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## C.D. Howe Institute Telecommunications Policy Working Group

### Communiqué #3: Will Mandated Access to Infrastructure Jeopardize CRTC's Ability to Balance Competition and New Investment?

- Telecommunications is a critical neural pathway for economic and social activity in Canada. To enhance its regulation, the federal government should improve the accountability, internal capabilities and timeliness of decision-making of the Canadian Radio-television and Telecommunications Commission (CRTC).
- The federal government also has pending decisions on mandated access to high-speed broadband and for “mobile virtual network operators” – so-called “MVNOs” that do not own the wireless network infrastructure over which they provide service.
- Important decisions on pricing lie ahead as well. Policy discussions around telecommunications pricing in Canada should rely on methodologically robust price comparisons and rigorous tracking of the actual costs facing consumers – for example, the reporting of consumer price index components for telecommunications services by Statistics Canada.
- Some context: cellular services have seen a 25 percent price drop from January 2016 to December 2020, according to data from Statistics Canada's consumer price index.

Canadian telecommunications policy is at a critical crossroads. Policy decisions about the structure and stance of regulation for telecommunications providers will in turn shape commercial decisions about investments in next generation facilities and capabilities. Government support for build-out of telecommunications infrastructure will impact the pace at which communities are digitally connected and their ability to participate in an increasingly digital economy.



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To this end, the C.D. Howe Institute has established the Telecommunications Policy Working Group to identify and distill policy directions on the strategic questions facing Canadian telecommunications – particularly concerning:

1. Vigorous competition for competitive pricing and high quality telecommunications services;
2. Investment in next generation infrastructure; and
3. Inclusive access to telecommunications services and participation in the digital economy.

This third communiqué will address questions such as how should the Canadian Radio-television and Telecommunications Commission (CRTC) be modernized and its processes streamlined for greater timeliness, transparency and predictability? How can regulators support a sustainable competitive market for telecommunications services? Should regulators defer to competitive market forces or impose regulated access rates/consumer prices for wireless and wireline facilities? What is the appropriate balance between a government emphasis on consumer prices and on telecommunications investment? How can regulations promote timely deployment of new technologies for connectivity (e.g., “Internet of Things” roll-out or satellite services for remote communities)?

Broadly, this Working Group believes that governments must resolve issues regarding the regulation of prices, the deference to market forces, fostering sustainable competition, and the terms for access to telecommunications facilities.

## **CRTC Modernization**

The questions around institutional design and regulatory approach were the subject of comments and recommendations by the report from the Broadcasting and Telecommunications Legislative Review Panel, chaired by Janet Yale (the “Yale Report”) in January 2020.<sup>1</sup> The Yale Report proposed a revamp of the CRTC and made specific recommendations on: pro-active monitoring of telecommunications markets and the regulator’s capability for strategic foresight; the streamlined process for issuance of Cabinet policy directions to the CRTC; accelerated timelines for appeals of CRTC decisions; clarification of the CRTC’s variance power; enhanced inter-department/agency institutional cooperation (particularly with the Competition Bureau); and promotion of public interest group participation in CRTC proceedings.

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1 Broadcasting and Telecommunications Legislative Review Panel. “Canada’s communications future: Time to act.” Final Report (January 2020). Available online: <http://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>

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Certain Working Group members stressed the importance of CRTC accountability. In particular, members noted the protracted nature of proceedings, the lack of timely decisions, and poorly specified appeal processes (e.g., ineffectiveness of the review and vary applications). The failure of the CRTC to meet service standards for many cases is a particular issue – for example, a three-year process for the CRTC rendering certain decisions results in significant regulatory uncertainty for market participants. Working Groups members suggested that regular reporting and benchmarking of CRTC timelines (e.g., relative to other tribunals and foreign counterparts) could promote greater timeliness of decision-making.

