation and establishing a Telecommunications Competition Tribunal, and the relationship between the CRTC and the Competition Bureau	<ul style="list-style-type: none"> • Ch. 3. Economic Regulation • Ch. 4. Telecommunications Competition Tribunal
Establishing a Telecommunications Consumer Agency	<ul style="list-style-type: none"> • Ch. 6. Social Regulation
Reviewing the relationship between the CRTC and the Privacy Commissioner	<ul style="list-style-type: none"> • Ch. 6. Social Regulation
Reforming the structure, operations and procedures of the CRTC	<ul style="list-style-type: none"> • Ch. 9. Policy-making and Regulatory Institutions
Improving policy-making and regulatory frameworks to reflect the convergence of telecommunications, broadcasting and the Internet and to address foreign ownership of telecommunications carriers	<ul style="list-style-type: none"> • Afterword

Improving the Policy-making Process

The Panel believes that a number of reforms should be made to the process of developing telecommunications and ICT policy, as well as in the manner of implementing such policies.

The major changes to policy making and policy implementation recommended in this report are:

- improving the capacity of Canadian government and non-government organizations to develop telecommunications policies that respond to the rapidly changing environment
- reforming the process of transmitting government policy to the regulator by means of policy directions, instead of after-the-fact political appeals from regulatory decisions
- establishing mandatory five-year reviews to ensure that Canada's telecommunications policy and regulatory framework remains current.

Canada's performance in telecommunications policy research and development is not as strong as that of leading OECD countries. The government is justifiably proud of the policies it has developed to "connect Canadians" through broadband and other advanced telecommunications networks. However, these policies stand out as exceptions. In other areas, particularly those related to regulatory policy, the Canadian government and its agencies have produced fewer and less forward-looking policy documents and related research than their counterparts in the United States, the United Kingdom and other major European and Asian OECD member countries.

Development of regulatory policy plays an important role in a market-based economy such as Canada's. To achieve "smart deregulation" of Canadian telecommunications markets² with respect to economic, technical and social issues, regulators need a policy framework that provides incentives for markets to innovate and respond to consumer and business demands for advanced ICT of all kinds.

The Panel's report is the first substantial review of Canada's telecommunications regulatory policies in a decade; the 1995 and 1997 reports of the Information Highway Advisory Council (IHAC) contained a few recommendations on regulatory issues in addition to the many other issues IHAC addressed.³ No comprehensive review of Canadian telecommunications regulation preceded the *Telecommunications Act* in 1993. Although that Act did include a policy direction power and a few new provisions to address the transition to a more competitive market structure, it was largely based on previous telecommunications legislation, dating back to the early 20th century. The last comprehensive reviews of the main elements of Canadian telecommunications policy and regulation were undertaken in the 1970s, following the creation of the Department of Communications.

² For deregulation to be "smart," it must balance the need to deregulate a market soon enough that it encourages innovation and productivity against the need to ensure that deregulation does not occur while a competitor still possesses significant market power that can stifle competition as well as the innovation and productivity that accompanies it.

³ See Industry Canada, Information Highway Advisory Council, *Connection, Community, Content: The Challenge of the Information Highway* (Ottawa: Supply and Services Canada, 1995); and Industry Canada, Information Highway Advisory Council, *Preparing Canada for a Digital World: Final Report of the Information Highway Advisory Council* (Ottawa: Industry Canada, 1997).

The 1993 *Telecommunications Act* empowered the federal Cabinet to provide policy directions to the CRTC. However, despite the significant changes in the telecommunications environment in the past decade, the government has never issued any such policy directions. In practice, the CRTC has developed the policies that underlie Canada's telecommunications regulatory framework through its regulatory proceedings and decisions. Some submissions to the Panel suggested that the CRTC had usurped the policy-making role of government. However, others suggested that the Commission had no choice but to act as it did, given the vague and conflicting policy objectives of s. 7 of the *Telecommunications Act* and the lack of government policy making.

The Panel believes the new statutory objectives recommended in Chapter 2 will clarify Canada's telecommunications policy framework. However, the Panel also believes the policy development mandate and capabilities of the federal government should be strengthened, so it is able to respond effectively to policy issues that arise in the more competitive, dynamic and less regulated environment that will increasingly characterize telecommunications and ICT markets. Specifically, the Panel believes institutional reforms are necessary to improve:

- the government's policy development mandate
- Canada's policy research capabilities
- data collection and reporting
- reviews of the telecommunications policy and regulatory framework.

These issues are discussed in the following sections.

The Policy Development Mandate

The Panel concludes that there should be a clearer separation of policy-making and regulatory functions at the federal level. To achieve this separation, it is necessary to transfer functions between institutions. In Chapter 5, Technical Regulation, the Panel recommends that the function of spectrum policy making should be separated from the functions of regulating, licensing and managing spectrum, and that the latter functions should be transferred from Industry Canada to the CRTC. In that chapter, the Panel also recommends that Industry Canada's other technical regulation functions for equipment and devices should be transferred to the Commission.

This recommended separation is consistent with the practice of most western OECD member countries. It is also consistent with the recommendations of a 2002 OECD report⁴ on regulatory reform in the Canadian telecommunications sector, which states:

The powers of Industry Canada are a mixture of policy and regulation. It would be more efficient in the context of future streamlining of regulations to transfer the licensing of spectrum and international submarine cables to the CRTC, which has the responsibility for market entry in fixed telecommunication services and the responsibility for regulating market entrants in all the telecommunication markets. Such a transfer of powers would also more clearly separate the policy functions from regulatory functions.

⁴ OECD, *Regulatory Reform in Canada: From Transition to New Challenges*, OECD Reviews of Regulatory Reform (OECD: 2002), p. 12. Available online at: <http://www.oecd.org/dataoecd/48/28/1960562.pdf>

The Panel's recommendations will transform the Spectrum, Information Technology and Telecommunications Sector of Industry Canada (SITT) from a mixed policy and regulatory institution into one focused primarily on developing and implementing government policy and programs.⁵ In Chapter 7, ICT Policy, the Panel recommends the establishment of a national ICT adoption centre with significant new ICT policy-making and program implementation functions. While the Panel leaves it to the government to decide where to locate this new institution, it appears to be most logically located within SITT, which already has policy and program responsibilities for telecommunications, spectrum, e-commerce and other ICT applications.

These changes will transform SITT into a policy-making institution similar to those found in ministries of communications or industry in other OECD countries. This should allow it to evaluate Canadian telecommunications and ICT policies in a more objective and independent manner, independent of its own past regulatory decisions, and take into account the changing Canadian and international environment. Such evaluation should be ongoing. SITT's functions should include policy development to ensure that front-line agencies such as the CRTC and the Competition Bureau as well as the proposed Telecommunications Competition Tribunal (TCT) and Telecommunications Consumer Agency (TCA) function effectively.

Under the renewed departmental mandate proposed in this report, Industry Canada should:

- act as the lead institution in developing the legislation required to implement this report and other telecommunications and ICT-related legislation
- act as the lead institution in undertaking a continuous review of Canada's telecommunications and ICT policy
- monitor the effectiveness of telecommunications policy and regulation on an ongoing basis
- develop new policies and programs to achieve national policy objectives that cannot be achieved by market forces and regulation alone
- develop policy directions to the CRTC for approval by the Minister and Cabinet under the revised policy direction power recommended in this report
- develop and supervise a program of telecommunications and ICT policy research
- act as the lead institution to support the government in undertaking and reviewing the results of the proposed five-year reviews of Canada's telecommunications policy and regulatory framework
- advise the Minister of Industry on these and all other matters related to telecommunications and ICTs that are under the Minister's jurisdiction.

⁵ See the discussion on the transfer of spectrum regulation authority from Industry Canada to the CRTC in Chapter 5, Technical Regulation.

Recommendation 9-1

The government should ensure that the *Department of Industry Act* grants the Minister and the department a clear mandate and sufficient powers to effectively lead national telecommunications as well as information and communications technology policy development.

Improving Policy Research Capabilities

Policy making should be an ongoing and dynamic process that responds to — and anticipates — important developments in the ICT and telecommunications sector. The Panel believes good telecommunications policy making requires good, ongoing research. The Smart Regulation report⁶ notes:

While regulation is an important tool for government action, the federal government has no policy research and development agendas in this area. The Committee believes that to support continuous improvement in the regulatory system, which is at the heart of Smart Regulation, ongoing policy research and development agendas are needed. These agendas would stimulate new thinking and innovation in the regulatory domain.

The Panel agrees with this assessment. While it was made in the context of economy-wide regulation, the Panel believes it is equally true in the area of telecommunications regulation. Modern telecommunications regulation and related competition policy are complex areas. They are becoming more complex, due to technological change and the convergence of many related ICT services and industries. Development of policies that maximize social and economic welfare of Canadians requires a good understanding of the economics and technologies of the Canadian ICT sector. Such policies should not be based on political or social policy intuition but, wherever possible, on empirical data, research and a good understanding of regulatory best practices from Canada and other jurisdictions.

As noted in the Smart Regulation report, there is in Canada a relative paucity of academic work on what has been referred to as the “regulatory craft.” In Canadian telecommunications regulatory proceedings, there are relatively few research-based policy recommendations submitted by Canadian telecommunications experts, and there is heavy reliance on foreign (mostly U.S.-based) experts on economic, technical and even social regulation.

⁶ External Advisory Committee on Smart Regulation, *Smart Regulation: A Regulatory Strategy for Canada*, Report to the Government of Canada (Ottawa: EACSR, September 2004), p. 67. Available online at: http://www.pco-bcp.gc.ca/smartreg-regint/en/08/rpt_fnl.pdf

Leadership in telecommunications and ICT policy research and analysis is clearly related to leadership in the telecommunications field. The absence of good telecommunications and ICT policy research could cause Canada to fall behind its peers in the OECD. Industry Canada and the CRTC have largely vacated the field of policy research, except in the case of notices that are issued from time to time seeking comments on specific matters. Canadian universities that had been active in the area of telecommunications regulation, notably McGill, Toronto and Simon Fraser, have seen departures of their leaders to other areas of study, retirement or to other countries.

The Panel considers that an ongoing, enhanced telecommunications and ICT policy research capability is an essential component of well-informed and forward-looking Canadian telecommunications policy and regulation. Parliamentary review of legislation, government policy making, CRTC regulation and competition analyses in the telecommunications sector could all be improved significantly with better data and analysis of policy alternatives and the implications of different regulatory approaches for the Canadian market.

It is not clear to the Panel why there is not more or better telecommunications and ICT policy research in Canada, particularly in areas that would be useful in redesigning regulation. The problem is probably related in large part to the lack of a market for such research.

Much telecommunications and ICT policy research is undertaken in the U.S., with substantial support from private research funding. In Europe, where less private funding is available, the European Commission, government ministries, regulators and other public sector bodies provide a significant amount of such funding.

Given the relatively small size of the Canadian market, it may be best to follow the European model and provide ongoing, targeted funding for policy research relevant to significant current and future policy issues. It would be consistent with Industry Canada's enhanced policy development role for the SITT sector to establish a fund to provide research grants in areas related to key policy issues.

The research fund could operate in the manner of other research programs, with a panel of telecommunications policy makers, regulators, academics and other industry experts awarding research grants. Grants could be based on either an established research agenda tied to key Canadian policy issues, or research applications, or both. All research results should be put into the public domain in a timely manner and could be relied on by parties participating in Canadian policy-making and regulatory proceedings.

The Panel is not certain what is the best means of improving Canada's telecommunications and ICT policy research capacity, but it is clear on one thing. More and better policy research and analysis need to be done in order to keep Canadian telecommunications and ICT policy and regulation at the forefront of ICT developments.

While research funding is important to policy making, government commitment to research on an ongoing basis is equally important in the Panel's view. Some research can be conducted on an independent basis but, in an area as complex as telecommunications, the Panel believes it generally should be anchored in well-established centres dedicated to producing solid research. It takes time and start-up funds to develop centres of expertise in telecommunications. This cannot easily be accomplished without some assurance of relatively stable, multi-year funding.

The Panel makes the following recommendation to further this objective.⁷ Consistent with its overall approach in this report, the Panel believes the issue of research funding should be reviewed after five years.

Recommendation 9-2

Industry Canada should make a multi-year commitment to fund ongoing policy research to support improved policy making and regulation in the telecommunications and information and communications technology sectors. Research grants should be awarded by a qualified, independent panel, and the research results should be made publicly available in a timely manner.

Data Collection and Reporting

In addition to research, good telecommunications policy making and regulation require good data. The Panel believes good data can improve the quality of research and thus produce added benefits for the policy-making process.

In rapidly changing markets, data that support decision making should be provided in a timely manner. Such data should be collected not only on the state of telecommunications and ICT markets but also, where feasible, on the costs, benefits and hence the effectiveness of regulatory measures.⁸

⁷ The establishment of a telecommunications and ICT policy research fund, with grants to outside researchers is consistent with two recommendations of the *Smart Regulation* report (p. 69):

Recommendation 40: The government must develop and implement a comprehensive learning strategy for the regulatory community.

Recommendation 41: The government should develop and implement regulatory policy research and development agendas in collaboration with appropriate partners from outside the public service.

⁸ The Panel's approach is consistent with that of the *Smart Regulation* report, which states (p. 69):

The Committee . . . feels that government needs to improve its ability to collect and disseminate regulatory data and to analyze and use this kind of information. That is how it will continuously learn and improve its practices.

Until recently, neither the CRTC nor Industry Canada closely monitored the development of competition in Canadian telecommunications markets. In June 2000, the Cabinet directed the CRTC⁹ to develop an annual report on the status of competition in Canadian telecommunications markets and on the deployment and accessibility of advanced telecommunications infrastructure and services in urban and rural areas in all regions of Canada. The direction was intended to last for five years. The CRTC has now submitted its fifth report¹⁰ and has recently indicated that it intends to continue collecting data and publishing annual monitoring reports to the telecommunications industry.¹¹

The Panel believes the CRTC should continue its annual reporting to the government for at least another five-year period. The CRTC reports provide a valuable source of data on the telecommunications sector in Canada and a good source of research information. Continued development of such reports will inform telecommunications policy making and regulation. The reports also complement the policy research program that the Panel recommends in the previous section. In addition, the reports provide useful information for telecommunications service providers, equipment manufacturers, market analysts, new entrants and others.

