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Changing the Channel on Canadian Communications Regulation

Canada's communications sector is set to undergo major policy reform. The federal government should replace ineffective Canadian content regulations with direct subsidies, introduce more legal and economic rigour in regulatory hearings, and eliminate ownership restrictions on communications companies and wireless spectrum.

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The Study In Brief

Canada's communications and broadcasting world has changed dramatically in recent decades. And more changes are coming. But our communications and broadcasting statutes and regulations have not kept pace.

Technology changes have enabled new services like Netflix that are changing fundamentally how Canadians watch TV. Various technologies now provide broadband access to a worldwide ocean of Internet content, with different wireless and wireline platforms competing for subscribers. Yet Canadian regulation of the communications sector still rests on a model born in an earlier era of over-the-air television broadcasting and technological constraints that inhibited competition among communications carriers.

A recently announced federal government review of Canadian communications and broadcasting policies should ask specific questions about current policies: Does the Canadian Radio-television and Telecommunication's (CRTC's) regulatory approach intensify competition or merely help individual companies or interest groups? Does the framework for mandating access to essential facilities encourage investment in innovative communications technologies? What, if anything, should the federal government do to put Canadian broadcasters on a level playing field with international competitors? What role, if any, should Ottawa play to ensure that Canadians have a choice of compelling TV viewing options that tell Canadian stories?

This *Commentary* argues that the federal government review of broadcasting and communications policy should conclude that:

- Ottawa should construct a unified policy framework for the *Broadcasting Act* and the *Telecommunications Act* that recognizes the convergence in conduits for accessing and delivering content;
- Ottawa should eliminate the CRTC's responsibility for Canadian cultural promotion and mandate the Department of Canadian Heritage to assume the role of articulating a policy framework for Canadian content;
- To finance Canadian content, government should not impose specific taxes on broadcasters, broadband providers or on content streamed via broadband, such as Netflix. Instead, Ottawa should support Canadian content production directly from general revenues. The federal government should also eliminate exhibition quotas for Canadian TV programming and replace them with subsidies or tax preferences for connecting Canadian audiences to Canadian content;
- The CRTC should face more economic and legal rigour in its hearings and defer to the Competition Bureau in countering specific anti-competitive conduct, protecting consumers and reviewing mergers; and
- Rather than support new entrants in spectrum auctions, the federal government should eliminate foreign ownership restrictions on Canadian communications companies and maximize the public benefits from the use of spectrum but defer to the Competition Bureau to counter anti-competitive conduct in spectrum acquisition.

These reforms would fundamentally change how Ottawa regulates Canadian broadcasting and communication. It is time for federal broadcasting and communications policy to keep pace with changing technology.

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The future is digital. The newest information communications technology has changed how people communicate, and this new technology makes our economy more efficient through broadened access to information.

Technological change has also driven "convergence" in the user experience among different platforms for accessing and distributing content. Canadians can now access content from their desktops, smartphones or television sets. We now have a wide range of choices regarding whether the content arrives by radio wave or along coaxial or fibre optic cable.

Meanwhile, information flows are global. The competitiveness of the Canadian economy will depend on access to global ideas and markets. To access those vast sources of knowledge and information, Canadians depend on the communications infrastructure where they live and work. While Canadian regulation shapes the economic incentives for providers of communications facilities to invest in new and faster technology, the current regulatory regime for the broadcasting and communication sectors rests on a model born in an earlier era.

When home television ownership started to spread in the 1950s, one-way TV or audio signals required a high amount of bandwidth across scarce radio spectrum. Content producers could not connect with individual users, and wireline connections to homes were primarily for telephones. In that era, spectrum scarcity favoured channels with the greatest viewership, crowding out diversity of content. High fixed costs and a lack of competing transmission technologies made communications providers natural monopolies, which begat close regulation.

Today, radio frequencies no longer limit the channels on offer. Users can access programming content on the Internet from global providers like Netflix. The digitization of content delivery makes the range of programming choices effectively unlimited.

The Need for Regulatory Reform

Against that backdrop, Canada's legislative framework reflects an out-dated structural separation between broadcasting and communications. The CRTC applies two separate statutes: the *Broadcasting Act* and the *Telecommunications Act*. The disputes over the applicable statutory regime in various CRTC decisions concerning content delivered to new devices and by Internet-based content providers (such as Netflix and Apple TV) are a consequence of such separation.