The Working Group made several suggestions in terms of improving the overall efficiency of the CRTC as it relates to its mandate to regulate the Canadian telecommunications industry. These suggestions stem from the belief that the CRTC's focus is too weighted towards cultural and broadcasting issues at the expense of the telecommunications industry. Specifically, members are concerned about the CRTC's lack of the required internal expertise to understand and analyze many aspects of the telecommunications infrastructure. In order to address this imbalance of focus and questions around competence, certain members of the Working Group suggested the following options for reform:

- Commissioners be appointed to the CRTC with specific experience in the telecommunications and technology-based Industries;
- The CRTC create – and appoint – a Chief Technology Officer position to assist the CRTC in being more in tune with developments in, and the evolution of, the telecommunications industry in Canada, and around the world; and
- Specific time limits be imposed for the CRTC to issue decisions, inspired from other regulatory models such as the United Kingdom.

Certain Working Group members also suggested the creation of advisory councils – similar to those in place with the U.S. Federal Communications Commission – to assist the CRTC staff and commissioners and provide opportunities for continual dialogue around developments and challenges facing telecommunications. The Working Group discussed other options for reform that will be considered at future meetings.

## **Competitive Pricing and Mandated Access**

With respect to its emphasis on “affordability” of telecommunications services, the current federal government has stressed its objective to reduce consumer prices and telegraphed its intention to impose structural measures if benchmarks are not met.

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Specifically, the Prime Minister's 2019 Mandate Letter to the Minister of Innovation, Science and Industry provided express political direction to reducing the average cost of cellphone services and expand mobile virtual network operators (MVNO) in the market.<sup>2</sup> The Mandate Letter directed the Minister to:

Use all available instruments, including the advancement of the 2019 Telecom Policy Directive, to reduce the average cost of cellular phone bills in Canada by 25 per cent. You will work with telecom companies and expand mobile virtual network operators (MVNO) in the market. If within two years this price target is not achieved, you can expand MVNO qualifying rules and the Canadian Radio-television and Telecommunications Commission mandate on affordable pricing.

In a backgrounder published on March 3, 2020, the federal government clarified that its 25 percent reduction target would be computed from a “benchmark price” “based on prices advertised on the websites of national operators in early 2020 for post-paid, bring your own device (BYOD), unlimited talk and text plans in the 2 to 6 GB range.”<sup>3</sup> The federal government subsequently established such benchmark prices for cellular data plans in each province based on a review of wireless prices advertised on company websites in early 2020 by Wall Communications and ISED.<sup>4</sup> These benchmarks were applied by ISED to determine the “25% reduction target” for each province across 2GB, 4GB and 6GB data plans.

In addition to the government's emphasis on artificial price setting, two sets of CRTC regulatory proceedings relate to the terms on which mandated access may be imposed on telecommunications facilities – specifically, high-speed broadband and wireless facilities.

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- 2 Office of the Prime Minister. *Minister of Innovation, Science and Industry Mandate Letter* (13 December 2019). Available online: <https://pm.gc.ca/en/mandate-letters/minister-innovation-science-and-industry-mandate-letter>
  - 3 Innovation, Science and Economic Development Canada, “Government of Canada takes action to offer more affordable options for wireless services” (5 March 2020). Available online: <https://www.canada.ca/en/innovation-science-economic-development/news/2020/03/government-of-canada-takes-action-to-offer-more-affordable-options-for-wireless-services.html>
  - 4 Innovation, Science and Economic Development Canada. 2020. *Telecom quarterly report: Price collection data*. Available online: [https://www.ic.gc.ca/eic/site/143.nsf/eng/h\\_00005.html](https://www.ic.gc.ca/eic/site/143.nsf/eng/h_00005.html)

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For broadband, the CRTC issued Order CRTC 2019-288 (the “Broadband Decision”) in August 2019.<sup>5</sup> This order established final rates for access to service providers’ high-speed access (HSA) broadband facilities (i.e., setting prices at which resellers may buy aggregated wholesale access for retailing services to ultimate customers) and applied those final rates retroactively. The rates were set to “facilitate greater competition and promote innovative broadband services and more affordable prices for consumers.”