There has been criticism of some aspects of the CRTC's monitoring reports, in particular, the timeliness of the data and their utility for regulatory decision making in the very dynamic local access markets. The Panel notes that the CRTC has recently revised some of its data collection requirements¹² and has taken steps to improve the timeliness of the release of data that it collects.¹³ However, the Panel believes policy makers, the CRTC and the telecommunications sector could continue to benefit from the collection and publication on a regular basis of additional aggregated data relevant to the sector.

Data collection can be improved in a number of ways:

- It can be refined to focus more specifically on data that support efforts to improve research capabilities in Canada, consistent with Recommendation 9-2.
- It can be better coordinated with Statistics Canada (and with the TCT if the Panel's recommendations in Chapter 4 are adopted) to minimize duplication and to maximize its utility for regulatory purposes.

⁹ By Order-in-Council PC 2000-1053, June 26, 2000.

¹⁰ CRTC, *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets: Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (Ottawa: CRTC, October 31, 2005). Available online at: <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2005/gic2005.pdf>

¹¹ *Monitoring the Canadian telecommunications industry*, Telecom Public Notice CRTC 2005-15, October 18, 2005.

¹² *Telecommunications industry data collection: updating of CRTC registration lists, telecommunications fees, Canadian revenue-based contribution regime, international licences and monitoring of the Canadian telecommunications industry*, Telecom Circular CRTC 2005-4, February 9, 2005.

¹³ In *Release of certain local market data*, Telecom Public Notice CRTC 2005-11, August 30, 2005, the CRTC released some local market data that would appear in its fifth report to the Governor-in-Council, two months before it actually issued that report.

- It can be released on a more timely basis, for example, by establishing grids of the most useful data, that can be updated quarterly and published upon collection, on the CRTC's website, without the delay that is currently entailed in waiting for accompanying CRTC analysis and associated translation requirements.

With Industry Canada assuming an enhanced role in telecommunications and ICT policy making, it must also be actively engaged in defining the current and future data requirements to support research. The Panel therefore recommends that the CRTC, Industry Canada and Statistics Canada should form a working group to determine what these future data needs are and which institution should collect the information.

In addition, the CRTC should be directed to consult with stakeholders to determine whether additional types of industry data should be collected from telecommunications service providers, whether and how its timeliness could be improved, the frequency with which it should be collected and published, and the levels of aggregation required to assure confidentiality of sensitive competitive information.

Recommendation 9-3

Telecommunications data collection and reporting should be improved in the following manner:

- (a) The CRTC should continue, for at least five more years, to publish annual reports on the status of competition in Canadian telecommunications markets and on the deployment and accessibility of advanced telecommunications infrastructure.**
- (b) The CRTC, Industry Canada and Statistics Canada should form a working group to determine requirements for additional data to support improved regulation, research and policy making, and to determine which institution should collect the information.**
- (c) The CRTC should conduct a public consultation to determine if additional data should be collected from telecommunications service providers and how best to make industry data available in a timely manner.**

Periodic Review of the Telecommunications Policy and Regulatory Framework

Submissions filed with the Panel provided broad support for mandatory and comprehensive reviews of Canada's telecommunications policy and regulatory framework on a regular basis. Telecommunications markets are evolving rapidly and the pace of change is expected to accelerate. In such a dynamic sector, the Panel believes policy makers should review the policy and regulatory framework frequently, terminate or change outdated policies and regulatory approaches, and ensure that Canada remains at the forefront of international best practices.

Periodic legislative and policy reviews exist in other sectors of the economy such as transportation.¹⁴ They have also been recommended and agreed to by the Canadian government for the telecommunications sector. In its April 28, 2003, report *Opening Canadian Communications to the World*, the House of Commons Standing Committee on Industry, Science and Technology recommended that the Government of Canada amend the *Telecommunications Act* to require a mandatory five-year review of the Act by a parliamentary committee. In response, the Minister of Industry made the following commitment¹⁵:

The Government of Canada welcomes your recommendation for regular parliamentary review of the *Telecommunications Act*. The years since the current legislation came into force have been marked by an accelerating pace of technological change, in the creation of new market opportunities, and in the everyday use by Canadians of services barely even imaginable a decade ago. Clearly the framework legislation for this innovative sector must be kept up to date. At the earliest opportunity, we will introduce an amendment to the legislation requiring its review every five years.

The Panel supports the proposal for a legislated ongoing five-year review process. However, it believes this should be a comprehensive review of the telecommunications sector and not limited solely to specific legislation. As such, the Panel believes a review by sector experts would be more appropriate than a review by a parliamentary committee. A comprehensive expert review should examine not only the legislation, but also the overall telecommunications regulatory framework as well as its impact on the telecommunications sector.

Such an expert review would be particularly appropriate at the end of the first five years, when it is anticipated that there could be more competition and deregulation of telecommunications markets. This review will require expert analysis of the state of telecommunications markets at that time, including detailed economic analysis and assessments of the increasingly dynamic technological environment. After completion of the review, any resulting legislative changes should be tabled in Parliament and reviewed by a parliamentary committee in the normal manner.

Recommendation 9-4

The Minister of Industry should be mandated by legislation to undertake a comprehensive review of telecommunications policy and regulation every five years.

¹⁴ See, for example, the *Canada Transportation Act*, S.C. 1996, c. 10, s. 53. Note that the Panel considers a broader review of the telecommunications regulatory framework more appropriate than a review of the relevant legislation alone.

¹⁵ Letter from Minister of Industry to Chair of the Standing Committee on Industry, Science and Technology, September 25, 2003.

The Relationship between Government and the CRTC

It is the proper role of government to establish policies and that of regulators to implement the policies and to develop the more detailed rules necessary to provide certainty as to how the policies will be applied. Comments submitted to the Panel during this review expressed broad support for the principle that the government should develop policies in the telecommunications sector. Parties also supported the principle that regulators should implement those policies in an independent, professional and transparent manner.

A number of submissions to the Panel noted that the current policy objectives set out in the *Telecommunications Act* contain conflicting and, in some cases, outdated provisions that provide little real guidance to the regulator in the discharge of its obligations. The Panel agrees that, as Canadian telecommunications markets become increasingly competitive and dynamic, our telecommunications policy must be clarified and changed to reflect the new realities.

As discussed in Chapter 2, the Panel also considers it important to differentiate between policy goals and the means of achieving them, since significantly different means are required in a competitive market-based sector from those in a monopoly environment. Moreover, in a rapidly changing marketplace, it is important to be able to make policy changes quickly.

Government Policy Direction and Review of Regulatory Decisions

As noted above, policy is by nature dynamic. Governments have an ongoing role in refining existing policies and developing new policies to anticipate or respond to changing conditions. This policy-making role is most commonly exercised by changing laws governing the telecommunications sector. In addition, the telecommunications legislation in a few OECD countries provides the government with a power to direct — or to communicate with — the regulator on policy matters.¹⁶ In some countries, the legislation permits the government to review decisions taken by the regulator.¹⁷

Canada appears to be the only OECD country whose telecommunications legislation empowers government to do both; that is, to provide advance directions on policy matters (the “policy direction power”)¹⁸ and also to review and vary, rescind or refer a decision back to the regulator on policy grounds (the “Cabinet review power”).¹⁹ The legislative framework within which the

¹⁶ The power to direct is given to the government in Austria, Canada, Ireland and the Netherlands; the power to communicate is granted in Italy. See OECD, *Telecommunication Regulatory Institutional Structures and Responsibilities*, Working Party on Telecommunication and Information Services Policies, DSTI/ICCP/TISP(2005)6/FINAL (OECD: June 2005), p. 15. Available online at: <http://www.oecd.org/dataoecd/56/11/35954786.pdf>

¹⁷ The power to review is given to the government in Belgium, Canada, Denmark, Hungary, Mexico and Norway. See *Ibid.*, p. 14, Table 5.

¹⁸ See *Telecommunications Act*:

8. The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.

¹⁹ See *Telecommunications Act*:

12.(1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.

CRTC operates therefore makes it appear to be one of the least independent telecommunications regulatory agencies in any OECD country. The government power to intervene in the regulatory process both before and after decisions have been taken has the potential to be detrimental to the integrity of the regulatory process. The Panel notes that this double-barrelled process has also led to negative comments in OECD reports²⁰ and other international fora.

In practice, however, the Commission has been allowed to act with relative independence. The policy direction power has never been used by the government since it was introduced in 1993, when the *Telecommunications Act* was proclaimed into force. The Cabinet review power has been used on a number of occasions. It is frequently called for by parties who are dissatisfied with CRTC decisions. However, the government has seldom granted such requests, and the Cabinet review power has never been used by the government on its own initiative.²¹

Improving the Policy Direction Power

The Panel does not consider the current approach to be the best one for government policy making. Unlike policy directions, which are forward looking in nature, the Cabinet review power is used after-the-fact, to change the results of a public regulatory process that has been completed. Since regulatory battles are primarily waged between private sector competitors, any Cabinet review can be viewed as a choice between competing commercial interests, rather than between competing policy alternatives. Although the *Telecommunications Act* establishes some procedural safeguards, these have not dispelled the impression that Cabinet reviews are determined based on behind-the-scenes lobbying campaigns to overturn decisions that were reached in a more transparent regulatory process. The fact that the Cabinet review power has not been used more frequently to date does not necessarily mean that this will be the case in the future.

On the other hand, concerns have been expressed about the fact that the policy direction power has not been used. Some submissions to the Panel expressed the view that the failure to use this power had created a policy vacuum. It has been suggested that this has left the regulator with too little policy guidance and no choice but to make its own policy within the general and conflicting policy objectives of s. 7 of the *Telecommunications Act*.

In previous sections of this chapter, the Panel has recommended measures to improve the policy research and policy-making capacities of the government. It has also suggested that the SITT sector of Industry Canada should play an ongoing role in monitoring the effectiveness of telecommunications policy and regulation. The Panel regards the policy direction power as a useful component of the policy maker's tool kit — one that becomes more important with SITT's enhanced policy-making role.

²⁰ See OECD, *Regulatory Reform in Canada*, p. 13.

²¹ The Consolidated Index of Statutory Instruments (May 5, 2005) indicates that since 1981, there have been 12 Cabinet reviews in which a CRTC telecommunications order was varied and one in which it was referred back to the CRTC. However, of that total, only two variances and the one reference back were made since the *Telecommunications Act* came into force.

The Panel's recommendations envisage a more active and dynamic role for the government in giving policy direction to the regulator. This may occur as part of the government response to this report. It may also occur in the future as the telecommunications sector evolves in ways that cannot be foreseen at present. The Panel concludes that the policy direction power should be maintained. However, the Panel believes procedural changes should be made to improve the quality of policy directions and the transparency of the process by which they are developed.

The *Telecommunications Act* sets out the procedure for making an order under the policy direction power. The procedure involves laying the proposal before both Houses of Parliament. There is no requirement to consult interested stakeholders such as consumers and service providers on proposed policy changes before they are laid before Parliament. The Panel believes such a consultation process can substantially improve the quality of resulting policy directions and the transparency of the policy-making process.

Therefore, the Panel believes that, before issuing a telecommunications policy direction to the CRTC, the Minister of Industry should issue a public notice containing the proposed policy direction. The notice should also provide the rationale for the policy and any relevant background or other information. Stakeholders and the general public should be given a reasonable opportunity to comment on the policy before it is finalized. With this reform, the development of policy directions will be viewed as a more orderly process — rather than as some *deus ex machina* development — that welcomes, rather than excludes, participation from those who will be most affected by its implementation.

The Panel considers that once Parliament has established the overall statutory policy framework in the *Telecommunications Act*, evolving policy making within that context is more properly the function of government. Accordingly, the Panel believes its proposed process for direct consultation with stakeholders should replace the current requirement to refer proposed policy directions to parliamentary committees for their review.²² Implementing this recommendation should, as a practical matter, expedite and lend greater certainty to the policy direction power. Directions will no longer be automatically subject to after-the-fact review by committees. However, before-the-fact reviews of proposed policy directions by stakeholders affected by them are more in keeping with modern regulatory practice. They are also fairer to stakeholders; that is, those who are actually affected by the direction.

As a related procedural matter, the Panel believes the phrase “interested persons,” as used in a number of sections in the *Telecommunications Act*, should be broadened to “any person,” since the former phrase suggests there is a standard that must be met in order to participate in the process.²³

²² Under ss. 10.(4) of the *Telecommunications Act*, a proposed order “stands referred to such committee as is designated by order of that House to receive such orders.”

²³ This change was recommended by ARCH, “A Legal Resource Centre for Persons with Disabilities,” Submission to the Panel, August 15, 2005, p. 31.

These recommendations and the related enhancements to the policy-making and policy research capabilities weaken the argument for providing the government with both *ex ante* direction and *ex post* review powers with respect to CRTC decision making. As discussed earlier in this section, the Panel believes the combination of the policy direction power with the Cabinet review power has the potential to undermine the integrity of the CRTC's independent regulatory process. The lack of transparency of the Cabinet review process also runs counter to the admonition in the *Smart Regulation* report that regulatory decision-making processes should, with confidence, be said to have been shaped in a fair and neutral manner.²⁴

Although the Cabinet review power has been exercised relatively infrequently since 1993, there have been frequent petitions to use it by parties who were dissatisfied with CRTC decisions. Each time a petition to review a CRTC decision is filed, it imposes significant costs on other stakeholders and the Government of Canada in terms of the resources required to respond to the petition. It also creates an extended period of uncertainty on the industry and other stakeholders, since the government may take up to one year to make its decision on the petition. Finally, consumer groups and other less well-funded parties are at a distinct disadvantage, in comparison to large commercial interests, in their ability to participate in the process. This creates an appearance of unfairness. For all these reasons, the Panel considers that it is not necessary to retain the Cabinet review power.

Recommendation 9-5

The policy direction power should be transferred into a more effective policy-making instrument by

- (a) requiring the government to issue a public notice containing a proposed direction and the reasons for it and giving the public a reasonable opportunity to comment on it,**
- (b) repealing the current requirement to refer a proposed policy direction to parliamentary committees for review, and**
- (c) repealing the Cabinet power to review individual CRTC telecommunications decisions.**

²⁴ EACSR, *Smart Regulation*, p. 131.

