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## **Reforming Telecommunications and Broadcast Policy for the New Technological Age**

Report of the C.D. Howe Institute Competition Policy Council, Eighth Meeting

The legislative, regulatory and institutional framework governing the Canadian telecommunications and broadcast sectors is outdated to the point of dysfunction, and requires a fundamental overhaul. This is the consensus view of the C.D. Howe Institute's Competition Policy Council, which held its eighth meeting on October 23, 2014.

The government of Canada has sought to create four wireless carriers in all regions, through spectrum auction rules and in its application of telecom merger policy – with limited success to this point. In the interim, and in part driven by the continuing failure to deliver on a four-carrier model, the federal government has intervened in the market, limiting wireless spectrum transfers and trading, and changing regulations for wholesale roaming charges and tower access. These actions have contributed to market uncertainty around the sector and uncertain impacts on competition, consumer prices and choice.

The framework governing the sectors must be updated. The Council's consensus view was that technological change in the digital sector forces a rethink of the concepts underpinning the telecommunication and broadcast policy and legislative framework in Canada. To this end, the Minister of Industry together with the Minister of Canadian Heritage should strike an independent panel which would review the current framework and propose legislative and institutional alternatives, to address appropriate policy objectives in the context of the current and future technological environment.

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The Council wishes to thank Adrian Foster, Maclean Foster & Co., for participating in this meeting of the Council, and sharing his written notes with the Chair.



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The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, chaired by Finn Poschmann, Vice President, Policy Analysis, at the C.D. Howe Institute, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Osler Chair in Business Law at the University of Toronto and Competition Policy Scholar at the Institute, advises the program, along with Mati Dubrovinsky, Senior Policy Analyst. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers and the public.

*At Issue* In past and upcoming wireless spectrum auctions, the federal government has taken steps to reserve spectrum for new market entrants; it has also limited subsequent transfers of spectrum among carriers, and has blocked incumbent acquisitions of failing entrants. Meanwhile, federal legislation limits foreign investment in the sector.<sup>1</sup> Further, legislation implementing the 2014 federal budget, among other things, took steps intended to “to achieve greater competition in the wireless market,” by amending *Telecommunications Act* provisions regarding wholesale domestic wireless roaming rates to prevent wireless providers from charging other companies more than they charge their own customers for mobile voice, data and text services.<sup>2</sup> These matters are currently at issue before the Canadian Radio-television and Telecommunications Commission (CRTC) review of wholesale mobile wireless services.

### **Issues with the Current Framework for Telecommunications and Broadcast Policy**

The Council viewed recent government actions in the regulatory sphere as symptomatic of the outdated state of the legislative and institutional framework for telecommunications, wireless and broadcast policy. Specifically, the legislative framework cannot deal adequately with the technological developments of the past decade. Outdated tools and institutions and market uncertainty flowing from disparate and occasional conflicting or contradictory policy objectives weigh heavily on the sectors’ capacities to achieve optimal results for Canadians.

*Separation of Telecommunications and Broadcasting:* The Council’s consensus view is that the separation of the legislation governing the relevant sectors under three acts, the *Telecommunications Act*, the

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1 See <http://www.cdhowe.org/pdf/Competition%20Policy%20Council%20June17%202011.pdf>.

2 See <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6684616&Language=E&Mode=1&File=4>.

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*Radiocommunications Act*, and the *Broadcasting Act*, is incompatible with current technology.<sup>3</sup> Wireless providers offer voice, text, and internet data services. The internet connection allows streaming of television and radio services, offering all many or all telecommunications services and many forms of broadcasting on one platform. Broadcast cable firms offer voice services, and broadband internet providers offer television and radio services. Combinations of all are also available via satellite services. When the CRTC and the Minister of Industry enact regulation or exercise authority under each of the *Acts*, they are faced with the difficult challenge of taking into account the interaction among existing and new rules in all of these domains, all within the context of an outdated telecommunications and broadcast policy framework. This process is complex and uncertain in the current environment, the policy goals are unclear, and the market impact unpredictable.

**Legislation Targeting Only Traditional Players:** Some members pointed out that the current *Broadcasting Act*, which governs content in broadcasting, does not capture content delivered on the internet by foreign providers.<sup>4</sup> This is particularly poignant in the context of the CRTC's recent "Let's Talk TV" consultation, where it became evident that technological change has left the *Broadcasting Act*, and the CRTC's mandate with respect to it, severely outdated.<sup>5</sup>

**Transparency and Predictability of Policy:** Currently, the CRTC, the Competition Bureau and Industry Canada have jurisdiction in matters related to transactions and to conduct in the telecommunications and broadcast sectors. The CRTC reports to the Minister of Canadian Heritage, which is responsible for the *Broadcasting Act*; the Competition Bureau, which is responsible for the *Competition Act*,<sup>6</sup> reports to the Industry Minister; the Industry Minister is responsible for the *Telecommunications Act* and the *Radiocommunications Act*. This raises coordination and policy consistency issues, which in turn bear on industry investment decisions, and the pace and cost at which innovative services appear in the marketplace.<sup>7</sup>

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3 The *Telecommunications Act* (S.C. 1993, c. 38; <http://laws-lois.justice.gc.ca/eng/acts/T-3.4/>), the *Radiocommunications Act* (R.S.C., 1985, c. R-2; <http://laws-lois.justice.gc.ca/eng/acts/r-2/>), and the *Broadcasting Act* (S.C. 1991, c. 11; <http://laws-lois.justice.gc.ca/eng/acts/B-9.01/>).