Following the Broadband Decision, various facilities-based broadband providers petitioned Cabinet to vary the CRTC’s decision,<sup>6</sup> as well as initiating appeals to the Federal Court of Appeal.<sup>7</sup> The final appeal was rejected by the Supreme Court of Canada in February of 2021.<sup>8</sup> In its petition, Bell Canada argued that a reversal of the Broadband Decision is necessary to “preserve incentives for network investment at a critical juncture in the investment cycle as Canada transitions to higher speed fibre and 5G wireless networks”. Similarly, TELUS argued that the CRTC has set mandated rates “so low as to threaten future investment in the infrastructure necessary to deliver quality broadband Internet to Canadians across the country.”

For the CRTC’s proceedings prior to the Broadband Decision, the Competition Bureau contributed a study of the wholesale broadband market.<sup>9</sup> In this study, the Bureau both noted “the potential negative effects that a wholesale access regime can have on the incentive for facilities-based competitors to make the necessary investments to ensure that Canadians are served by world class networks” and stressed “the importance of setting wholesale access rates at the correct level to ensure that investment incentives are maintained, while at the same time ensuring sufficient scope for wholesale-based competitors to continue to offer competitive discipline in the marketplace.”

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5 Canadian Radio-television and Telecommunications Commission. Telecom Order CRTC 2019-288 (15 August 2019). Available online: <https://crtc.gc.ca/eng/archive/2019/2019-288.htm>

6 Petitions to the Governor in Council concerning Telecom Order CRTC 2019-288. Available online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11568.html>

7 In *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140, Justice Eleanor Dawson dismissed this appeal. <https://decisions.scc-csc.ca/scc-csc/news/en/item/7076/index.do>

9 Competition Bureau. *Delivering Choice: A Study of Competition in Canada’s Broadband Industry* (7 August 2019). Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04470.html#Sec00>

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In its Order in Council of August 13, 2020, the federal Cabinet declined to vary the CRTC's Broadband decision.<sup>10</sup> However, the Cabinet specifically highlighted the CRTC's ongoing public proceeding concerning the application to review and vary the earlier decision. Importantly, despite declining to vary the CRTC decision, Cabinet noted its opinion that "the final rates set by the decision do not, in all instances, appropriately balance the objectives of the wholesale services framework" and "will, in some instances, undermine investment in high-quality networks." The Order in Council also reiterated Cabinet's objectives for a wholesale services framework that achieves improved consumer choice and competition, further investment in high-quality networks, innovative service offerings and reasonable prices.

For wireless services, a central issue in the CRTC's review of wireless services (on which a decision remains pending)<sup>11</sup> is the access by mobile virtual network operators (MVNOs). As part of this review, the CRTC received submissions from the Competition Bureau concerning the state of competition and impact of MVNOs. In its final submission,<sup>12</sup> the Bureau argued that Bell, TELUS and Rogers (the "Big 3") possess market power at both the retail and wholesale level in most regions in Canada, but facilities-based regional competitors (i.e., who operate their own wireless networks) are increasingly disrupting the Canadian wireless landscape. The Bureau found that MVNOs are unlikely to deliver the benefits of sustained and vigorous competition that facilities-based wireless disruptors are capable of providing. The Bureau therefore recommended that the CRTC pursue a MVNO policy where Bell, Rogers and TELUS would have to sell temporary access to their wireless networks to regional wireless carriers who intend to invest and further expand their own networks. Certain parties have disputed the Competition Bureau's research and analysis.