Reforming the CRTC

The recommendations of this report envision a more deregulated telecommunications industry, with more streamlined and targeted regulatory interventions in those areas where regulation remains necessary. Chapter 2 recommends more focused regulatory objectives — and recommendations elsewhere in the report suggest less intrusive and more targeted means of achieving those objectives. These new means place much more reliance on market forces, in combination with a more focused approach to achieving key economic, technical and social objectives of regulation.

Based on the recommendations in this report, the new telecommunications mandate of the CRTC will be significantly different from that exercised under current legislation. Under its new mandate, the CRTC will be less directly involved in dealing with complaints of anti-competitive conduct and related telecommunications market analysis. These areas will be addressed by the new TCT. Similarly, the CRTC will be less directly involved in dealing with consumer issues and complaints, which will be handled by the new Telecommunications Consumer Agency (TCA).

The CRTC will continue to deal with an increasingly complex range of issues related to interconnection and unbundling of essential facilities. It will add to these responsibilities, new issues of consumer access to multi-layered telecommunications platforms. The CRTC's telecommunications regulatory mandate will be enlarged in other ways that require additional technical expertise. In particular, the Commission will become responsible for authorization and regulation of the use of the radio spectrum and telecommunications equipment, taking over these functions from the SITT sector of Industry Canada.

While some forms of detailed CRTC economic regulation will be significantly reduced by the move away from *ex ante* regulation, the Commission will require an enhanced professional capacity to determine when regulatory intervention is required and to be able to act quickly and knowledgeably. An example is the move from *a priori* approval toward a negative disallowance regime for tariff filings. Rather than having weeks or months to review tariff filings, the Commission will have to decide within seven days whether to disallow or suspend a tariff or to allow it to go into effect.

The Commission will also need to enhance its capacity to deal with the accelerating convergence of the telecommunications, Internet and broadcasting industries. This convergence will demand more sophisticated forms of economic, technical and legal analysis, to enable the Commission to determine in a timely and effective manner when and how to regulate — and when to move out of the way of market forces.

The Panel's vision is to see Canada become a global leader in telecommunications regulatory practice — developing and adapting international best practices to support the development of world leading communications markets. Currently, the CRTC does not appear to have the level of expertise of the regulators in important comparator markets, such as the U.S. and the U.K., to develop and implement innovative regulatory practices in the areas of economic, technical or social regulation.

It is a truism that good regulation requires good human resources. The *Smart Regulation* report succinctly made this point by saying²⁵:

As in any knowledge enterprise, human resources are the most important asset. The regulatory system is no different.

Effective and efficient regulation also requires a streamlined organizational and decision-making structure — and efficient regulatory practices. Subsequent sections of this chapter deal with the CRTC's powers, responsibilities, practices and procedures.

In this section, the report deals with the size and composition of the CRTC and its staff. The main recommendations on these issues are:

- reduce the size of the CRTC from 13 members to five (at least for telecommunications regulatory purposes)
- improve the recruiting practices for commissioners to attract the best qualified and most knowledgeable candidates for these five positions
- increase the flexibility of the government to pay market-scale compensation for the best-qualified candidates for commissioner positions and for a limited number of key professional staff in positions where special skills are required
- permit the CRTC to retain well-qualified individual experts or firms on consulting contracts, where specialized capabilities are required.

Number of Telecommunications Commissioners

Under current legislation, 13 full-time members and six part-time members can be appointed to the CRTC. Full-time commissioners may participate in both telecommunications and broadcasting matters. Part-time members may deal with broadcasting matters only.²⁶

This number is exceptionally large compared with other OECD countries — or any other country in the world — even taking into account the fact that commissioners also have responsibility for broadcasting matters.²⁷ For example, the U.S. FCC has only five members, even though its

²⁵ *Ibid.*, p. 66.

²⁶ *CRTC Act*, ss. 3.(1) and 12.(2), respectively.

²⁷ The exceptionally large size of the CRTC compared with other regulatory agencies was commented on in OECD, *Regulatory Reform in Canada*, p. 12. One wry observer noted that such a large CRTC appears more like a “Parliament” than an expert regulatory institution that is required to make decisions based on the application of competition policy and economic principles.

responsibilities are broader than those of the CRTC today. The FCC's mandate includes spectrum management in addition to telecommunications and broadcasting regulation. An OECD report released in October 2005 indicates that Canada has the largest number of members on its regulatory body of the 30 OECD countries. No other federal telecommunications regulator had more than nine members, and most had one to five.²⁸

The large number of CRTC commissioners can complicate and delay the decision-making process and lead to lowest-common-denominator consensus decisions. Procedurally, it is more difficult to arrange meetings for a large number of commissioners. Substantively, it can be more time consuming to reach consensus, and more trade-offs may be required.

Consistent with its proposals for streamlining regulation and appointing commissioners with more expertise in new regulatory approaches (discussed in the next section of this chapter), the Panel concludes that there should be a smaller number of commissioners.

The Panel recommends that the number of commissioners should be reduced to five full-time members.²⁹ The five commissioners should deal with both telecommunications and broadcasting regulatory matters. If the government concludes that a greater number of commissioners is needed to regulate broadcasting, the Panel recommends that these additional commissioners should not deal with telecommunications. This would preserve a smaller and more effective decision-making group for telecommunications regulation.

However, the Panel notes that, based on the experience of the U.S. and other countries, it does not seem necessary to have more than five commissioners, even for broadcasting purposes.

The Panel believes five commissioners will constitute a large enough organization to carry out the new functions contemplated in this report. With the transfer of a number of competition policy issues to the new TCT, a CRTC appointment should not be too demanding on any one member. Careful selection of the five members should also permit a reasonable linguistic and regional mix.³⁰ In addition, a total complement of five commissioners should be capable of addressing all telecommunications matters in various panels without impairing the CRTC's ability to conduct review applications of telecommunications decisions when required.³¹

²⁸ See OECD, *Telecommunication Regulatory Institutional Structures and Responsibilities*, p. 10, Table 4.

²⁹ This may have to be phased in through attrition.

³⁰ While it is a Canadian custom, the Panel is not persuaded that there is a real need to appoint a regional mix of commissioners to achieve the objective of effective regulation. The principles of economic, technical and social regulation of telecommunications companies do not vary greatly from region to region and, to the extent they should vary in their application, commissioners can be made aware of the relevant regional differences. There is perhaps a greater risk that regional commissioners may view themselves as advocates for regional constituents such as locally based telecommunications companies or other local interests and represent such interests against those of others.

³¹ The Panel notes that in the local forbearance hearings conducted in 2005, all 11 full-time commissioners sat on the hearing panel. When the CRTC conducts review applications under s. 62 of the Act, it attempts, as far as possible, to have commissioners who did not participate in the original decision sit on the review panel.

Recommendation 9-6

The *Canadian Radio-television and Telecommunications Commission Act* should be amended to reduce the number of CRTC commissioners from 13 to 5. The five commissioners should deal with both telecommunications and broadcasting matters. Any additional commissioners who might be appointed for broadcasting regulation purposes should not deal with telecommunications matters.

The Selection Process for CRTC Commissioners

Effective implementation of the new regulatory approaches proposed in this report will present significant challenges to CRTC commissioners. Their task will be complicated by technological and market developments in an increasingly dynamic and converging environment. It will require commissioners with a good understanding of the issues related to economic, technical and social regulation, and with rigorous analytical skills.

Telecommunications has become such an important enabler for Canada's economic and social development that Canada cannot afford to have the regulator "get it wrong." The Commission will require the best and most experienced minds to "get it right." This will require individuals with particular skill sets and professional qualifications who are highly valued in the marketplace.

If the government accepts the recommendations contained in this report, the CRTC's new mandate will be more technically and economically oriented and less focused on general social policies — although commissioners will need a good understanding of how best to achieve essential social goals in the new market environment. The task of implementing the Panel's recommendations will require commissioners to have a thorough knowledge and understanding of: the economic and legal underpinnings of competition policy and its application to a less regulated environment, wholesale access matters, technically challenging issues relating to interconnection, the interaction between Internet applications and telecommunications networks, and the complex area of spectrum management.

At present, there are no formal qualifications required for appointment as a CRTC telecommunications commissioner.³² Nor, to the best of the Panel's knowledge, has the government established any formal recruitment procedures. Insiders have described the process of appointing commissioners as "highly political." While there have been some excellent appointments, the Panel is concerned that the current selection process may not place sufficient emphasis on the experience, knowledge and analytical skills required to successfully implement the new regulatory framework. Accordingly, the Panel believes the government should adopt a more open and professional approach to recruiting commissioners, similar to that used by universities, other public institutions and private corporations to recruit senior executives.

³² The *CRTC Act*, ss. 5.(1) simply disqualifies persons who have conflicting financial interests that would clearly interfere with their impartiality. However, there are no affirmative qualifications contained in the Act.

This approach should apply to all commissioners involved in telecommunications regulation. It should be based on a written statement of the qualifications required for appointment as a commissioner. These should include superior capabilities in one or more of the key professional disciplines required for economic regulation of a sector like telecommunications, such as economics, business administration, law or expertise in telecommunications technology. The qualifications should also include a demonstrated capacity to learn and to rigorously apply the economic, legal and technical approaches used in the regulation of competitive telecommunications and ICT markets.

The Panel is concerned that the current selection process may fail to identify qualified candidates who would be available and interested in a commissioner position. Therefore, a professional recruitment organization from inside or outside the public service should be retained to assist with the selection process. The recruitment specialists should assist in advertising for, identifying and screening qualified candidates. A short list could then be prepared by the recruitment specialists, to be presented to the government for its final selection.

The Panel does not consider it necessary to amend the legislation to specify the recruitment process, although this could certainly be done. At a minimum, the government should publish a policy statement adopting the new CRTC commissioner selection process.

Recommendation 9-7

The government should adopt an open, professional recruitment process for CRTC commissioners who are responsible for telecommunications regulation.

The Panel also wishes to address the issue of reappointment of commissioners. The current process provides for fixed-term appointments that may be renewed for additional terms. However, there is no requirement that the government advise incumbent commissioners in advance whether or not they will be reappointed. This can lead to considerable uncertainty within the CRTC. In a number of cases, commissioners have not known whether they would be reappointed until the last few days of their term. Therefore, commissioners who might wish to be reappointed do not know whether or not to seek other employment opportunities. It is difficult for the CRTC's chairperson to assign those individuals to any proceeding that may extend beyond their current term. This has the effect of making them lame ducks for the last part of their tenure at the Commission. It may also affect their decision to seek other positions or to seek reappointment.

This is an inefficiency that can easily be remedied by amending the *CRTC Act* to require commissioners to be notified at least six months before their terms expire whether or not they will be reappointed and, if so, for what length of term. Any affirmative notification can include a reasonable amount of time for the affected commissioner to indicate whether or not the new conditions are acceptable.

Recommendation 9-8

The *Canadian Radio-television and Telecommunications Commission Act* should be amended to include a requirement to advise incumbent commissioners, no later than six months prior to the end of their appointed term, on whether or not they will be reappointed and, if so, the length of their new term.

Compensation Levels

During the course of its review, the Panel frequently heard of the difficulty in attracting and retaining highly qualified commissioners and CRTC staff with specialized telecommunications expertise, since such individuals have the option of earning significantly higher compensation working in the private sector.

The salaries of the full-time commissioners are set by Order-in-Council. Commissioners are also entitled to federal public service pension benefits.³³ The current salaries and pensions are certainly reasonable by public service compensation standards. However, they are well below the levels paid to senior executives and some middle managers in telecommunications companies, and to top professional regulatory practitioners such as lawyers and consultants. The Panel is concerned that the current salary levels are insufficient to attract and retain the highly qualified candidates who are capable of meeting the increased demands that will be placed on the Commission to implement the new regulatory approaches proposed in this report.

The same problem exists at the level of the Commission staff. As with many expert tribunals, the Commission staff is responsible for most of the research, analysis and decision writing of the Commission, among their other responsibilities. The Panel considers that it would be necessary to attract, recruit, train and retain a number of highly experienced telecom experts among the staff to successfully implement the new regulatory framework proposed in this report.

The proposed new regulatory framework calls for quicker decision making and entails more challenging professional analyses of issues involving interconnection, economic, technical and spectrum regulation, among others. In addition, the Commission staff who are assigned to support proceedings of the new TCT will require in-depth knowledge, not only of the telecommunications industry, but also of competition law and policy.

³³ *CRTC Act*, ss. 7.(1) and 9.(1), respectively.

Members of the Panel who visited Ofcom, the new telecommunications regulator in the U.K., were impressed with the level of professional sophistication, youth, energy and dedication of the staff of that institution. They were told that it had been possible to attract top-quality professional staff because Ofcom was able to offer them compensation at market rates for consultants that were considerably above the normal U.K. public service salary scales. Ofcom executive compensation plans also include performance-based compensation.³⁴ Precedents for market-based compensation schemes also exist in Canada, in the case of Special Operating Agencies.³⁵

The Panel recommends that, in selected cases, more flexible and market-oriented compensation levels should be made available to attract top candidates for commissioner and expert senior staff positions. The Panel notes that its recommendations include a significant reduction in the number of commissioners. Accordingly, higher levels of compensation could be paid to commissioners without increasing overall budget levels. In the case of expert staff, the Panel considers that more market-oriented compensation levels would be required to retain a small number of experts to perform tasks that require specialized expertise and abilities related to telecommunications regulation.

Recommendation 9-9

There should be increased flexibility to set compensation levels for commissioners and a small number of expert staff positions at market levels, including the potential for performance-based incentives, to permit the CRTC to attract and retain highly qualified individuals to meet the professional requirements of the proposed new regulatory framework.

Even if it is able to attract more highly qualified staff experts, it is likely that the CRTC from time to time will require specialized professional expertise not available in-house. In addition, heavy workload periods may make it impossible for the Commission to process applications or other proceedings in a timely manner, without the assistance of outside resources.

Many government, business and non-government organizations fill demand for specialized expertise and excessive workload by retaining individual consultants or firms. Other telecommunications regulatory agencies, such as Ofcom, do the same. Timely recourse to outside consulting expertise would greatly assist the CRTC in meeting the demanding requirements of the proposed new regulatory framework. The inability to retain such outside expertise may make it impossible for the CRTC to do so.

³⁴ Some executive compensation arrangements include the potential for performance-based bonuses of up to 20 percent of salary levels.

