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Chapter 10
Implementation



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An Agenda for Change

The Telecommunications Policy Review Panel has undertaken the first comprehensive review of Canadian telecommunications policy and regulation in over 30 years. In this report, the Panel calls for extensive reform of national telecommunications policy and the regulatory approaches used to implement it. The Panel's recommendations aim to transform regulation of Canada's key telecommunications industry and infrastructure by:

- revitalizing the role of policy making in the telecommunications sector (see particularly Chapters 2 and 9)
- reforming the regulatory framework by replacing the traditional legal framework inherited from railway and public utility regulation with one that relies on market forces to the extent feasible to achieve telecommunications policy objectives, and that also incorporates new safeguards against anti-competitive behaviour closely related to the approaches used in general competition law and policy (Chapters 3 and 4)
- sharpening the focus of technical regulation to improve its effectiveness as well as of social regulation to promote the interests of consumers in today's competitive and increasingly dynamic telecommunications markets (Chapters 5 and 6)
- promoting the use of networked information and communications technologies (ICTs) to increase productivity throughout the economy, improve public services, and ensure that Canadians remain among the most "connected" citizens of the world (Chapters 7 and 8)
- harmonizing, streamlining and modernizing regulatory institutions and their functions in the telecommunications sector (Chapter 9).

The Panel's recommendations are intended to accomplish these reforms. The recommendations are the result of extensive consultations with individual Canadians, telecom sector stakeholders as well as Canadian and international experts, policy makers and regulators. The Panel is impressed with the thoughtfulness and depth of the submissions it has received and the goodwill that lies behind them. It offers its recommendations to the government in the hopes that it will initiate a process to improve Canadian telecommunications policies, and ultimately to enhance the performance of the telecommunications sector and the benefits that the sector brings all Canadians.

In the Panel's view, there is some urgency to implementing a telecommunications reform agenda. Although Canada's regulatory policies and legislative framework generally have served us well in the past, times have clearly changed. As discussed in the report, the telecommunications industry has been transformed from being characterized by a series of monopoly providers of basic telephone and cable TV services to a highly competitive industry building Internet Protocol (IP) platforms to roll out a constantly evolving mix of advanced wireline and wireless services.

Other countries have established new legal and regulatory frameworks that are more attuned to the competitive realities of the global telecommunications market and to the very rapid development and deployment of new technology. Canada's current regime is becoming the exception to the rule, relative to its major trading partners. With telecommunications assuming ever-increasing importance as an enabler of social and economic well-being, Canada must ensure that its policy and regulatory frameworks are conducive to the attainment of our social and economic goals and are not an impediment to them.

Full implementation of the Panel's recommendations will require amendments to Canada's telecommunications laws. The Panel recognizes that the legislative process is not a fast one and that considerable care must be taken in drafting amendments to the existing statutory framework and then debating them in Parliament.

The urgency for reform, on the one hand, and the time constraints of the legislative process, on the other, have led the Panel to consider steps that could be taken under the existing statutory framework, in advance of legislative amendments, in order to begin the reform process at an earlier stage.

The government has a number of tools at its disposal to begin the reform process. While the enactment of new legislation is critical to the institutional reforms recommended by the Panel, as well as to amendment of certain key provisions of the *Telecommunications Act*, other recommendations can be implemented without legislation. Some reforms can be implemented by Order in Council or ministerial decisions, such as changes to government programs and human resources procurement practices, coordination of the work of different government institutions, and the establishment of working groups to advance work on issues that the Panel recommends for further analysis; by requiring the Canadian Radio-television and Telecommunications Commission (CRTC) to report on certain matters pursuant to s. 14 of the *Telecommunications Act*; or by issuing policy directives pursuant to s. 8 of the Act.

To provide the telecommunications industry, regulatory institutions and other stakeholders in the telecommunications sector with a clear understanding of the direction that the government intends to take, the Panel recommends that the government publish a response to the Panel's report, announce the general policy approach it intends to pursue in the telecommunications sector, and map out its intended course of action regarding the Panel's recommendations.

The Panel believes the government's response and related policy announcements will have a significant impact in starting the process of reform, both within the CRTC and the industry. They can also provide the industry and investors with notice of changes in the regulatory regime that are intended to encourage investment in new technologies and facilities.