In addition to the Competition Bureau, other parties made proposals to obtain access to the networks of Bell, TELUS and Rogers while preserving the incentive to invest in facilities, focused on closing

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10 Order in Council 2020-0553. *Order declining to vary, rescind or refer back for reconsideration Telecom Order Canadian Radio-television and Telecommunications Commission (CRTC) 2019-288 given the CRTC is already reviewing it* (13 August 2020). Available online: <https://orders-in-council.canada.ca/attachment.php?attach=39521&lang=en>

11 Canadian Radio-television and Telecommunications Commission. "Telecom Notice of Consultation CRTC 2019-57: Review of mobile wireless services." (28 February 2019). Available online: <https://crtc.gc.ca/eng/archive/2019/2019-57.htm>

12 Competition Bureau. "Executive summary of the Bureau's submission to the CRTC on mobile wireless services." (25 November 2019). Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04505.html>



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the digital divide in rural and remote areas of Canada. Further, a number of parties similarly provided differing views on the issue of temporary access or permanent access to the wireless networks of Bell, TELUS and Rogers.

## Accuracy of Tracking and Price Comparisons for Telecommunications Services

Working Group members share concern around the accuracy of benchmarks and validity of comparisons for consumer prices of telecommunications services. With the federal government's focus on wireless pricing, group members stressed the importance of timely and transparent information about the telecommunications market that reflects actual prices paid by consumers. Specifically, accurately assessing prices across time and jurisdictions for telecommunications involves resolving heterogeneity across tiers for service and bundled pricing for a diversity of consumer profiles. It is important to control for network quality, plan characteristics, and country characteristics when making international price comparisons, members noted.

Working Group members express concern about international comparisons that compare price levels based on surveys of posted prices from providers in different countries. Group members observe that such blunt comparisons neglect cross-jurisdictional differences in network quality, plan characteristics, and geography (e.g., population density), noting that such differences shape the cost of delivering telecommunications services and the value for consumers. Experts have criticized these more simplistic average-price comparisons and have exhibited how more advanced econometric methods can be used to correct for underlying determinants of consumer value from telecommunications services.<sup>13</sup>

More specifically, 24 prominent telecom experts concluded that international price comparisons (such as a recent report by the consultancy Rewheel)<sup>14</sup> suffer from methodological flaws. These experts assert that policymakers should avoid relying on such studies given their theoretical and practical flaws in comparing telecommunications prices or evaluating the relative degree of competition between jurisdictions.<sup>15</sup>

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13 Dippon, Christian. 2020. *A Comparison of the Mobile Wireless Value Proposition*. NERA Economic Consulting. March 2. Available online: <https://api.ctia.org/wp-content/uploads/2020/03/Final-Study.pdf>

14 See: Rewheel. 2020. "4G&5G connectivity competitiveness 2020." *Digital Fuel Monitor*. November. Available online: [http://research.rewheel.fi/downloads/4G\\_5G\\_connectivity\\_competitiveness\\_2020\\_PUBLIC\\_VERSION.pdf](http://research.rewheel.fi/downloads/4G_5G_connectivity_competitiveness_2020_PUBLIC_VERSION.pdf)

15 Dippon, Christian, et al. 2020. "The Case for Adding a Warning Label to Rewheel's International Price Comparison and Competitiveness Rankings." Available online: <https://www.nera.com/publications/archive/2020/the-case-for-adding-a-warning-label-to-rewheel-s-international-p.html>

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For changes in telecommunication services pricing over time in Canada, Statistics Canada compiles indices for cellular and internet access services as components of its consumer price index. The services included in the cellular services component have evolved with Canadians' changing consumption patterns. The cellular component compiles all costs associated with the services of a wireless device in a given period and evolves with Canadians' changing consumption patterns.<sup>16</sup> Since cellular plans are typically discontinued rather than modified, this index tracks several representative profiles for Canadian wireless consumers. These profiles are updated regularly with shifts in market share or new services.

Notably, the index component for cellular services in Statistics Canada consumer price index has declined by over 25 percent from January 2016 to December 2020 and prices for internet access services increased by roughly 1 percent over those four years (see Figure 1). In contrast, Canada's all-item Consumer Price Index increased by over 8 percent over that period.<sup>17</sup>

### Rate-setting Challenges for Mandated Access

A fundamental challenge for mandated access is setting appropriate rates in a multi-product setting where different services are delivered on shared infrastructure and supported by common corporate operations. A primary challenge for rate-setting is the allocation of such common costs for physical infrastructure, as well as “overhead” human resources, between the multiple types of services that a provider may deliver.