³⁵ See, for example, the Office of the Superintendent of Financial Institutions.

It is apparently possible, in principle, for the CRTC to retain outside consultants under its current public service arrangements. However, experience has shown³⁶ that these requirements are excessively bureaucratic and time-consuming and that they make it very difficult to retain sufficient expertise at market-oriented rates. The Panel considers that the *CRTC Act* should be amended to grant the Commission clear authority and sufficient budget to retain outside expert consultants at market rates. This authority should extend to cases where such experts are required to provide specialized advice or other assistance, or to meet heavy workload requirements in a timely manner. It could be modeled on similar authority granted to the Competition Bureau.³⁷

Recommendation 9-10

The CRTC should be granted clear authority and sufficient budget to retain outside expert consultants at market rates when they are required to provide specialized expertise or to meet heavy workload requirements.

Improving the Regulatory Process

The preceding sections of this chapter focus on proposed changes to Canada's telecommunications policy-making process, the relationship between government and the CRTC, and the composition and staffing of the CRTC. In addition to its recommendations in those areas, the Panel believes improvements should be made to the regulatory process itself.

Canada can be justly proud of having a generally open and transparent regulatory process in the telecommunications sector. However, the Panel believes this regulatory process can be improved through more timely delivery of regulatory services and through more efficient and effective regulatory approaches.

More timely regulation could be achieved by adopting the following approaches:

- After the record of a proceeding has closed, the time taken by the CRTC to issue its decisions should be shortened on a consistent basis. While the CRTC has recently introduced measures to reduce regulatory lag, the Panel believes performance standards should be introduced and retained on an ongoing basis.
- When the CRTC engages in regulatory rule making, it should improve the focus of its consultation process by setting out its objectives, proposed approaches or options under consideration at the commencement of the proceeding.

³⁶ For example, the CRTC experienced significant and time-consuming problems when it tried to retain outside experts to assist it in completing its recent local forbearance proceeding in a timely manner. Failure to deal with local forbearance issues in a timely manner has been a major source of industry criticism of the CRTC.

³⁷ *Competition Act*, R.S.C. c. C-34, ss. 25–27.

- In an *ex post* regulatory regime, when violations occur, there should be timely enforcement with sufficient deterrence. To achieve this, the CRTC should be granted additional enforcement tools. The CRTC should also be able to refer matters to the Attorney General of Canada for possible prosecution of offences.
- To reduce delays associated with judicial appeals, the requirement for leave to appeal CRTC decisions should be abolished.
- Regulatory services can be delivered in a more timely manner when they are handled efficiently. The Panel anticipates that there will be an increased role for dispute resolution in the future. This can be most efficiently handled — and strains on CRTC resources reduced — if disputes that do not have any policy implications can be outsourced to the private sector.

In addition, more efficient and effective regulation could be achieved through the following approaches:

- The current tariff approval process should be streamlined, with the onus placed where it properly belongs, by replacing the various CRTC-prescribed documents required to be filed by carriers to justify tariff applications with simple statements of regulatory compliance by them.
- The CRTC regulatory “jurisprudence,” which consists of myriad decisions, orders, tariffs, letter decision, public notices, regulations and other documents is more complex and opaque than desirable. It can be made more transparent through development of a single “regulatory code” that over time could incorporate and update all applicable regulatory rules in the telecommunications sector.
- Some authorizations currently required to provide telecommunications services in Canada no longer serve a useful purpose and should be repealed.
- The *CRTC Telecommunications Rules of Procedure* (the Rules) do not reflect current practices and procedures. The CRTC should conduct a thorough review of its Rules of Procedure, with a view to streamlining, updating and consolidating them to reflect the new regulatory regime. The CRTC should also revise its current approach to the awarding of costs in its proceedings, and the government should review the issue of funding public interest groups that participate in such proceedings.

The following table summarizes the changes proposed in this section.

Regulatory Issue	Recommended Improvement
Regulatory lag	<ul style="list-style-type: none"> Require the CRTC to establish performance service standards measuring the timeliness of its decision making
Lack of focus and depth in regulatory rule-making proceedings	<ul style="list-style-type: none"> Require the CRTC to initiate rule-making proceedings with a notice setting out the specific objectives and, whenever possible, the proposed rules or options being considered, and to provide the rationale for the proposals
Inadequate enforcement and deterrence mechanisms	<ul style="list-style-type: none"> Grant the CRTC authority to impose administrative monetary penalties Grant the CRTC authority to refer matters to the Attorney General of Canada for possible prosecution Increase fines to levels consistent with those in the <i>Competition Act</i> Simplify and clarify the rights of civil action for damages
Delay and uncertainty in judicial appeals of CRTC decisions	<ul style="list-style-type: none"> Repeal the requirement to obtain leave to appeal to the Federal Court of Appeal on matters of law and jurisdiction
Slow or inadequate dispute resolution mechanisms	<ul style="list-style-type: none"> Increase CRTC reliance on alternative dispute resolution (ADR) by the Commission itself and by outside ADR mechanisms in appropriate cases
Delays in analysis and approval of tariffs	<ul style="list-style-type: none"> Replace required documentation to justify tariff filings with documents that certify compliance with all regulatory requirements
Complexity and opaqueness of CRTC telecommunications rules	<ul style="list-style-type: none"> Require the CRTC to establish a regulatory code over time, to provide a single, updated source of telecommunications regulatory rules
Unnecessary authorizations	<ul style="list-style-type: none"> Replace licensing regimes for basic international telecommunications services and for international submarine cables with simple registration requirements
Outdated rules of procedure	<ul style="list-style-type: none"> Review, streamline and update the <i>CRTC Telecommunications Rules of Procedure</i> Revise the criteria for awarding costs in telecommunications proceedings Review public interest group funding

Service Standards for CRTC Regulation

Regulatory lag is one of the major complaints generally cited in recent years with respect to telecommunications regulation. The CRTC from time to time has taken initiatives to reduce regulatory lag, and it has significantly reduced such lag over the past eight months. However, the Panel believes steps should be taken to ensure that the Commission continues to run a more streamlined regulatory process on an ongoing basis.

There are two major components of regulatory lag in CRTC proceedings:

- the time it takes the regulator to complete the record of relevant material in a proceeding
- the time it takes the regulator, after the proceeding has closed, to issue its decision.

With respect to the first component, the CRTC normally imposes time limits within which parties appearing before it must provide documents. These time limits are set out in the Rules. They are frequently supplemented by more detailed directions on procedure issued by the CRTC. Although this routine use of supplementary rules is a concern (which the report addresses later in this chapter), the actual time limits imposed are generally proportionate to the level of effort required to provide the required materials.

However, with respect to the second component, there is nothing in the *Telecommunications Act* nor the Rules that imposes deadlines on the CRTC to issue rulings or decisions. The Act does contain one provision (s. 26) that established a 45-day time limit for the disposition of tariff filings. In practice, this time limit has not always been effective because it includes an exception (para. 26.(c) whereby the CRTC can publish written reasons for a delay), which has been relied upon fairly frequently.

The result has often been an open-ended process, in which parties have had no guidance on when a decision would be issued or on what priority it might have within the CRTC. The CRTC's problems with regulatory lag have often been exacerbated by the complexity of the issues it has faced and the lack of adequate Commission resources available to deal with them — matters that are addressed elsewhere in this report. The Panel also notes that the Commission has recently begun to indicate the anticipated decision date in some proceedings³⁸ and has introduced performance service standards for the disposition of retail service tariff applications, which are discussed below.

³⁸ See, for example, *Forbearance from regulation of local exchange services*, Telecom Public Notice CRTC 2005-2, April 28, 2005, and *Framework for forbearance from regulation of high-speed intra-exchange digital services*, Telecom Public Notice CRTC 2005-8, June 30, 2005. In both cases, the CRTC stated that “a decision will be issued within 150 days after the record closes.” However, the Panel observes that in the more recent *Bell Digital Voice Service*, Telecom Public Notice CRTC 2005-9, July 7, 2005, the statement had been softened to “The Commission expects to issue a decision within 90 days after the record closes.”

Applying Service Standards to the CRTC Process

The Panel believes there are some opportunities to reduce the time that it takes to complete the record in CRTC proceedings, without sacrificing the quality of the evidentiary record. As one small example, greater use should be made of mandatory electronic exchange of documents. While the CRTC has already implemented and encouraged electronic filing, it is not yet mandatory. In the Panel's view, mandatory electronic document exchange should further reduce the time that the CRTC normally builds into its process for documents to be prepared and exchanged. This would also be consistent with the Panel's recommendation that government should become a champion in the adoption and use of ICTs.

The time required to complete the record in a telecommunications proceeding may be longer than necessary, but it does have the advantage of being a matter of public record, in that parties understand when the various steps will have been completed. The same cannot be said about the time required for the CRTC to issue its decisions.

As the telecommunications sector becomes increasingly competitive and the CRTC begins to rely to a greater extent upon *ex post* regulation, open-ended decision making will become a matter of increasing concern.

Ex post regulation may be viewed by some as a leap of faith that does not carry with it the certainty that the *ex ante* model appears to offer. The Panel believes one of the principal underpinnings of successful *ex post* regulation is the knowledge that when regulatory intervention is required, it will be taken in a timely manner. One of the five fundamental principles in the Smart Regulation report is "timeliness," which is described in the following manner³⁹:

Principle 3 **TIMELINESS** — Regulatory decisions and government services must be provided in a manner that reflects the pace at which new knowledge develops, consumer needs evolve and business now operates. Timeframes and standards for decision making should be developed and enforced.

The pace at which new knowledge is developing in the telecommunications sector is clearly accelerating, as is the evolution of consumer needs and business operations. The delivery of regulatory services should not be allowed to lag behind. The CRTC has recently made significant efforts to become more accountable in the timeliness of its decision making. However, the Panel believes this should not be a matter that is left solely to the CRTC's discretion and to internal regulatory priorities that may change over time.

³⁹ EACSR, *Smart Regulation*, p. 14.

The Panel makes a number of recommendations that should reduce both the number and type of matters that engage the CRTC decision-making process, as well as the time required to issue decisions when intervention is required. These include, for example, the introduction of the presumption of deregulation, the negative disallowance approach with respect to tariff filings, the reduced number of telecommunications commissioners and the authority to retain outside experts in certain circumstances, all of which have been discussed above in the report. In addition, as discussed below in this chapter, the Panel is recommending the repeal of unnecessary licensing regimes and greater reliance on registrations and declarations by senior officers of filing entities, in place of traditional regulatory scrutiny.

A number of federal regulatory statutes include requirements for the regulator to make certain decisions within specified times.⁴⁰ This model does offer the attraction of certainty. However, the telecommunications regulatory process involves several different types of proceedings, with different levels of complexity and different implications for the industry. Some CRTC telecommunications decisions are very lengthy and technically detailed, while others are quite short and straightforward. The requirement to provide all CRTC determinations in both official languages can add to the time required to release the lengthier decisions.

In that context, any attempt to capture an average length of time for decision making will inevitably allow too much time for some decisions and insufficient time for others; neither result is in the public interest.

The Panel notes that the CRTC has begun publishing performance service standards with respect to retail service tariff applications.⁴¹ These standards establish “measurable indicators,” such as the percentage of CRTC rulings to be issued in a specific process within a predetermined number of days. The published report compares the actual results with those goals. The Panel believes this approach should be encouraged in other areas of CRTC service delivery and that it is more conducive to improved overall timeliness than a one-size-fits-all statutory time limit.

The Panel recommends that the CRTC be directed to consult with industry stakeholders to establish performance service standards for delivery of all forms of rulings by it. Standards should be developed by defined category of proceeding, subject to the following minimum expectations:

- Time limit targets should run from the time that the record of a proceeding closes and not from the time that originating documents are received by the CRTC. This should minimize the potential for regulatory gaming by parties that appear before the CRTC.
- Time limit targets must be reasonable, so they do not compromise the CRTC’s ability to issue well-reasoned and responsible decisions, but they should also require its focused deliberation.

⁴⁰ See, for example, the *Canada Transportation Act*, S.C. 1996, c.10, s. 29 and the *Special Import Measures Act*, R.S.C. 1985, c.S-15, ss. 37.1, 38, 39, 41 and 41.1.

⁴¹ See: http://www.crtc.gc.ca/eng/publications/reports/t_st2005.htm

- When time limit targets are established, the CRTC should comply with them. In the event that it does not meet a particular target during a measured period, the CRTC should state publicly what specific steps it will take to meet the target in the future.
- The CRTC should publish the results of its actual performance, measured against the established service standards on a quarterly basis and in its annual reports.

Recommendation 9-11

The CRTC should establish and adhere to published performance service standards for the various forms of regulatory proceedings it runs. These standards should be developed in consultation with the telecommunications industry and the public.

The Rule-making Process

When the CRTC wishes to introduce a regulatory policy or to change an existing policy, it generally does so in an open manner, following a public consultation process. This rule-making process typically begins with a public notice issued by the CRTC, in which it seeks comments from the public and ends with a decision by it that is based on the record of that proceeding.

In some cases, the CRTC issues a public notice with a proposed regulatory policy or preliminary view included. On other occasions, it simply states that it is considering a matter and — with or without indicating its views on the matter — asks interested parties either to provide their views or to respond to a series of questions. There does not seem to be a consistent pattern. Several parties suggested to the Panel that the CRTC should be obliged to adopt a process similar to the notice of proposed rule making (NPRM) process used by the FCC. The FCC frequently issues an NPRM in which it sets out new or changed regulatory rules it proposes to adopt, explains the background and rationale for the proposals and seeks comments on them.

Improving the Rule-making Process

Both the CRTC and Industry Canada have adopted the NPRM approach from time to time in recent years. The Panel endorses this approach, since it will lead to an improved regulatory process. However, this is a matter that is too fundamental to good regulatory governance to be left to a case-by-case approach. In the Panel's view, the NPRM approach should be adopted and applied consistently whenever possible, and the rationale for the proposal should be sufficiently detailed as to allow informed comment from interested parties. Consistent with the discussion in Chapter 2 regarding telecommunications policy objectives, any such rationale should make a clear distinction between the means to be adopted in the proposal and the ends that those means are intended to achieve.