The regulatory model for communications providers is also ill-suited to current technology that allows users to access information across various wireline and wireless media. Indeed, competition among communications providers is increasingly about greater quality and higher speed of information flows. This new kind of competition requires companies to invest in new technology and

Those listed as authors of this paper wish to recognize the decisive contribution to much of the analysis herein and to earlier drafts of this study, made by current and former Institute Fellows involved at different stages of this project. Many thanks also to all reviewers and to participants at the C.D. Howe Institute's November, 2015 conference for their feedback and input at various stages of this work. We retain responsibility for any errors in this paper.

better communication infrastructure. Consumers can choose among various wireless providers and wireline carriers with different technologies. In this setting, regulating based on natural monopoly assumptions rooted in an earlier technology may actually chill dynamic forms of competition rather than remedy hypothetical inefficiencies.

A Roadmap for Reform of Communications Regulation

Technological change has intensified the potential competition both among producers of content for viewers and providers of communications facilities for subscribers. In particular, digital information can be accessed efficiently through a variety of platforms. Such convergence will enhance the competition between incumbent wireline carriers, on the one hand, and wireless carriage and other wireline facilities on the other. Consumers can now access content from wireless broadband or through either coaxial cable or optic connections, improving consumer welfare, constraining incumbents' market power and enhancing incentives for facilities providers to provide faster and more reliable infrastructure.

However, the scope for convergence's full benefits is inhibited by Canada's current approach to communications regulation. Today, communications providers invest in innovative new infrastructure with uncertain returns – new investments that are a kind of upfront competition. The CRTC's regulatory approach toward new communications investment is overly restrictive, hindering competition and long-run efficiency.

To modernize Canadian communications regulation, rather than creating a single law for the sector, Ottawa should establish a unified legislative framework, noting that the current fragmentation is incompatible with current technology.[1] The increasing competition among conduits for accessing content makes the CRTC's traditional monopoly regulation less relevant than it used to be. Moreover, the federal government should clearly divide regulatory responsibilities among the CRTC (which regulates communications carriers, broadcasters and broadcast distributors in the public interest), the Department of Canadian Heritage (responsible for outlining Canadian content policy), the Department of Innovation, Science and Economic Development (ISED, formerly Industry Canada, which allocates radio spectrum used in wireless communications) and the Competition Bureau (which, as an independent law-enforcement agency, applies the *Competition Act* as a law of general application).

To address the fragmentation, Ottawa should enact the following broad reforms:

- First, the CRTC's responsibility for Canadian cultural promotion should be eliminated, with this responsibility – along with direct financial support – assumed by the Department of Canadian Heritage;
- Second, the CRTC should defer to the Competition Bureau in countering specific anti-competitive conduct, protecting consumers and reviewing mergers, except where a market failure exists that competition law cannot remedy; and
- Third, ISED's aims in radio spectrum allocation should be streamlined, mandating ISED to maximize the public benefits from spectrum use but to defer to the Competition Bureau to

1 This follows the recommendations of the C.D. Howe Institute's Competition Policy Council, which has previously presented the need for an expert panel to review and update the regime (C.D. Howe Institute Competition Council 2014). Many panellists at the Institute's November 2015 conference on the "Future of Telecommunications and Broadcasting" supported the idea (See conference summary at: https://www.cdhowe.org/speeches-and-presentations/conference-report-future-canadian-telecommunications-and-broadcasting).

counter anti-competitive conduct in spectrum acquisition.

Canadian Cultural Promotion

The federal government promotes Canadian content for television in three main ways. First, it supports production of Canadian content, either directly (e.g., via the National Film Board) or by requiring broadcasters, as a condition of obtaining their licence, to support Canadian production (by either directly funding it or via contributions through vehicles like the Canadian Media Fund). Second, Ottawa sets exhibition quotas – a certain number of Canadian channels and a certain proportion of Canadian content must be made available as part of content distributors' offerings to subscribers. Third, the government maintains a public broadcaster with nationwide coverage and offerings in both of Canada's official languages through CBC/Radio-Canada.

Why Support Canadian Content?