A key conceptual question is whether, in such a dynamic setting, the regulator can accurately identify economic rents (i.e., pricing above the appropriate costs and a normal return) should they arise for a specific producer at any moment in time, let alone keep pace with changing marketplace

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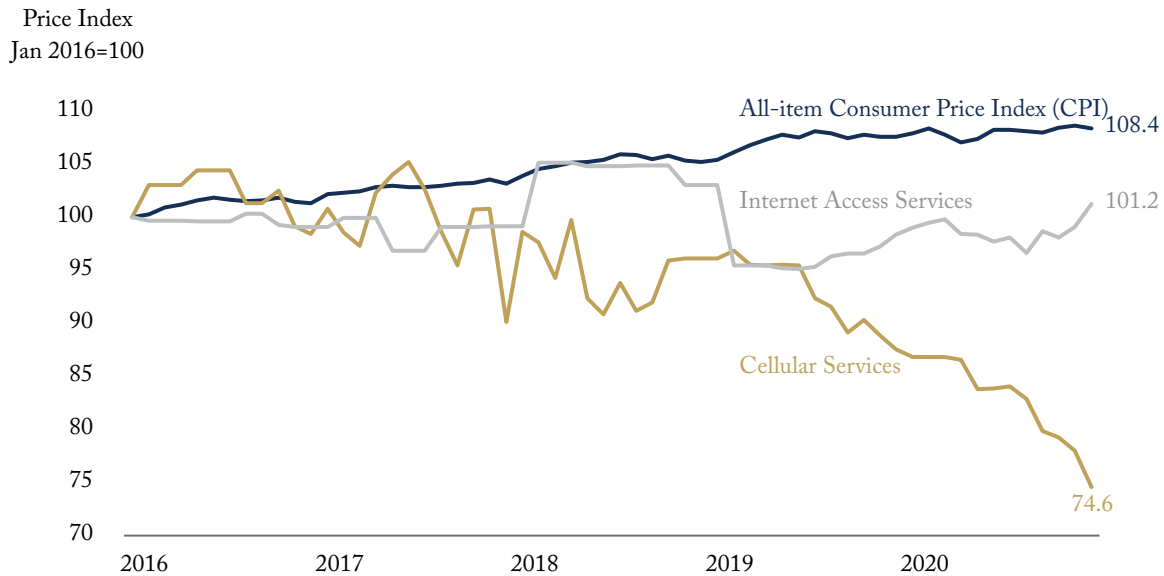
16 Statistics Canada. 2019. *New approach for estimating the Telephone Services Index of the Consumer Price Index*. Available online: <https://www150.statcan.gc.ca/n1/pub/62f0014m/62f0014m2019003-eng.htm>

17 Notably, with increased de-bundling of smartphone devices from wireless services, Statistics Canada modified its index in November 2018 to exclude devices (i.e., to only track wireless services). Between November 2018 and October 2020, this wireless services index declined by roughly 21 percent. As well, the significant decline in July 2019 corresponds to the widespread introduction of “unlimited data plans”.



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Figure 1: Consumer Price Index and Cellular and Internet Access Services Components



Source: Statistics Canada (Table 18-10-0004-01).

conditions. Moreover, facilities-based providers differ widely in their internal corporate organization, physical infrastructure and mix of services. With such heterogeneous competitors, a “one size fits all” methodology for establishing rates risks dampening investment incentives for at least certain facilities-based providers.

The costing exercise involves the allocation of common costs to particular services so as to arrive at a notional price for wholesale access. Certain Working Group members regard past costing exercises by the CRTC in determining access rates as “unscientific” and tending to support the viability of resellers in the market. That is, common costs are allocated to achieve a particular wholesale price, rather than based on a coherent economic rationale.