There may be exceptional instances in which the CRTC has not determined its proposed course of action, possibly because it does not have sufficient underlying facts or data in its possession. In those cases, the notice initiating the process should clearly set out specific options that the CRTC is considering, together with arguments for and against each option. Where appropriate, it should also outline the additional information that it expects to gather during the process, in order to allow it to finalize the policy.

This NPRM approach will require more rigour by the CRTC at the front end of the consultation process, both in terms of thinking through a coherent position or options, and also in articulating the objectives of the proposal. However, this will give commenting parties a more specific framework to address. This improved focus should also reduce the time required for subsequent CRTC analysis of positions and the potential for participant surprise at the outcome. The reduction in time is consistent with the Panel's recommendations to reduce regulatory lag.

Recommendation 9-12

When the CRTC proposes to introduce or to change a regulatory approach or rule, it should routinely publish a notice seeking comments on specific proposals or options being considered. The notice should set out the background and the supporting rationale for the proposed approach or options.

Enforcement of Telecommunications Regulation

The *Telecommunications Act* provides three different avenues of recourse in the event that someone breaches its provisions:

- regulatory intervention by the CRTC
- quasi-criminal prosecution
- actions for damages.

It is possible that one breach might give rise to more than one of the above remedies. However, the remedies were enacted during a period in which most telecommunications services were provided on a monopoly basis and service providers were considered more as public utilities than as competitive service providers. As such, the remedies have not kept pace with regulatory and market developments.

Strengthening Regulatory Remedies

The *Telecommunications Act* contains limited powers for the CRTC to respond to a breach of the Act. The CRTC may issue an order requiring an activity to cease and taking corrective action on a prospective basis. However, there are limited powers to enforce compliance with the Act or to punish parties who breach it.

When the *Telecommunications Act* was proclaimed into force in 1993, Canadian telecommunications regulation still relied heavily on a traditional public utility model of monopoly service provision, using the rate base–rate of return method of regulation.⁴² Under that model, the regulator and the service provider could focus on quality of service, extension of service through internal cross subsidies and the achievement of various social policy objectives. The likelihood of a deliberate breach of the regulatory statute was relatively low. In that context, prospective orders were generally a sufficient remedy. However, these approaches are inadequate in an era of increasingly competitive supply of telecommunications services.

In today's more competitive markets, a breach of the law or regulatory rules has the potential to provide a significant advantage to the transgressor and a permanent disadvantage to its competitors, by altering market share or even putting a smaller competitor out of business. In that context, prospective orders by themselves are insufficient remedies, since they do not necessarily deter the transgressor from future breaches.⁴³ A “try it out until you get stopped” approach may be viewed by some as an acceptable way of doing business. The Panel considers the absence of statutory authority for deterring unacceptable behaviour to be particularly unsatisfactory in an *ex post* model of regulation, with less detailed regulation and greater reliance on competitive forces.

Bill C-37

On December 13, 2004, the government introduced Bill C-37, which addresses problems with unsolicited telecommunications, or “telemarketing.” The Bill, which received Royal Assent on November 25, 2005, amends the *Telecommunications Act* to establish the legislative framework for a national do-not-call list. More relevant to this section of the report, it also gives the CRTC the authority to impose administrative monetary penalties (AMPs) on persons whom it finds have breached the do-not-call rules.

The imposition of AMPs does not technically have criminal law connotations. AMPs are intended to serve as a deterrent rather than as punishment. They are therefore fundamentally different from fines imposed in relation to the commission of criminal offences. In addition, in an AMPs proceeding, the CRTC is required to be convinced only on the balance of probabilities that the breach occurred. This is a lower standard of proof than is required in the case of criminal prosecutions.

⁴² The first price caps decision was not issued until four years later: see *Price Cap Regulation and Related Issues*, Telecom Decision CRTC 97-9, 1 May 1997.

⁴³ Under s. 63 of the *Telecommunications Act*, the CRTC could make its order requiring future compliance an order of the Federal Court of Canada or of a superior court of a province. That would make any future breach an act of contempt of that court. However, this is a cumbersome process that has rarely been used by the CRTC.

The Panel supports the thrust of Bill C-37. In the Panel's view, it is good public policy for the CRTC to have a variety of enforcement tools that can be tailored to respond to the breach involved. Clearly, some behaviour may require deterrence by the regulator, yet fall short of quasi-criminal activity to be punished by the state. Having the power to impose AMPs can fill this void.

Broader AMPs Power

The Panel believes the CRTC should be given more general powers to impose AMPs as a regulatory enforcement mechanism, and not simply in the case of telemarketers. This broadened power should apply in respect of the breach of any provision of the *Telecommunications Act*, any regulation, decision or order made under that Act, any special Act, or any conditions, prohibitions or requirements properly imposed by the CRTC.

Any extended power should be the same in concept as contemplated in Bill C-37, namely, to determine, on the balance of probabilities, that a breach has occurred and to impose a penalty that does not carry with it any criminal connotations. In addition, the procedural safeguards that have been incorporated into Bill C-37 should be included in any broader AMP authority.

Recommending a maximum amount for a general AMP power is a challenge. A major thrust of this report is increased deregulation and a greater role to be played by competition law principles in an *ex post* regime. The *Competition Act* (ss.74.1(1)) currently allows the Competition Tribunal to impose AMPs of up to \$50 000 for a first offence and up to \$100 000 for subsequent offences in the case of individuals and twice those levels for corporations. Bill C-19, which was given first reading November 2, 2004, but which died with the dissolution of Parliament, proposed to amend the *Competition Act* to provide substantial increases to the existing level of AMPs in certain instances.

Bill C-73, which was given first reading November 14, 2005, but which also died with the dissolution of Parliament, proposed to amend the *Telecommunications Act* to give the CRTC a general AMP authority, with the potential for substantial penalties that appear to be linked in amounts to those proposed for the *Competition Act* under Bill C-19.

The *Competition Act* is an act of general application and, as such, its AMP provisions apply to breaches of that Act by competitors in all sectors of the economy, except in specific areas that have been carved out, generally for purposes of sector specific regulation. The telecommunications sector is one such example. However, the Panel considers that the potential impact of a breach of a statutory provision was never the reason for sector specific treatment of telecommunications. Accordingly, the Panel supports the principle of linking the quantum of AMPs under both the *Telecommunications Act* and the *Competition Act*. It also supports the thrust of Bill C-73 and recommends that the government introduce a bill substantially similar to it, in the next Parliament.

The Panel also recommends that, as part of an AMP authority, the CRTC should be granted specific power to make ancillary and related non-monetary determinations and orders. These would be intended to improve the deterrent effect of the AMP itself through publicity. For example, this could include authority to direct the respondent to insert in all monthly invoices during a billing cycle an acknowledgment that it had breached the Act, had been penalized by the CRTC and had taken remedial steps to avoid future breaches.

Recommendation 9-13

The *Telecommunications Act* should be amended to grant the CRTC power to levy administrative monetary penalties at levels similar to those under the *Competition Act*. The CRTC should also be granted specific power to make related non-monetary orders designed to enhance the deterrent effect of the penalty.

Prosecutions

This report makes a number of recommendations that, if accepted by the government, will involve a significant shift of the telecommunications regulatory framework toward more deregulation, more *ex post* regulation and more industry self-regulation. In such a regulatory environment, it will be absolutely essential, in the Panel's view, to have in place what Bell Canada referred to in its submission to the Panel as "sufficient deterrence mechanisms"⁴⁴ against all forms of unacceptable behaviour by telecommunications service providers. These deterrence mechanisms must be sufficient not only in terms of potential remedy or sanction, but also in terms of availability and timeliness.

A breach of the *Telecommunications Act* may also constitute an offence that makes the person liable to prosecution under s. 73. However, unlike most prosecutions under the Criminal Code and other statutes, which are commenced by the state itself, a prosecution under the Act may be commenced only by private initiative and only with the consent of the Minister of Industry or the CRTC, depending upon the offence. The Minister and the CRTC do not themselves initiate prosecutions. This means that prosecutions will be commenced only by competitors, customers or possibly public interest groups. It is the Panel's understanding that, to date, there has only been one prosecution commenced — without a conviction — since the Act came into force.

The Panel believes competitors and customers may have little incentive to seek consent to initiate a private prosecution for a number of reasons:

- They may regard prosecutions as the responsibility of the state and/or the regulator rather than the responsibility of private initiative.
- The burden of proof in a criminal prosecution is to establish guilt beyond a reasonable doubt. This requires extremely convincing evidence, and private prosecutors may have difficulty in obtaining access to documents held by the accused that would assist in the case.

⁴⁴ Bell Canada submission August 15, 2005, Section B, page 52.

- The delays and expense associated with seeking consent and then initiating a prosecution may act as a further deterrent.
- They may conclude that the maximum fines provided under the Act are too low in the circumstances and not worth the effort.

The Panel sees no principled basis for treating offences committed under the *Telecommunications Act* in this manner. The state has an interest in ensuring that its telecommunications laws are obeyed. There may be merit in retaining the ability to initiate private prosecutions. However, the state should not in effect completely outsource this responsibility to competitors or customers and compound the challenge by including the requirement that they obtain consent before initiating a private prosecution.

The CRTC is generally in the best position to know whether it is likely that an offence has been or is about to be committed under the *Telecommunications Act* or any special Act, but it does not have the expertise to conduct prosecutions. Accordingly, the Panel recommends that, in such circumstances, the CRTC should first satisfy itself with the underlying facts and, in appropriate cases, have the authority to refer the matter to the Attorney General of Canada for possible prosecution. A similar type of authority has been granted to the Commissioner of Competition under the *Competition Act* (s. 23).

Recommendation 9-14

The *Telecommunications Act* should be amended to remove the need to obtain the consent of either the Minister or the CRTC to initiate a prosecution under the Act.

Recommendation 9-15

The *Telecommunications Act* should be amended to authorize the CRTC to refer possible offences under that Act or any other telecommunications legislation to the Attorney General of Canada for investigation and possible prosecution.

The Panel has considered whether the current fines, which are intended to be actual punishments for quasi-criminal behaviour and not mere deterrents, are adequate. It concludes that they are not. It notes that Bill C-73, among other things, would have substantially increased the fines that could be imposed for offences.

The Panel has concluded that competition law principles should play a greater role in the overall regulatory scheme of the telecommunications sector in Canada. This greater interplay should also extend to greater coordination of fines and related punishments for offences.

It is quite conceivable that an offence committed under the *Telecommunications Act* could have a considerable impact upon competition in the telecommunications sector, especially as Canada moves toward greater reliance on ICT as a driver of the overall economy. This impact could be as great as or greater than the impact that offences committed under the *Competition Act* may have on other sectors of the economy. The Panel therefore supports the initiative in Bill C-73, with its proposed increases in fines for offences committed under the *Telecommunications Act*.

Recommendation 9-16

The *Telecommunications Act* should be amended to increase the fines for offences under the Act to levels similar to those in the *Competition Act*.

The Panel also believes it would be appropriate for the government to review the *Telecommunications Act* to link potential fines more directly to the gravity of the offence involved. As an example, the fine for operating without a basic international telecommunications licence, which is essentially granted as a right by the CRTC and which the Panel recommends repealing, is four or five times as high as the fine for a Canadian carrier with significant market power breaching one of its approved tariff provisions.

In addition, if the need to obtain the consent of the CRTC or the Minister is repealed as recommended, the *Telecommunications Act* should also be amended to include the possibility of a due diligence defence; that is, the accused took reasonable precautions to ensure that it did not commit an offence. For example, if a Canadian carrier does not qualify as “Canadian” as defined in the *Telecommunications Act* and regulations, there does not appear to be a defence of due diligence available to it and it is liable to a fine that is four or five times as high as the fine for knowingly making a material misrepresentation to the CRTC. This appears to the Panel to provide for a lower fine for a graver offence and also appears to fail to allow an accused Canadian carrier the possibility of demonstrating that it took all reasonable precautions to ensure that it did in fact qualify as such.

Recommendation 9-17

The government should review the *Telecommunications Act* to link potential fines for offences more directly to the gravity of the offence committed and to add a due diligence defence in appropriate cases.

Actions for Damages

The CRTC does not have a specific power under the *Telecommunications Act* to award damages to compensate parties who have sustained losses due to breaches of the Act, regulatory decisions or orders.⁴⁵ Actions for damages must be brought in the courts. This can mean that a competitor who believes the *Telecommunications Act* has been breached must bring a complaint to the CRTC to have the breach corrected. The competitor must then launch a separate lawsuit in the courts to sue for compensation by way of damages.

Extending the power to award damages to the CRTC has the intuitive appeal of one-stop shopping, which could reduce both the costs and the time consumed in litigation. However, the Panel concludes that it would not be appropriate to expand the authority of the CRTC to include this power. Consistent with its overall approach of capturing comparative expertise, the Panel is persuaded that the courts have greater expertise in assessing damages. This comparative advantage outweighs any disadvantage that continuing the *status quo* presents. The Panel is also concerned that granting the CRTC this new power could raise constitutional issues that could take a considerable period of time to resolve.⁴⁶

In addition to the constitutional question, the Panel concludes that granting the CRTC the power to award damages would almost certainly detract from the CRTC's focus on its regulatory responsibilities under the *Telecommunications Act*, thus undermining the core themes of this report.

The Panel believes its recommendations with respect to a new TCA, discussed in Chapter 6, should provide relatively expeditious and inexpensive resolution for the vast majority of residential and small business complaints. These are the complainants most likely to be sensitive to costs and delays associated with litigation.

Although the Panel believes the courts have greater expertise in assessing damages generally, it also believes the CRTC has greater industry-specific and technical expertise in assessing the issue of liability in telecommunications matters. Improvements to the current system can be implemented that will capture this comparative advantage. In its comments, TELUS had suggested that a possible improvement might be to recognize CRTC decisions regarding carrier liability as *prima facie* evidence in court of liability. As a practical matter, this means, once the CRTC had found a carrier liable for having breached the Act, that the plaintiff would not have to prove carrier liability in a subsequent civil lawsuit. Instead, the onus would shift to the carrier. If it could not disprove its liability, the court would then assess the damages that flowed from that liability.

⁴⁵ Section 72 does give aggrieved parties certain rights to sue for damages in the courts. However, ss. 72.(3) appears to prevent actions based on breach of contract to provide telecommunications services, thus limiting ss. 72.(1) to actions based on civil wrongs, such as negligence.