Use of the government's policy-making process in this manner is wholly consistent with the recommendations in Chapter 9 of this report, which are designed to establish the primacy of government policy to guide the development of the regulatory framework and of regulation in

the telecommunications sector. As discussed in Chapter 9, the absence of government policy initiatives over past decades has required the CRTC to step into the vacuum and become the *de facto* policy maker in the telecommunications sector. By making a clear policy announcement in response to the Panel's report, the government can signal its intention to re-establish the primacy of government in telecommunications policy making. This will pave the way for the institutional and legislative changes and, just as important, subsequent changes in the regulatory approaches and the "culture" of regulation. A clear government policy announcement can also significantly reduce the timelines between the issuance of this report and the implementation of any reforms based on it.

With this in mind, the Panel proposes that the government should implement its recommendations in two phases. In the first phase of reform, it should act immediately on recommendations that can be implemented under existing legislation.

Phase 1 would include a number of separate but related initiatives:

- one or more **policy statements** responding to and addressing the recommendations of the report that do not require legislative change to implement, and setting out the government's commitments in the ICT sector
- a **policy direction** to the CRTC under s. 8 of the *Telecommunications Act* addressing broad policy matters that the government wishes the CRTC to begin taking into account immediately
- **government measures** to implement recommended reforms within the government itself, designed to ensure consistency in "smart regulation" within the telecommunications sector and to implement new programs in the ICT and broadband segments
- the establishment of **implementation working groups** to begin the detailed groundwork that will assist in drafting new legislation and other reforms recommended in the report
- an order under s. 14 of the *Telecommunications Act* requiring the **CRTC to issue reports** on issues identified by the Panel in its recommendations.

Concurrently with the initiation of the Phase 1 initiatives, the Panel recommends that the government should begin the process of developing the legislative changes required to implement the remaining recommendations in the second phase of the reform process.

Phase 2 would involve legislative amendments to the statutes that govern the telecommunications sector, in particular the *Telecommunications Act*, the *Radiocommunication Act*, the *Canadian Radio-television and Telecommunications Commission Act*, the *Emergency Preparedness Act* and the *Competition Act*.

Each of the two phases is discussed in greater detail below.

Phase 1

Policy Statements

A critical first step in the reform process is for the government to signal to the industry and the regulatory institutions what is its intended course of action on the reforms recommended in the report. The Panel believes such a statement of government policy should include the government's general response to the report and an indication of the broad policy directions that the government intends to pursue in relation to the telecommunications sector. If the Panel's recommended approach to reforming telecommunications policy and regulation is adopted, the government could issue one or more statements addressing the policy-oriented recommendations of the report. These statements would set the overall approach to be followed in the implementation of those recommendations and would serve to put the industry, regulators and investors on notice as to that approach.

Direction to the CRTC

Section 8 of the *Telecommunications Act* empowers the government to issue to the CRTC "directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives" that are set out in s. 7 of the Act. Pursuant to para. 47.(b) of the Act, the CRTC is required to exercise its powers and perform its duties under the *Telecommunications Act* in accordance with any such directions.

The s. 8 power of policy direction is not unfettered. Policy directions must be limited in their subject matter and their specificity. They must be confined to "broad policy matters with respect to the Canadian telecommunications policy objectives" and must be "of general application." The Governor-in-Council cannot use the power of direction to alter the Canadian telecommunications policy objectives or other legislated provisions. However, by empowering the Governor-in-Council to issue policy directions to the CRTC, within these parameters, Parliament clearly envisaged a role for the government in directing the regulator on how to interpret the policy objectives in s. 7. This view is buttressed by the wording of s. 47 of the Act.

In considering the extent to which the power of direction can be used to implement the recommendations made in this report, the Panel has focused in particular on para. 7.(f), which states that an objective of Canadian telecommunications policy is "to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective"; and para. 7.(c), which sets out as an objective "to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications."

The manner in which these two objectives are interpreted is key to implementation of many of the regulatory reforms recommended in this report. The fact that these objectives require clarification is demonstrated by the amount of attention they received in the Panel's public consultations and by the wide disparity of interpretations given to them by parties advocating diametrically opposing views on their interpretation. Similarly conflicting interpretations are frequently presented in submissions made as part of regulatory proceedings of the CRTC.