Support for Canadian content is rooted in the idea that it is a public good to connect Canadians to information, along with educational and cultural products, from their own country and communities, and to a diversity of voices. This is because these connections promote informed choices, enhance Canada's diverse cultures and build communities. As well, there are arguably positive spillovers on economic activity outside the arts and culture sector, for example by contributing to the creation of new designs and uses for goods and services.[2]

The contribution of cultural policy to these important policy goals is well established in both the literature (for a review, see Schwanen 1997 and 2001) and in public examinations of governments' roles in supporting Canadian culture and public broadcasting.[3] In theory, private companies would not produce as much of this social good as would be ideal. Public support of some kind, it is widely felt among Canadian content supporters, fills that gap.

The question under consideration here is not that of public support for cultural, educational or news production. The question is whether the policy tools we are using to meet cultural policy goals – in particular through communications and broadcasting policies – are effective, or even sustainable in light of technological change and changing Canadians' preferences.

Two alleged market failures underlie the case for subsidizing Canadian cultural production: First, producing programming involves high fixed costs and uncertainty about demand (i.e., it is difficult to predict a hit series in advance). However, after a program is produced, the costs for further distributing the content are negligible. Consequently, the market favours programming with the largest projected audiences. Content for smaller audiences with slightly different tastes may be crowded out by the scale advantages of producing for a neighbouring mass market.

The second alleged market failure is that demand for new production is variable and periodic, particularly in a smaller market. A market without stable and predictable demand for content may be unable to cultivate and maintain the cluster of

2 See Goldthwaite (1993) for examples from the Renaissance. For a more contemporary example, Kearney and Levine (2015) find that the introduction of Sesame Street across the United States had a strong effect on school readiness, especially for children from economically disadvantaged areas.

3 The 1929 Royal Commission on Radio Broadcasting (Canada 1929) stated, "At present, the majority of programs heard are from sources outside of Canada. It has been emphasized to us that the continued reception of these has a tendency to mould the minds of young people in the home to ideals and opinions that are not Canadian."

talent and related services to sustainably continue to tell local stories.

These arguments are often subsumed under the heading "cultural and information goods are different." And, to be sure, they often have unique characteristics. (For a list of such characteristics, see Grant and Wood 2004). However, these arguments can also be overdone, given that Canadians should have a unique advantage in telling Canadian stories, even against larger competitors, who may be less well tuned to Canadians' needs. As well, new, low-cost production and dissemination technologies should make it easier to produce Canadian content despite its relatively small market size.

And while these alleged market failures may affect the availability of Canadian cultural or information products and activities, the case for subsidizing Canadian content rests on not only making Canadian content available, but more fundamentally on the extent to which Canadians actually partake of that content (Schwanen 1997). The ultimate goal of a policy devoted to supporting cultural or information content is to have Canadians connect, watch, and listen to, or even interact with, this Canadian content. Put simply, the test for Canadian content's value is whether Canadians willingly connect to it.

In this context, the key policy goal with respect to Canadian content should shift from "pushing" it on TV and radio to promoting the connection of Canadian content with Canadian audiences, across any platform, in a context where all offerings compete for Canadians' time and attention. The instruments of Canadian content promotion should be rethought with this in mind.

Financial Support for Canadian Content

Ottawa's largest single tool promoting Canadian content is its support of the Canadian Broadcasting Corporation (CBC), which received just over $1 billion in direct support in the 2014/15 fiscal year.[4] Ottawa also provides funding for independently produced programming through the Canadian Media Fund (CMF) and tax credits. CMF funding comprises roughly one-quarter of total funding for CMF-eligible programming.

Cable or satellite service providers, known as Broadcast Distribution Undertakings (BDUs), also make significant contributions to Canadian programming.[5] BDUs with more than 2,000 subscribers must contribute 5 percent of their gross revenues from broadcasting-related activities to creating Canadian programming, and the CMF receives at least 80 percent of such contributions. BDUs that operate a community channel are permitted to count such "local expression" expenditures toward their 5 percent target.[6] In total, BDUs contributed between $460 million and nearly $500 million per year toward Canadian content creation between 2010 and 2014 (See Figure 1).