⁴⁶ Under ss. 92.(13) of the *Constitution Act*, 1867, for example, the provinces have exclusive jurisdiction over matters relating to property and civil rights.

The Panel supports the concept that a CRTC decision regarding telecommunications service provider liability⁴⁷ should be *prima facie* admissible to prove a violation by that provider of any provision of the *Telecommunications Act*, any regulation, decision or order made under that Act, any special Act, or any conditions, prohibitions or requirements properly imposed by the CRTC, leaving the matter of assessment of damages to the courts. Given the comparative expertise of the CRTC with respect to the issue of liability, the Panel anticipates that the courts would be prepared to show a considerable degree of deference to CRTC findings.

Recommendation 9-18

The *Telecommunications Act* should be amended to provide that, in any civil court proceeding, a CRTC decision regarding the liability of a telecommunications service provider for a breach of the Act or regulatory measures established under the Act should be *prima facie* evidence of such liability.

The Panel also notes that the wording of s. 72 of the *Telecommunications Act* is quite confusing and should be clarified. Subsections 72.(1) and (2) appear to grant the right to sue for damages in court within two years after a cause of action arises. However, under one interpretation of ss. 72.(3), the ability of a potential complainant to sue for a breach of contract, a contract to provide telecommunications services or any rate charged by a Canadian carrier is precluded; under another — inconsistent — interpretation of that subsection, not only is such a lawsuit permitted, but also the two-year time limitation does not apply.⁴⁸

The Panel believes, in an increasingly competitive and unregulated telecommunications environment, there should be no limitations on the right of parties to sue for damages in the courts, other than generally applicable statutory limitation periods. Section 72 should be amended to ensure that it does not limit the right to sue for damages in the courts for a breach of the *Telecommunications Act* or a breach of contract. The Panel believes any clarification of the section should have no impact on the ability of a Canadian carrier to raise what is known as the “regulated conduct doctrine” if that is appropriate in the circumstances.⁴⁹

Recommendation 9-19

The *Telecommunications Act* should be amended to ensure that it does not place limitations on the right to sue for damages in the courts for a breach of the Act or a breach of contract.

⁴⁷ The TELUS proposal had focused on carriers. The Panel is proceeding on the assumption that the *Telecommunications Act* will be amended to provide for direct CRTC jurisdiction over all telecommunications service providers, that is, facilities-based carriers and resellers of telecommunications services that rely on the facilities of others.

⁴⁸ In *Sprint Canada Inc. v. Bell Canada* (1997) 79 C.P.R. (3d) 31 (Ont. Ct. Gen. Div.), aff'd 116 O.A.C. 297 (C.A.), the trial judge held that ss. 72.(3) barred a court action for damages in relation to a rate charged by a telecommunications carrier; on appeal, the court affirmed the decision but declined to affirm the trial judge's analysis of the subsection. In *934691 Ontario Inc. cob First Media Group Inc. et al v. Bell Canada* (2001) Ont. S.C.J. Ct. File 99/2520, the trial judge held that ss. 72.(3) takes a cause of action away from the courts if there is an allegation of breach of contract to provide telecommunications services. On appeal, the court stated that it did not agree with the trial judge's comments concerning jurisdiction. See *934691 Ontario Inc. v. Bell Canada*, August 15, 2002 docket CA C37453.

⁴⁹ For the leading cases on the regulated conduct doctrine, see: *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 (HCJ), *Attorney General of Canada v. Law Society of British Columbia* (the “Jabour” case) (1982), 127 D.L.R. (3d) 1 (S.C.C.) and *Garland v. Consumers' Gas Company*, [2004] 1 S.C.R. 629.

Appeals from CRTC Decisions

The *Telecommunications Act* permits an appeal to the Federal Court of Appeal from any CRTC decision on any question of law or of jurisdiction, provided that leave to appeal is first obtained from the court.⁵⁰ A number of parties suggested to the Panel that the requirement to obtain leave should be repealed. They noted that the threshold for obtaining leave is low and that the process simply added delay and expense and in effect required parties to argue their cases twice.

In addition, Bell Canada submitted that CRTC decisions should be subject to appeal to the Federal Court of Appeal on questions of fact, with leave of the court, noting that a similar power already exists with respect to decisions of the Competition Tribunal.⁵¹ TELUS submitted that if the CRTC were given jurisdiction to award AMPs, the courts should have the power to review those decisions on the facts.

Appeals on Law or Jurisdiction

The requirement to obtain leave to appeal on matters of law or jurisdiction does not appear to serve a useful function. The threshold test that is applied in considering leave applications is a low one. Despite this relatively low barrier, the court over the years has not been inundated with applications for leave to appeal from CRTC telecommunications decisions. However, the leave process does require the expenditure of additional human and financial resources.

Consistent with its approach of removing unnecessary delays in the regulatory process, the Panel recommends repealing the requirement to obtain leave from the Federal Court of Appeal before commencing appeals from CRTC decisions on matters of law or jurisdiction.

Recommendation 9-20

The *Telecommunications Act* should be amended to repeal the requirement to obtain leave to appeal a decision of the CRTC to the Federal Court of Appeal on any question of law or of jurisdiction.

Appeals on Facts with Leave

The Panel considers that there is no logical connection between granting the CRTC power to levy AMPs and allowing the courts to review a decision on the facts. Some CRTC decisions involve greater amounts of money than a proceeding in which an AMP may be levied, yet there is no appeal on the facts. In addition, the Panel believes the CRTC will have a level of expertise not necessarily available to the courts in determining the AMPs that should be imposed in any particular case.

⁵⁰ *Telecommunications Act*, ss. 64.(1). The method of obtaining leave is set out in ss. 64.(2) and (3).

⁵¹ *Competition Tribunal Act*, S.C. 1986, c.26, s. 13.

More generally, the Panel is not convinced that adding a provision allowing for an appeal on facts, even with the leave of the court, would be desirable. The CRTC has been established by Parliament as the expert tribunal with respect to telecommunications regulatory matters. The recommendations to enhance the CRTC's professional expertise, discussed above, should improve the Commission's capacity in this regard. Many telecommunications proceedings are lengthy and factually very complex. Adding the potential for judicial review of CRTC decisions on the facts could undermine the CRTC's status as the expert tribunal in telecommunications matters. The proposal would also add a new level of delay to the regulatory process, something that the Panel is attempting to reduce wherever possible.

The fact that there is provision for appeals on findings of fact from the Competition Tribunal, does not alter the Panel's thinking on the matter. The structure of the Competition Tribunal is quite different from that of the CRTC. Judicial members of the Competition Tribunal⁵² play a pervasive role in its activities. In addition, the tribunal is called upon to make determinations on competition laws of general application to all sectors of the economy.⁵³ As such, the tribunal is more of a hybrid form of specialized court than expert regulatory tribunal. In light of the different overall composition of the two institutions and their different mandates, the Panel believes the CRTC is better equipped to make findings of fact in telecommunications matters under its jurisdiction and that those findings should not be subject to appeal, even with leave.

Alternative Dispute Resolution

The CRTC has made significant progress in reducing the regulatory lag associated with competitive disputes between telecommunications service providers, notably through its expedited dispute resolution process.⁵⁴ However, this is still a relatively formal process that typically involves the assignment of a panel of three commissioners (with associated support staff) to hear and decide the matter under dispute. This process involves a level of formality and dedication of CRTC resources that is not necessarily required to address competitive disputes in a manner that would be acceptable to the participants and consistent with the public interest.

The Panel believes the Commission could rely more on alternative dispute resolution (ADR), which can involve various types of mediation, arbitration or variants of these options. ADR is currently used at the staff level of the CRTC and, in theory, external ADR is already available to disputing competitors in certain cases. However, not all potential competitors may be aware of the availability of external ADR. More importantly, where a respondent in a dispute has significant market power (SMP), it may wish to delay or even thwart the efforts of the applicant to proceed to quick resolution via external ADR.

⁵² Judicial members, who include the chairman of the tribunal, are appointed from among the Federal Court. At least one judicial member must participate in every application to the Tribunal. See R.S.C. c. 19 (2nd Supp.), ss. 3, 4 and 10.

⁵³ The jurisdiction of the Competition Tribunal is set out in s. 8.

⁵⁴ The process is set out in *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, February 10, 2004.

Expediting Dispute Resolution

ADR can offer clear benefits in the form of faster and less expensive resolution of disputes, less formality and the potential for greater confidentiality in increasingly competitive markets. The Panel supports the CRTC's efforts to make expedited dispute resolution an integral part of its overall regulatory tool kit, but believes more can be done in the area of ADR.

At this point, it is premature to attempt to prescribe a particular form of external ADR to supplement the CRTC's existing procedures. For example, if the TCT is created, its activities may have an impact on the need for — and form of — external ADR. However, the Panel recommends that the *Telecommunications Act* should be clarified to ensure that the CRTC has available to it the option of mandating ADR in appropriate cases. The CRTC should have the power to mandate ADR under its own auspices, in cases involving matters of regulatory policy and also on an outsourced basis, for disputes that do not involve policy matters.

The Panel notes that there is a model for a form of essentially outsourced ADR in the *Canada Transportation Act*, which may be of assistance in the government's consideration of this issue.⁵⁵ The principal limitation with the model is its restriction to the use of final offer arbitration as the only acceptable ADR approach. The Panel sees no reason to limit the format of outsourced ADR, which should include any format the parties may wish to adopt.

Recommendation 9-21

The *Telecommunications Act* should be amended to ensure that the CRTC has the power to mandate alternative dispute resolution both by the CRTC itself and on an outsourced basis in appropriate cases.

Streamlining the Tariff-filing Process

Every year the CRTC expends a considerable portion of its resources in the review and approval process of individual tariff proposals filed by individual Canadian carriers. These reviews frequently involve an assessment of related materials filed by the carriers, such as economic evaluation studies in support of proposed rates.

Carriers are required to file these supporting materials in an effort to confirm that the proposed rates comply with various regulatory requirements that have been established by the CRTC. Ironically, there is no requirement that the filing carrier actually state as a fact that the filing is in compliance. This means that the CRTC staff must examine the materials to ascertain whether its rules have been met, before recommending acceptance of the filing to the commissioners. As such, the supporting materials are in reality “documents of justification” rather than “documents of compliance.”

⁵⁵ S.C. 1996, c. 10, Part IV (s. 159 to 169).

Proposed Improvements

The current approach to tariff filings produces a number of adverse consequences. It involves considerable CRTC resources in the review analysis. It inevitably contributes to regulatory lag. The filing carrier claims confidentiality with respect to much of what is contained in the documents of justification. This means that interested parties do not see the unabridged material. This in turn limits their ability to comment on it and reduces the transparency that should be associated with the regulatory process.

Most importantly, the process places the onus on the wrong party. The Panel believes the onus of regulatory compliance should remain at all times with the filing carrier. This will be particularly true in the context of a negative disallowance regime.

It would be far more efficient to replace the filing of these documents of justification with a document certifying compliance. The Panel envisages that this approach would require certification of compliance with a simple checklist of regulatory requirements to replace much or all of the supporting information currently filed with the CRTC, other than the actual proposed tariff pages. The checklist would be developed by the CRTC in consultation with the industry and would become an appendix to the *CRTC Telecommunications Rules of Procedure*. It would list all of the requirements that must be met by any Canadian carrier that is filing a proposed tariff,⁵⁶ in order for it to be approved under the current *ex ante* regime and for it not to be suspended under the negative disallowance *ex post* regime.⁵⁷ The checklist could be modular so that it applied to all filings, but the filing carrier would only be required to check applicable items and to indicate “N/A” on non-applicable items. The carrier would include the checklist with its filing with the CRTC.

A key component of this recommendation is having a senior officer of the filing carrier sign a certificate of compliance, declaring that the completed checklist had been personally reviewed by the officer and that it was true in every respect. Certification of full compliance with the regulatory requirements of the checklist would result in automatic acceptance of the tariff filing — under both the current *ex ante* regime and the proposed negative disallowance *ex post* regime — unless and until it was challenged. A certification including any reservations or exclusions would result in the approval being delayed or the filing being suspended until the CRTC had conducted a review to determine whether it was acceptable.

This form of compliance certification would significantly reduce regulatory lag and free up CRTC and industry staff resources. It would place the onus of compliance on the filing carrier. The compliance certificate would be admissible as evidence against the carrier in any

⁵⁶ The Panel considered the option of recommending a simple statement to the effect that the filing was compliant, but rejected that approach for two reasons. The first is that it would be difficult to criticize or fine a carrier for breaching one or more regulatory requirements if they were not specified. The second is that requiring the CRTC to set out all applicable requirements in one document will provide an opportunity to reassess the ongoing need for each requirement prior to its inclusion.

⁵⁷ For example, in today's context the checklist would include statements that the proposed tariff met the imputation test, complied with all bundling rules and any price cap requirements, etc. In the future, regulatory requirements should be considerably reduced and simplified.

subsequent proceedings that challenged its veracity.⁵⁸ In addition, the Panel's enforcement recommendations — to give the CRTC the power to levy AMPs, to reduce barriers to criminal prosecutions and to bring fines into line with those of the *Competition Act* — should ensure that the certification process is not treated lightly by filing carriers.

Adoption of a compliance certification approach should be a major short-term priority for the CRTC. It is a reform that can be implemented without legislative change and that can apply in both the current regulatory context of *ex ante* tariff approvals and in the Panel's recommended context of *ex post* negative disallowances.

Recommendation 9-22

The CRTC should replace the obligation to file detailed studies and other documentation to justify applications for tariff approvals with a regime under which applicants certify compliance with a list of relevant regulatory requirements.

Increasing Regulatory Transparency

The *Telecommunications Act* and related statutes establish the skeleton of Canada's telecommunications regulatory framework but, as any regulatory lawyer will attest, "God is in the details" that flesh out the skeleton. The CRTC and Industry Canada have established a plethora of detailed rules to regulate conduct within the telecommunications industry. These rules are contained in a wide variety of documents, including regulations, rules, public notices, circulars, orders, decisions, tariffs and checklists.

Understanding regulatory rules and staying abreast of developments is a complex and — to many — an arcane process that requires sophisticated regulatory, economic and legal experts. To some extent, this is to be expected in a sector such as telecommunications.