The two objectives have been used to justify both a *laissez-faire* approach to economic regulation and an interventionist approach, to support the increased regulation of essential facilities and the deregulation of them, as well as to require proactive measures to increase competition and to allow market forces to work unimpeded by regulation. These two objectives also provide the basis for ongoing debate over whether competition is a policy objective in its own right or a means to achieving policy objectives.

As discussed in Chapters 2 and 3, the Panel is recommending a separation of policy objectives from the consideration of the means that can be used to achieve them, a greater reliance on market forces as the means of achieving those policy objectives, and reliance on regulation only when market forces are unlikely to achieve a telecommunications policy objective within a reasonable time frame. The Panel is also recommending a decreased reliance on mandated wholesale rates for essential facilities and a decreased use of *ex ante* regulation of retail telecommunications market prices and service conditions.

The government can begin to implement these reforms through a policy direction.

The Panel sets out below the text of a draft policy direction that it considers would satisfy the requirements of s. 8 and advance implementation of a number of key recommendations in the report.

Proposed Text of Policy Direction

“In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission shall interpret and implement the Canadian telecommunications policy objectives set out in section 7, and particularly in paragraphs 7.(c) and (f), in accordance with the following principles:

- (a) Market forces shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives.
- (b) Regulatory measures shall be applied only where
 - (i) market forces are unlikely to achieve a telecommunications policy objective within a reasonable time frame, and
 - (ii) the costs of such measures do not outweigh the benefits.
- (c) Regulatory measures shall be efficient and proportionate to their purpose and shall interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.
- (d) When it is determined that regulatory measures are required, they shall specify the telecommunications policy objective that is advanced by the measure and demonstrate compliance with the foregoing principles.
- (e) Economic regulation shall apply only if there is a finding of significant market power in respect of a telecommunications service or class of services provided by a Canadian carrier. The Canadian Radio-television and Telecommunications Commission should continuously review telecommunications markets on a timely basis to ascertain the appropriate degree of regulation or forbearance under section 34 of the *Telecommunications Act*.

- (f) To provide increased incentives for innovation, investment in and construction of competing telecommunications network facilities, mandated access to wholesale services shall be limited to essential services provided by a carrier with significant market power, and shall be priced on a basis that encourages investment and innovation in network infrastructure.
- (g) Economic regulation, when required, shall neither deter efficient competitive entry nor promote inefficient entry.
- (h) Interconnection arrangements and access regimes, including access to buildings, in-building wiring and support structures, shall, to the greatest extent possible, be technologically and competitively neutral; to enable competition from new technologies and not to artificially favour either facilities-based or non-facilities-based carriers or resellers.
- (i) Regulatory measures designed to advance non-economic objectives of regulation shall, to the greatest extent possible, be implemented in a symmetrical and competitively neutral manner.
- (j) To ensure that regulation, when required, is efficient, the Canadian Radio-television and Telecommunications Commission shall maintain and publish service performance standards for the various forms of regulatory proceedings it undertakes.
- (k) To ensure greater efficiency in regulation, *ex ante* tariff regulation shall be used only when less intrusive and less onerous tariff approval mechanisms, such as price cap mechanisms, are determined to be ineffective means to satisfy the objectives of economic regulation.
- (l) The Canadian Radio-television and Telecommunications Commission shall continue to explore and implement new approaches for streamlining its regulatory process to enhance the efficiency and effectiveness of regulation.”

Consistent with its recommendation in Chapter 9, the Panel suggests that the proposed text of any policy direction to the CRTC should be set out in a government public notice, and the public should be provided with an opportunity to comment on it before it is implemented.