Exhibition Quotas for Canadian Content

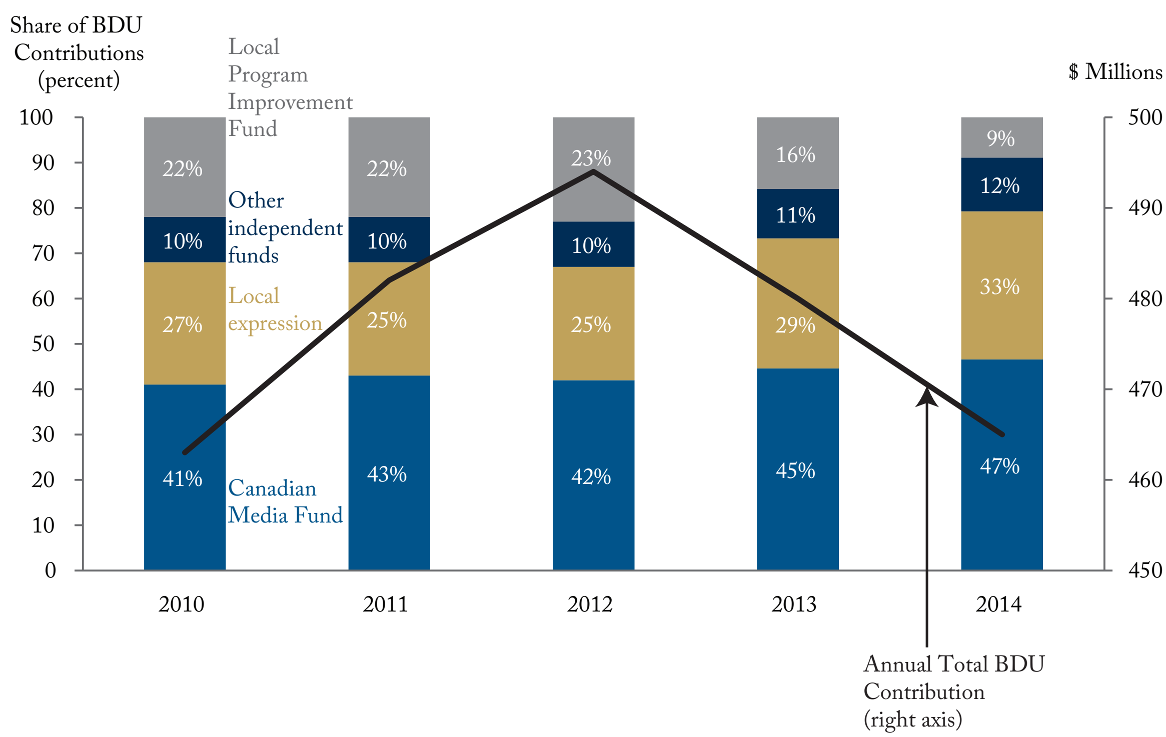
In addition to financial support requirements, BDUs must also broadcast a certain amount of Canadian programming. Under recently announced changes, major Canadian over-the-air broadcasters will be required by August 2017 to offer 50 percent Canadian content daily during evening prime time hours. Meanwhile, Canadian specialty channels will

4 See Public Accounts of Canada (Dec. 7, 2015), online at: http://www.tpsgc-pwgsc.gc.ca/recgen/cpc-pac/2015/vol2/pch/ap-pa-eng.html.

5 The material in this section draws heavily from C.D. Howe Institute (2015) and Hunter, Iacobucci, and Trebilcock (2010).

6 See http://www.crtc.gc.ca/eng/info_sht/tv13.htm.

Figure 1: Broadcast Distribution Undertakings (BDU) Contributions to Canadian Content



Note: Local Program Improvement Fund is a since-discontinued program to support small broadcasting stations.

Source: Communications Monitoring Report 2015, Figure 4.3.10; See: http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr4.htm#f4310.

need to provide Canadian content covering 35 percent of overall broadcast time.[7]

The Changing Landscape of Canadian Content Promotion – The Need for Policy Change

The traditional methods that the federal government used to promote Canadian content may have been effective in an era of limited viewing options. That is, there was a great deal of spectrum scarcity, and governments could influence what was shown on that limited spectrum. At first, Canadians were limited to watching what was broadcast over-the-air and received in their homes. Later, Canadians could choose from a rapidly growing number of channels. The government-imposed BDU financial contributions and exhibition quotas were effective in ensuring that BDUs presented Canadians with Canadian content (Hunter, Iacobucci, and Trebilcock 2010).