The procedural complexity of Canadian telecommunications regulation has evolved over time. Sometimes an application to the CRTC for approval of a specific tariff filing may trigger a public process that ultimately leads to a decision that contains a major policy announcement.⁵⁹ On other occasions, the CRTC may issue a public notice that leads to such a decision.⁶⁰ However, in the rapidly evolving telecommunications environment, decisions that establish major elements of the regulatory framework rarely remain stand-alone documents. They are changed over time, through applications to review and vary, amendments, follow-up proceedings, tariff filings of specific carriers, etc. As a result, it has become difficult to ascertain the current rules that govern some areas of regulated conduct.

⁵⁸ *Telecommunications Act*, ss. 66.(1).

⁵⁹ See, for example, *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, Telecom Decision CRTC 92-12, June 12, 1992.

⁶⁰ See, for example, *Local Competition*, Telecom Decision CRTC 97-8, May 1, 1997.

For example, the Panel’s staff searched the CRTC’s website⁶¹ for information on five specific matters that are the subject of CRTC rules and obtained the following results:

- “affiliate rule” — 33 responses
- “CLEC (competitive local exchange carrier) obligations” — 22 responses
- “imputation test” — 558 responses
- “local competition” — 506 responses
- “long distance competition” — 67 responses.

Some of the responses addressed the issue in the context of a specific filing or complaint, while others provided links to earlier versions of the current rules. However, the task of sifting through all of the responses to locate the fundamental — and current — rules is more difficult than the Panel believes is appropriate for Canadian telecommunications regulation in the 21st century.

The result is that regulatory compliance is more costly and time consuming than it needs to be. It also means that regulation is not as transparent as it should be. The discussion in this chapter regarding the CRTC Rules provides one example of this state of confusion.

Consolidating CRTC Regulatory Rules

The Panel believes efforts should be taken to consolidate, update and simplify:

- all regulatory rules dealing with each area of regulated conduct into a single coherent document
- all regulatory rules collectively into a single set of CRTC rules — or a consolidated regulatory code.⁶²

The Panel recommends directing the CRTC to establish a consolidated regulatory code of rules. Over time, the code should become a single reference source for all regulatory rules of general application in telecommunications markets.⁶³ It should be made easily accessible on the CRTC website and updated regularly. The code should include only current rules, and the CRTC should clearly state when any prior document has been amended or replaced by a subsequent document.⁶⁴

Compiling a consolidated regulatory code is a significant task. The Panel believes it can best be accomplished by dividing it into prospective and retrospective elements.

⁶¹ The search was conducted January 4, 2006.

⁶² In this discussion, the Panel uses the term “rules” in the widest possible sense. It is intended to cover all regulatory requirements, regardless of their formal title and regardless of where they may be located (policies, decisions, orders, letters, circulars, regulations, rules of procedure, etc.) that must be adhered to by any telecommunications service provider.

⁶³ The Panel notes that the *Canadian Broadcasting Regulatory Handbook*, which is published privately in Canada, attempts to provide this type of compilation, on an unofficial basis, for the broadcasting sector.

⁶⁴ The Panel notes that the CRTC routinely does this on the broadcasting side, when it publishes its *Revised lists of eligible satellite services from time to time*.

On a prospective basis, whenever the CRTC issues a decision or document that establishes or amends a telecommunications rule or otherwise changes the regulatory framework applicable to the industry, it could ensure that the document contains a separate rule or “order” that sets out the actual rules flowing from the decision. This separate order should also include clear references to other applicable rules or decisions. This separate order would be added to the consolidated code of rules. This is similar to the process adopted by the FCC in the U.S., and the Panel believes it will contribute considerably to the openness and transparency of the regulatory framework in Canada. The Panel believes the CRTC could begin to implement this approach immediately on a prospective basis, without undue difficulty or delay.

On a retrospective basis, the difficulty of the task depends in large measure upon the government’s response to the Panel’s recommendations. If the overall response is positive, the Panel expects a substantial reduction in the number of existing CRTC rules that will continue to be relevant going forward. For example, if the government implements the principle of negative disallowance in place of *ex ante* positive tariff approvals, much of the current regime of tariff-filing rules and decisions governing supporting documentation will no longer be applicable and will not need to be included in the code.

It is clear, however, that a number of existing rules will continue to be relevant. The Panel recommends, with respect to those rules, directing the CRTC to establish a team to extract and consolidate them over time into the code. To provide a reasonable time frame to accomplish this important task without drawing too heavily on existing CRTC resources, the Panel recommends accomplishing this task over a three-year period, so it will be completed before the first review of the telecommunications regulatory framework, as the Panel recommends earlier in the report.

The task of undertaking a retrospective review of the CRTC’s regulatory framework along with updating and consolidating it is an important one that the Panel believes should attract a high priority from the CRTC. The exercise will improve openness and transparency of telecommunications regulation in Canada. It will also benefit the CRTC’s process by obliging it to reassess the ongoing validity of many of the existing rules that have been imposed on regulated entities over the years and that may no longer be appropriate in the new regulatory environment envisaged in this report.

Creating and maintaining a consolidated code of rules will produce several benefits:

- As noted, the act of consolidating its regulatory rules will require the CRTC to review all existing decisions, orders, tariffs, etc., that impose the rules to determine which are still appropriate. This process will result in the repeal or streamlining of some existing rules.
- Over time, the consolidated rules will serve as a one-stop source for anyone attempting to understand or comply with the regulatory framework governing particular types of regulated conduct.
- Consolidation of the rules will make regulatory compliance less time consuming and less costly.
- The consolidation will improve the transparency of the regulatory framework.

Recommendation 9-23

The CRTC should establish a single code of the regulatory rules that apply to telecommunications markets by consolidating and updating rules now contained in various decisions, orders, rules, regulations, public notices, circulars and other documents. This consolidated approach to rule making should be applied prospectively in the case of new CRTC rules. In the case of the CRTC's existing rules, the consolidation should be completed within three years.

Reducing Authorization Requirements

The Panel believes it is important to remove or reduce barriers to competitive entry into telecommunications markets. Consequently, the Panel believes the licence or authorization requirements for entry into the telecommunications business should be simplified and reduced, and all such authorization requirements should be consolidated under a single regulatory institution, the CRTC. As discussed in Chapter 5, this approach necessitates the transfer of licensing and other responsibilities currently exercised by Industry Canada in telecommunications matters to the CRTC.

This transfer of responsibilities is consistent with international best practices in telecommunications regulation. The OECD has reported that, of its 30 member countries, only Canada, Finland and Spain divide responsibility for fixed and mobile market entry between the independent regulator and the ministry.⁶⁵ The report notes that an independent regulator is often free of short-term political pressure and it can avoid the potential conflict of interest that may occur if the regulator is also responsible for industry promotion.

The OECD report further notes that a majority of countries reviewed have designated the regulator as the entity responsible both for spectrum planning and spectrum allocation.⁶⁶ The shift with respect to spectrum planning and allocation has been a relatively recent phenomenon, occurring principally within the past five years.

The recommended realignment of responsibilities under the CRTC is a more efficient method of providing regulatory services to the sector. The authors of the Smart Regulation report stressed the need for “single windows” as one of the five principles in their report. They defined “single window” as a single point of contact for the entire federal government to liaise with a specific industry sector.⁶⁷ The Panel agrees that the “single window” concept should apply to the telecommunications sector.

⁶⁵ See OECD, *Telecommunication Regulatory Institutional Structures and Responsibilities*, p. 18, Table 6. Italy, Japan, South Korea, Luxembourg and Mexico still leave responsibility for all fixed and mobile market entry to the ministry.

⁶⁶ *Ibid.*, p. 22, Table 8.

⁶⁷ EACSR, *Smart Regulation*, p. 33.

Authorizations and Licensing

The Panel recommends in Chapter 3 that economic regulation should apply only where telecommunications service providers offer services in respect of which they possess significant market power. With respect to all other telecommunications services, the Panel recommends that the overall regulatory approach should shift significantly to general authorizations and rules applicable to all service providers of the same class.

Canada does not have a tradition of licensing telecommunications service providers in the same way as most other countries. The Panel does not recommend that it adopt such a licensing approach for a number of reasons:

- Licensing of entities not possessing significant market power unnecessarily increases barriers to competitive entry and introduces an element of regulatory or political discretion.
- Licensing requires additional attention to specific conditions of licence.
- Licensing may appear to confer some form of legitimacy on the holder of such a document.

Accordingly, unless there is a compelling reason to the contrary, the Panel believes mandatory licensing of service providers should be replaced with a simple registration requirement wherever possible. Licensing requirements should normally be restricted to those related to the assignment of scarce resources, such as radio spectrum — but should not apply to the simple right to enter telecommunications markets. This approach away from licensing requirements is consistent with better regulatory practices being adopted in the European Union and elsewhere.

Certificates of Registration

The Panel believes there is merit in permitting anyone operating telecommunications facilities to be entitled to obtain a certificate of registration as a telecommunications service provider from the CRTC for a nominal fee. Such a certificate would be evidence of authority to construct and operate a telecommunications undertaking in Canada under federal telecommunications legislation. This document would not exempt the holder from any other laws of general application. However, it has the potential to be useful in disputes with other entities that typically arise in the context of access to rights-of-way, support structures, etc. As discussed in Chapter 5, the Panel believes the federal telecommunications regulatory framework should provide means to avoid and resolve such disputes in an effective manner.

Recommendation 9-24

The *Telecommunications Act* should be amended to provide that anyone operating telecommunications facilities is entitled to obtain a certificate of registration as evidence of its authority to operate as a telecommunications service provider in Canada.

Licensing: Basic International Telecommunications Services

The basic international telecommunications services (BITS) licence regime was instituted as a result of amendments to the *Telecommunications Act* in 1998.⁶⁸ It came about as part of Canada's commitments to the World Trade Organization (WTO) to terminate the monopoly previously held by Teleglobe Canada with respect to Canada–overseas telecommunications traffic.

When it was first established, the CRTC stated that a licensing regime was useful to deal with instances of anti-competitive conduct. However, in June 2005, the CRTC streamlined the filing requirements that it had initially imposed, based on the fact that it had not received any complaints about anti-competitive behaviour since the regime had been instituted.⁶⁹ The Commission also extended the length of new licence terms from five to ten years, the maximum allowable under the *Telecommunications Act* and, effective immediately, extended all existing licences by a four-year period.

The BITS licence regime serves very little purpose that could not be accomplished by a registration regime and other regulatory approaches. Therefore, the Panel recommends abolishing the BITS licensing requirements and repealing s. 16.1 to 16.4 of the *Telecommunications Act* and related sections.⁷⁰ The Panel is of the view that the regime serves no useful purpose, unnecessarily gives the appearance of limiting open entry and consumes unnecessary resources on the part of both the CRTC and licensees. The Panel recommends replacing the current system with the general registration requirement applicable to non-dominant telecommunications service providers and subject to generally applicable information provision requirements.

Recommendation 9-25

The requirement to obtain a licence under the *Telecommunications Act* to provide basic international telecommunications services should be repealed and replaced with a simple registration regime.

⁶⁸ *Regulatory Regime for the Provision of International Telecommunications Services*, Telecom Decision CRTC 98-17, October 1, 1998. The relevant provisions of the *Telecommunications Act* are set out in sections 16.1–16.4.

⁶⁹ *Basic international telecommunications services (BITS) licensing regime — Amendments*, Telecom Circular CRTC 2005-8, June 23, 2005.

⁷⁰ These would include para. 67.(1)(b.1) and (b.2). Subsection 73.(1) would have to be reworded to remove the reference to ss. 16.1(1) and (2).

Licensing: International Submarine Cable

The international submarine cable licences regime was updated in 1998 as part of Canada's commitments under the General Agreement on Trade in Services, whereby Canada agreed to permit, as of October 1, 1998, foreign investment of up to 100 percent for operations conducted under an international submarine cable licence.⁷¹ This too was part of the termination of the monopoly previously held by Teleglobe Canada. The effect of this termination is that there now are no significant restrictions on entry into the international submarine cable market. In addition, the Canadian ownership and control restrictions are not relevant with respect to the ownership or operation of international submarine cables.⁷²

Although ss. 19.(1) of the Act states that a licence “may” be granted by the Minister, there appears to be no reason for this discretion based on telecommunications policy, since the original intent of limiting entry into this market no longer exists. Moreover, although ss. 19.(2) provides that “An international submarine cable licence may contain such conditions as the Minister considers are consistent with the Canadian telecommunications policy objectives,” the terms that have been prescribed do not impose any substantive obligations on the operators of cables.⁷³ The requirement in the conditions to provide information can be addressed in the recommended registration regime for the CRTC. The requirement in the conditions to demonstrate compliance with the environmental laws is duplicative in the sense that the relevant environmental legislation binds submarine cable operators in any event.

The provisions in the *Telecommunications Act* relating to submarine cables do not apply to cables situated entirely under fresh water.⁷⁴ This means that they have no application to cables running between Canada and the U.S. via the Great Lakes. With the termination of Teleglobe Canada's monopoly for Canada–overseas telecommunications traffic in 1998, there no longer appears to be a policy or regulatory basis upon which to make this distinction.

The Panel sees no justification for the continuance of these statutory provisions and recommends repealing s. 17 to 20 and ss. 22.(2) of the *Telecommunications Act* and related sections⁷⁵ and the *International Submarine Cable Regulations* and replacing them with the CRTC registration regime recommended above.

Recommendation 9-26

The requirement to obtain a licence under the *Telecommunications Act* to construct or operate an international submarine cable should be repealed and replaced with a simple registration regime.

⁷¹ The relevant provisions of the *Telecommunications Act* are set out in s. 17 to 20 and ss. 22.(2).

⁷² *Telecommunications Act*, para. 16.(5)(a).

⁷³ *International Submarine Cable Licences Regulations*, SOR/98-488.

⁷⁴ See the definition “international submarine cable” in s. 2 of the *Telecommunications Act*.

⁷⁵ These would include the definition of “international submarine cable” in s. 2 and para. 16.(5)(a). Subsection 73.(1) would have to be reworded to remove the reference to s. 17.

The CRTC Telecommunications Rules of Procedure and Costs Awards

The CRTC enacted its *CRTC Telecommunications Rules of Procedure* (SOR/79-554) with a view to setting out the processes that would apply in the various proceedings before it. However, there have been few amendments to the Rules since they were enacted more than 25 years ago. Today they no longer accurately reflect the nature of proceedings before the CRTC nor technological developments such as the widespread use of the Internet for filings related to regulatory proceedings.