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The misspecification of rates for mandated access can also produce free-riding and, by reducing the expected returns of a given investment, discourage future investments and new entry of facilities-based providers. Working Group members observed that setting preferential rates for pure resellers (e.g., Third Party Internet Access resellers) would cut into the growth of recent facilities-based entrants and be counterproductive for the long-stated aim of increasing facilities-based competition.<sup>18</sup>

Finally, while some have contended that commercial negotiation, coupled with a regulatory backstop, such as “final offer” arbitration, may be a solution to assign wholesale access rates, Working Group members observed that there must be some guiding objective principle or benchmark to allow parties to propose reasonable offers and for an arbitrator to decide between these.<sup>19</sup>

## **Key Takeaway: Pricing in Telecoms**

Much of the debate in telecommunications policy has focused on prices. However, the last five years have seen a 25 percent reduction in prices of cellular phone services. Further, mandating access to infrastructure would make setting prices that balance competition and the incentive to invest challenging for the CRTC.

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18 This Working Group’s first communiqué presented evidence from BCG and TD Securities that shows that mandated access to the wireline broadband market would reduce capital investment. There was disagreement among members of whether such evidence would carry forward to mandated access for wireless infrastructure depending on the policy design of mandating access.

19 *Telecommunications Act*, SC 1993, c 38, s.27 provides that “Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.” However, the statute does not stipulate an objective principle and benchmark to economically assess whether a given rate meets this standard.

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## Upcoming from the C.D. Howe Institute Telecommunications Policy Working Group

The next communiqué from this Working Group will address the framework and timeliness for allocating spectrum.

### *Working Group Mandate:*

The C.D. Howe Institute has established the Telecommunications Policy Working Group to identify and distill policy directions on the strategic questions facing Canadian telecommunications – particularly concerning:

- Promotion of vigorous competition for pricing and quality for telecommunications services;
- Investment in next generation infrastructure; and
- Inclusive access to telecommunications services and participation in the digital economy.

### *Objectives and Format:*

This Working Group will:

- Meet monthly to distill perspective for government and identify priority policy challenges;
- Issue communiqués synthesizing discussions, identifying policy options and differing perspectives (to be drafted in coordination with co-chairs and published after feedback from members);
- Identify pressing policy questions for research by Institute;
- Contribute to Institute initiatives on issues identified by the group (e.g., podcasts, webinars).

### *Members:*

- **Lee Bragg**, Executive Vice Chair, Eastlink.
- **Lucy Casacia**, Vice-President Smart Solutions, WSP.
- **Robert Ghiz**, President & CEO, Canadian Wireless Telecommunications Association.
- **Lawson Hunter**, Senior Counsel, Stikeman Elliott LLP.
- **Elisa Kearney**, Partner, Davies Ward Phillips & Vineberg LLP.
- **Marie-Helene Labrie**, Senior Vice-President, Public Affairs, Cogeco.
- **Daniel Levitan**, Vice President of Stakeholder Relations, Hydro One.

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- **Robert Malcolmson**, Chief Regulatory Officer, BCE – Bell.
- **Viet Nguyen**, Director, Head of Government & Industry Relations, Ericsson.
- **Chima Nkemdirim**, Vice-President, Government Relations, Shaw Communications.
- **Steve Orsini**, Co-chair and Adjunct Professor, Public Policy & Administration, Carleton University, and former Ontario Secretary of Cabinet.
- **Wayne Purboo**, Senior Vice-President, New Relic, Inc.
- **Stephen Schmidt**, Vice-President, Telecom Policy & Chief Regulatory Legal Counsel, Telus.
- **Terence Smith**, Partner, Boston Consulting Group.
- **Susan Stanford**, Assistant Deputy Minister, Connectivity and Distributed Growth, Government of British Columbia.
- **Konrad von Finckenstein**, Senior Fellow at the C.D. Howe Institute.
- **Scott Wallsten**, President, Technology Policy Institute.
- **Len Waverman**, Co-chair and Dean of DeGroot School of Business at McMaster University.
- **Ted Woodhead**, Senior Vice-President, Regulatory Affairs, Rogers Communications.