Government Policies and Programs

In addition to proposing reforms to the institutions responsible for regulating telecommunications in Canada and to the governing legislation, the Panel recommends a series of reforms designed to improve the way in which the government conducts itself in the telecommunications and ICT sectors. These measures include ensuring that government policies and programs are consistent with the principles of “smart regulation” being applied to other institutions and that all parts of the telecommunications policy and regulatory framework are coordinated to achieve the same objectives. It is within the government’s power to initiate reforms in these areas in advance of legislation that changes the institutional structure. The following recommendations could be initiated in advance of legislation:

- Recommendations 2-2 to 2-5 respecting guidelines for government measures affecting the telecommunications sector, and for coordinating the work of government departments, agencies and programs in a manner that achieves Canadian telecommunications policy objectives
- Recommendation 5-7 respecting the availability of spectrum for expansion of broadband services to unserved regions of Canada

- Recommendation 5-11 respecting a review of programs related to telecommunications equipment and devices by Industry Canada
- Recommendations 7-1 to 7-3 respecting a national ICT policy and adoption strategy
- Recommendation 8-4 respecting establishment of the U-CAN broadband access program
- Recommendation 9-1 respecting a review of the *Department of Industry Act*
- Recommendation 9-2 respecting the initiation of a new program to fund public policy research in the telecommunications and ICT sectors.

Establishment of Working Groups

The Panel recommends the establishment of a number of working groups to undertake some of the detailed work required to implement its recommendations. In the Panel's view, this work should start as soon as the government decides to pursue the relevant reforms and policy initiatives. The following recommendations refer to the need for such working groups:

- Recommendation 3-15 respecting guidelines to adapt competition law principles to the telecommunications sector (for use by the Telecommunications Competition Tribunal and, before its establishment, the CRTC)
- Recommendation 3-21 respecting the development of a definition of “essential services” in current Canadian telecommunications markets
- Recommendation 5-9 regarding the need for the CRTC and Industry Canada to plan for the transition of spectrum management and licensing to the CRTC
- Recommendation 5-9 respecting a review by Industry Canada of its terminal equipment certification program
- Recommendation 9-3(b) regarding cooperation between the CRTC, Statistics Canada and Industry Canada in developing a new set of data requirements that meets their respective needs.

Reports

The government could use its authority pursuant to s. 14 of the *Telecommunications Act* to require the CRTC to report on the following issues identified in the report:

- Recommendation 3-3 respecting an appropriate costing methodology for wholesale access services and essential facilities
- Recommendation 9-3(a) concerning continuing reports on the status of competition in Canadian telecommunications markets and on the deployment and accessibility of advanced telecommunications infrastructure
- Recommendation 9-3(c) respecting a review of what additional sector data are required to carry out the CRTC's regulatory mandate and how best to publish them in a timely manner.

Phase 2

As discussed earlier in this chapter, Phase 2 involves the development and implementation of legislative amendments required to implement the Panel's recommendations.

Maintaining a Unified Policy Vision

The Panel believes a two-phased approach to implementing its recommendations is the most practical way of moving forward. It also believes the three main issues that it was asked to address — regarding the Canadian regulatory framework, ICT adoption and broadband deployment — should be seen as integral parts of Canada's overall telecommunications policy.

Different kinds of measures are needed to achieve the objectives the Panel recommends in different areas of telecommunications policy. Reforming the regulatory framework requires significant legislative change, and this will take some time to implement. Work to improve connectivity and promote the use of ICTs, on the other hand, can begin immediately through the U-CAN program and under the leadership of the Minister of Industry and the proposed National ICT Advisory Council.

In developing a phased implementation strategy along the lines we propose, the Panel urges the government not to lose sight of the fact that it is dealing with different aspects of what the Panel believes should be a harmonized national ICT policy.

To connect Canadians and use networked ICTs to maximum advantage throughout our economy and society, Canada needs a modern regulatory framework that facilitates the growth of a healthy, competitive, telecommunications industry capable of deploying advanced networks and providing innovative products and services — equal to or better than those available in other countries. Demand for and “smart adoption” of these networks, products and services in turn can be increased by policies and strategies aimed at promoting access to ICTs and their effective use.

Going forward, the Panel believes the federal government should take a broad view of the scope of telecommunications and related ICT policies, and ensure that the fundamental objectives and principles recommended in this report are applied consistently in all policy domains. Thus, whether the issue is regulatory reform, broadband access or ICT adoption, Canada's telecommunications policy should aim to maximize reliance on competitive market forces, while protecting consumers and promoting social inclusion through well-targeted, competitively neutral government and regulatory measures.

Maintaining a unified vision of this kind will ensure an effective, coordinated approach to telecommunications policy that benefits consumers and industry, citizens and communities. It will help Canada regain and retain its position as a leader in the development and use of telecommunications to improve economic and social welfare.