4 <http://www.cbc.ca/news/business/netflix-refuses-crtc-demand-to-hand-over-subscriber-data-1.2774921>

5 Hunter, Trebilcock and Iacobucci (2014; [http://www.cdhowe.org/pdf/e-brief\\_184.pdf](http://www.cdhowe.org/pdf/e-brief_184.pdf)) and 2010; [http://www.cdhowe.org/pdf/commentary\\_301.pdf](http://www.cdhowe.org/pdf/commentary_301.pdf)).

6 <http://laws-lois.justice.gc.ca/eng/acts/C-34/>

7 The inconsistency has led to legal challenges, as described in <http://business.financialpost.com/2014/09/05/u-s-private-equity-fund-and-mobilicity-sue-feds-for-1-2-billion/>.

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*Complexities of Wireless Spectrum Allocation:* The Council members also believe that the current process of allocating wireless spectrum raises concerns about the substance of the decisions on this question, and illustrates some of the concerns about the institutional landscape.

## **The Wireless Spectrum Example**

The federal government has designed and conducted a series of auctions covering access to regional blocks of wireless spectrum, and more are scheduled for 2015, allocating spectrum that is particularly useful for data transmission. Some blocks of spectrum are set aside, in the sense that the large incumbent wireless carriers are prohibited from bidding on them.<sup>8</sup> The stated policy goal is to increase competition by facilitating entry of a fourth wireless carrier “in every region of the country.”<sup>9</sup>

In usual circumstances, unrestricted auctions would be the norm, as the process would ensure that the spectrum assets were acquired by the competitor that placed the highest value on them, presumably because the winning bidder is best placed to value the spectrum assets and deploy them. Further, unrestricted auctions, designed with appropriate safeguards against collusion among bidders, should tend to maximize auction revenue.

A challenge arises if a firm or group of firms collectively hold market power; in that case, economic theory suggests that an increase in the number of competitors would erode total industry (economic) profits, perhaps to the benefit of consumers. Hence, if the market is not competitive, incumbents potentially would have incentives to outbid an entrant seeking new spectrum, to preserve that market power, even if the incumbent was not best placed to employ the spectrum in question.

Accordingly, if there is market power, preventing incumbents from bidding on spectrum may be necessary, if entrants are to buy spectrum and compete; if there is no market power, preventing incumbents from bidding on spectrum may prevent that asset from being best managed.

There is a further complication: because wireless telecom is a network industry where entry involves high fixed or sunk costs, the retail price of voice and data services will be higher than the marginal cost of delivering those services. A network may charge a significant mark-up on marginal costs but,

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8 For detail see Church and Wilkins (2013; <http://www.policyschool.ucalgary.ca/?q=content/wireless-competition-canada-assessment>, 2014; <http://www.policyschool.ucalgary.ca/?q=content/wireless-competition-canada-damn-torpedoes-triumph-politics-over-economics>).

9 <http://www.ic.gc.ca/eic/site/icgc.nsf/eng/07389.html>.

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rather than being an indicator of market power, such margins may be necessary to cover fixed costs and generate a competitive economic rate of return.

In any event, the debate over the existence of market power in wireless turns on points of fact, methodology, and market definitions, on which members of the Council expressed no consensus – members generally agreed that the case had not been conclusively made that the wireless market is not currently competitive.<sup>10</sup> There was some concern that the pursuit of a fourth national wireless carrier might decrease service quality, in part owing to congestion issues, limit investment, and ultimately prove chimeric. These factors could lead to lower service quality overall, and unnecessarily high prices, absent a problem with competition. In addition, further policy and regulatory action may be the result, as policymakers seek to salvage past initiatives.

The Council reached no conclusion on these issues. What became apparent, however, is that the current institutional and legislative framework is inadequate for dealing with them, even in the limited context of spectrum.

For instance, inefficient and costly spectrum allocations could increase congestion in the system, which would limit the capacity of wireless providers to deliver broadcast and streaming content. And if wireless providers are competitors in broadcast content, then market issues and Canadian content rules need to be contemplated in a broader context, and this in turn raises fundamental questions about goals and powers under the *Broadcasting Act*, and the very role of the CRTC. That the legislation and relevant institutions are unsuited to the current economic and technological environment, and future ones, is a point on which the Council achieved full consensus.

## **Policy Recommendations**

The Council's consensus view was that technological change in the digital sector forces a rethink of the concepts underpinning the telecommunication and broadcast policy and legislative framework in Canada. To this end, the Minister of Industry together with the Minister of Canadian Heritage should

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<sup>10</sup> Some members of the Council noted that in having approved some wireless sector mergers in the past, the Competition Bureau seemingly had expressed the view that the market was sufficiently competitive, as in the case of Telus' acquisition of Public Mobile; see <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03633.html>.

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strike an independent panel which would review the current framework and propose legislative and institutional alternatives, to address appropriate policy objectives in the context of the current and future technological environment. Among the aims would be to establish a clear set of policy goals and instruments guided by principles that are independent of the technology at issue.

The proposed panel would make recommendations, in early 2016,<sup>11</sup> on the legislative changes needed to establish the regulatory institutions that would support high-quality telecommunication services at appropriate prices for consumers, and address relevant policy issues that may arise in future, such as interactions with broadcast and Canadian content policy.

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11 The report of the proposed panel would follow on, by a decade, the report of the Telecommunications Policy Review Panel, available at [https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/\\$FILE/tprp-final-report-2006.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf).

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*Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.*

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