If the Panel's recommendations are adopted by the government, the timely resolution of competitive disputes becomes increasingly critical. The Rules give a misleading impression of the time required by the CRTC to dispose of a competitive dispute and there is no reference in the Rules to the *CRTC's expedited dispute resolution process*⁷⁶ or to a number of other procedural matters that have instead been addressed in CRTC circulars.⁷⁷ In addition, although the CRTC has virtually complete discretion with respect to the awarding of costs in any proceedings before it, there is no reference in the Rules that accurately reflects its approach to this issue.⁷⁸

One of the adverse consequences of the disparity between the Rules and actual practice before the CRTC is that it must routinely issue directions on procedure to govern the conduct of nearly every proceeding that comes before it. Those directions prevail over the Rules in the event of any inconsistency.⁷⁹

Updating the Rules of Procedure

The *ad hoc* approach to procedure in telecommunications matters is detrimental to the openness and transparency that should be characteristic of an independent regulatory tribunal such as the CRTC. It leaves affected participants with no prior knowledge of the process that is to be adopted in any given proceeding. It also requires additional CRTC resources and delays to design rules applicable to each matter. In the Panel's view, the use of *ad hoc* procedures should be the exception, not the rule.

Parties appearing before the CRTC are entitled to expect all relevant rules to be contained within one document and, further, consistent application of those rules on an ongoing basis. The expedited processes and other procedural matters that are addressed in circulars or elsewhere should be incorporated into the Rules, unless there is a compelling reason to exclude them.

⁷⁶ *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, February 10, 2004.

⁷⁷ See, for example: *Introduction of a streamlined process for retail tariff filings*, Telecom Circular CRTC 2005-6, April 25, 2005 (as finalized in *Finalization of the streamlined process for retail tariff filings*, Telecom Circular CRTC 2005-9, November 1, 2005) and *New procedures for disposition of applications dealing with the destandardization and/or withdrawal of tariffed services*, Telecom Circular CRTC 2005-7, May 30, 2005.

⁷⁸ Sections 44 and 45 of the Rules deal with the award of costs, but they are contained in Part III Applications for General Rate Increases. This leaves the impression that this is the only opportunity for costs awards, which is not the case.

⁷⁹ *CRTC Telecommunications Rules of Procedure*, s. 8.

The need for the consistent application of well-defined rules is a matter that will take on increased importance if the Panel's recommendations are adopted by the government. For example, the Rules will need to be amended to reflect the following changes:

- Negative disallowance will replace prior tariff approval requirements.
- General rate case proceedings will virtually disappear.
- There will be specialized panels, such as the proposed TCT.
- The new TCA will address most customer complaints.
- The CRTC will have new jurisdiction over spectrum-related matters and telecommunications apparatus.
- Competitive disputes may increasingly be settled by way of outsourced alternative dispute resolution methods.
- Filing of documents will be streamlined, as the CRTC and parties move increasingly to online publication and exchange of documents.

In addition to procedural changes that should be made to the Rules, the Panel also recommends directing the CRTC to change its substantive approach to the quality of evidence that it accepts in its proceedings. With some exceptions, the CRTC's general approach has been to accept almost all evidence offered to it and to make an assessment of the weight that it deserves in any particular case.

The Panel believes this approach is detrimental to the integrity of the regulatory process generally, because it lowers the overall quality of evidence upon which the CRTC ultimately bases its decision. The CRTC could take several steps to improve this situation:

- Require each side to a competitive dispute to disclose all information upon which it intends to rely at the outset, together with a certificate signed by an officer of each party certifying that all facts contained in the statement are accurate. Any new evidence could be submitted only with leave of the CRTC.
- Allow parties to apply for the right to cross examine an adverse party on any material filed with the CRTC. This process could be conducted separately, and a transcript could be made available to the CRTC upon completion.
- Require better evidence from any party seeking the stay of the implementation of any CRTC decision.
- Significantly reduce the reliance on interrogatories, as an aid to making a party's case.
- Generally apply the traditional rules of evidence on a more consistent basis.

With these considerations in mind, the Panel recommends directing the CRTC to conduct a thorough review of its Rules as part of the implementation of recommendations accepted by the government that do not require legislative changes. The goals of the review should be to:

- update the Rules to reflect current and future practices and procedures
- eliminate those rules that are outdated
- incorporate technological advances (through greater reliance on more transparent and efficient electronic filings for example)
- streamline and simplify the Rules wherever possible
- reduce delays
- limit the use of a “directions on procedure” provision to exceptional circumstances and require the CRTC to explain those circumstances when such an approach is used
- incorporate the above suggested improvements for the quality of evidence admissible in proceedings before it
- incorporate into one document all existing practices and procedures that are set out in other documents, to the greatest extent practicable.

The Panel anticipates that a second review may be required as part of the implementation of recommendations accepted by the government that do involve legislative changes. An example of such a change is the process adopted by the CRTC in determining whether to assess AMPs and the factors to be taken into account in assessing the quantum. However, since the implementation of this latter phase may take one or more years to complete, the CRTC should begin its review as part of the first phase. Recommendation 9-12, regarding the publication of specific proposals, should also apply to the process of reviewing the Rules.

Consistent with the overall approach of this report, the Rules should include a mandatory review requirement every five years.

Recommendation 9-27

The CRTC should review, update and consolidate its *Telecommunications Rules of Procedure*. The updated Rules should include changes required as a result of implementing the recommendations of this report.

Recommendation 9-28

The CRTC should review its *Rules of Procedure* at least every five years, and update them continuously.

Costs Awards — Introduction

The CRTC's authority to award costs is set out in s. 56 of the *Telecommunications Act*. For several years, the CRTC has adopted a limited approach to the award of costs, which in practice has meant that only consumer and other public interest groups are eligible for costs awards on an ongoing basis.⁸⁰ Costs awards have become sources of ongoing funding for these groups. The justification given by the CRTC for its approach has been that other parties (normally telecommunications service provider competitors or large telecommunications service users) have a business incentive to appear before the CRTC and that the regulatory process is a cost of doing business.

Reforming the Approach to Costs Awards

The Panel considers it appropriate to recommend a change in the CRTC's restrictive approach to the awarding of costs in proceedings before it. Courts routinely award costs in litigious matters and the interest that a litigant has in the matter is generally not a relevant consideration. Costs are awarded to reward success and/or to encourage settlement.

In many cases, seeking redress from the courts is an option not open to aggrieved parties in telecommunications matters, because of the regulated nature of the sector. However, there are occasions when parties appear before the CRTC in competitive dispute situations that are very analogous to breach of contract and/or civil wrongdoing cases that are taken to the courts.⁸¹ There are also situations in which a competitor brings to the attention of the CRTC the fact that another party is breaching a tariff requirement, CRTC decision or other regulatory requirement. Correcting such behaviour is in the public interest.

Normally, contentious proceedings before the CRTC are relatively complex, detailed and lengthy. The Panel believes, regardless of the motivation behind a complaint, the complainant should not automatically be deprived of some compensation from the other party by way of costs awards, in the following limited circumstances:

- The case is proved to the CRTC's satisfaction on the balance of probabilities.
- The CRTC is satisfied that the behaviour of the responding party was clearly unreasonable or unjustifiable in the circumstances.
- The behaviour of the complainant has not disentitled it to costs.

⁸⁰ There are exceptions, but these have been very limited and the CRTC has in each case noted the exceptional circumstance that led it to deviate from its normal approach.

⁸¹ For example, an allegation by a competitor that a tariff-regulated Canadian carrier had breached a provision of a tariff under which the former obtained services, could not be litigated in the civil courts. It would have to be decided by the CRTC, even though the practical effect on the competitor might be essentially the same as if it was a plaintiff in a lawsuit involving an alleged breach of contract to provide services.

The Panel does not want to encourage unnecessary CRTC litigation. Nor is it convinced that the CRTC should move to a complete adoption of the general approach taken by the courts. As a rule, courts will normally award costs to a successful plaintiff and also to a successful defendant. This approach could mean that if the CRTC ultimately dismisses a complaint, for example, brought against a large incumbent carrier, the complainant may be obliged to pay for the costs incurred by the carrier in defending its actions. Payment of those costs would likely constitute a significant burden to a complainant. That possibility may deter potential complainants from bringing issues of apparently inappropriate behaviour to the CRTC.

Accordingly, the Panel recommends striking a balance by awarding costs to successful complainants only in clear cases of inappropriate behaviour and awarding costs against them only in clear cases of frivolous complaints.

The Panel notes that the CRTC could make a rule or regulation under para. 67.(1)(c) of the *Telecommunications Act* establishing the criteria for the awarding of costs that reflect these considerations.

The Panel believes the government should review its approach to the funding of public interest group participation in telecommunications proceedings. The market-driven framework recommended by the Panel raises questions about the appropriateness of the current practice of awarding costs to such groups.⁸² The Panel believes, if the government places importance on such funding, it should be made available as a subsidy directly from government, for example, from the Office of Consumer Affairs in Industry Canada, rather than as a charge against telecommunications service providers. However, as with the above recommendation regarding the funding of improved research capabilities in the sector, the Panel recommends that any government commitment should adopt a multi-year approach.

Recommendation 9-29

The CRTC should enact a rule or regulation establishing the criteria for the awarding of costs in proceedings before it. The criteria should be based on the principles that costs shall be awarded to successful complainants in clear cases of inappropriate behaviour and against them in clear cases of frivolous complaints.

Recommendation 9-30

The government should review the issue of public interest group participation in telecommunications regulatory proceedings. Funding for such participation should come from a multi-year commitment by government to subsidize such participation, rather than costs awards imposed by the CRTC on individual telecommunications service providers.

⁸² Public interest groups would remain eligible for costs awards under the Panel's recommended new criteria.

Recovering the Costs of Regulation

The *Telecommunications Act*, s. 68, gives the CRTC authority, with the approval of the Treasury Board, to make regulations prescribing fees payable for the recovery of all or a portion of the costs that it determines are attributable to its telecommunications responsibilities. The CRTC has enacted the *Telecommunications Fees Regulations*, 1995, under which it recovers these costs through fees that it levies on an annual basis. These fees are payable by Canadian carriers who are required to file tariffs with the CRTC during that year. The payment is based on the Canadian carrier's telecommunications operating revenues as a percentage of the telecommunications operating revenues of all Canadian carriers that are required to make such payments.

The Panel supports the concept of recovery of costs of regulation from industry participants. Although these costs in turn may be passed on to the users of telecommunications services, it is appropriate that they, rather than the general body of taxpayers, should ultimately bear this financial burden, since it is those users who benefit from the variety of protections offered to them by the regulatory regime.⁸³

The structure of the regulations may have been appropriate at the time they were enacted, since most services were provided on a monopoly basis by tariff-regulated Canadian carriers, and the CRTC exercised jurisdiction over Canadian carriers only. However, since that time, a number of developments have called into question the appropriateness of continuing the current approach:

- Numerous non-facilities-based telecommunications service providers — some of which are quite large — have emerged that are not subject to direct jurisdiction of the CRTC, but whose activities necessitate the involvement of the regulator⁸⁴ and will come under direct jurisdiction of the CRTC if the Panel's recommendations in this regard are accepted by the government.
- A variety of facilities-based Canadian carriers are competitors to the tariff-regulated incumbents, but are not required to file tariffs because of their non-dominant competitive position. However, their activities can generate CRTC involvement, based on complaints from incumbents, complaints filed about the activities of incumbents, and complaints regarding various intercarrier matters.
- A Canadian carrier is liable to pay fees based on all of its telecommunications activities if even one of its services becomes subject to tariff regulation.

⁸³ These include protection against abuse of significant market power through inappropriately high prices, unsatisfactory quality of service, as well as a variety of privacy safeguards.

⁸⁴ The CRTC extends its consumer safeguards to telecommunications service providers through ILEC (incumbent local exchange carrier) tariffs and as a condition of CLEC (competitive local exchange carrier) forbearance.

Increasing Competitive Neutrality

It is evident to the Panel that it is not simply tariff filings that generate the need for — or the costs associated with — regulation. In the regime contemplated by the recommendations in this report, the tariff-filing process will require reduced regulatory resources of the CRTC, as greater resources are dedicated to issues regarding settlement of competitive disputes and detariffing of related matters. Similarly, the activities of the newly created TCT will focus on issues regarding the existence or absence of significant market power, alleged anti-competitive conduct and the identification of essential facilities, rather than tariff-filing matters.

With increasing competition in telecommunications markets, the Panel believes it is no longer good regulatory policy for only one group of market participants to be required to pay for the costs associated with regulation. The Panel notes that the CRTC itself reached a similar type of conclusion in 2000, when it broadened the base for payment of contribution subsidies to local residential service in high-cost areas to require a *pro rata* payment from all telecommunications service providers, based on all Canadian telecommunications services revenues, rather than limiting it to a contribution based solely on long distance revenues.⁸⁵

The Panel recommends amending the *Telecommunications Fees Regulations, 1995* to make all telecommunications service providers liable for a share of the cost of the CRTC's telecommunications activity. To minimize any additional regulatory workload, the Panel recommends that the share of each telecommunications service provider should be calculated in the same manner as is used for the determination of liability-to-pay contribution. This approach would exempt all telecommunications service providers with Canadian telecommunications service revenues below \$10 million from the obligation to pay toward this cost recovery.

For all of the reasons noted above, the Panel also believes the costs of the TCT should be paid for by the telecommunications industry in the same *pro rata* manner. Given the transitional status of the TCT mechanism, the TCT's costs could be assessed based on an estimate of annual expenses presented to Parliament on behalf of the TCT by the CRTC. The TCT should make recommendations regarding the amounts required to perform its functions and obligations. Payments of a TCT levy could be made simultaneously with payments made in respect of the CRTC's telecommunications activity.

Recommendation 9-31

The *Telecommunications Fees Regulations, 1995* should be amended so all telecommunications service providers are required to pay a *pro rata* share of the annual costs of CRTC and TCT telecommunications activities. Shares should be calculated using the same approach and exemptions as are used under the existing subsidy regime for local residential service in high-cost areas.

⁸⁵ *Changes to Contribution Regime*, Decision CRTC 2000-745, November 30, 2000.