Now, Canadians live in a world in which spectrum scarcity no longer constrains

7 See Let's Talk TV Ruling (March 12, 2015), online at: http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm.

viewer choice since viewers are not limited to programming carried over the airwaves. Instead, viewers can access a universe of content from around the globe, and Canadian content must be competitive with those offerings. Notably, Internet-based programmers such as Netflix are not required to make either financial contributions or follow exhibition quotas. It is the emergence of these services in a new technological era that requires a rethinking of support for Canadian content.

Under the *Broadcasting Act*, the CRTC has authority to mandate contributions from broadcasters and broadcasting distributors to Canadian programming. Yet, in an age when Canadians can access content online, a model for content-promotion in which Canada's broadcasters are differentially saddled with content quotas or contributions to media funds only penalizes certain Canadian-based conduits. Avoiding this outcome would seem to call for changes to policies that promote the availability of Canadian content.

Changing Financial Support

Some have suggested a general tax on broadband access to fund domestic cultural production (Ontario 2014). However, since some portion of the tax would be borne by broadband subscribers, such a tax might exclude some people from Internet connectivity. Moreover, the targeted tax base would be overbroad relative to the benefits of the cultural programming since those benefits would not accrue to business users of broadband services, nor to individual subscribers in their multifaceted need to access the Internet beyond cultural or news programming, such as internet shopping or banking.

If policymakers believe that Canadian content is a general public good, contributions to Canadian programming should be most appropriately funded from general revenues, making the size of the subsidy transparent to taxpayers and compelling conversations about the value of Canadian content. The funding should then be allocated under the auspices of the Department of Canadian Heritage, whose core mandate encompasses promoting Canadian culture.

Such financial support should not distinguish between the means by which content producers connect with Canadians. The core of Canada's cultural policy with respect to reproducible audio-visual content should reward broadcasters or distributors of Internet-based content for capturing a share of Canadians' time and interest with Canadian content that is otherwise not commercially provided. It follows, then, that instead of requiring broadcasters to fund programs that may or may not be viewed by Canadians, government should support voluntary plans by broadcasters (and other distributors) that demonstrably engage Canadian audiences with Canadian content. The Department of Canadian Heritage could, for example, provide support for plans depending on their proposed mix of Canadian news and public affairs, regional diversity, drama, amateur sports, documentary, personal interest, minority language and cultural programming.

The Department of Canadian Heritage could form a working group of experts who are at arm's length from the department to evaluate the plans. The experts would not evaluate editorial content, but the type of programming and plans to promote the content to Canadian audiences by, for example, making it easily accessible to their subscribers. The bidder or bidders offering the better connection of such Canadian content, and at the lowest cost to the government, would win the Department's financial support.

The government could ensure that its public support does not go toward programming that private companies would provide without subsidy, by setting a duration (say five years), after which the success of engaging with audiences could be assessed and funding for different distributors might be re-evaluated accordingly. This long-term review of audience engagement would reconcile the economic goal of supporting initially uneconomic content that eventually connects with a wide audience.

Changing Exhibition Requirements

Starting on March 1, 2016, Canadian BDUs were required to offer minimally priced, minimal choice, channel offerings. In addition, BDUs are limited in the extent to which they can require buyers to purchase packages of channels. Buyers can now "pick-and-pay" for only the channels they want, but BDUs will still be required to have a majority Canadian channels on offer.

This ruling ignores the potential economic benefits of bundling. Bundling can make both consumers and BDUs better off if the result is, for example, more channel offerings (Hunter, Iacobucci and Trebilcock 2014). A broad prohibition on bundling may result in consumers not having access to bundle options when those might, in fact, make them better off if the restrictions on bundling mean less choice.

The result of these pick-and-pay rules is that Canadian distributors are saddled with additional, unnecessary costs. Consumers might react by fleeing traditional broadcasters in favour of Internet-based offerings, hurting both domestic broadcasters and Canadian content producers.

The Role of the CBC

The CBC originated as a national radio broadcaster in the 1930s, an era of spectrum constraints and high fixed costs for delivering programming nationwide. It served to curate a common sense of national identity and convene conversations about issues facing Canada. However, in an era of platform convergence, when print, video and audio are increasingly accessed online and media produce content for multiple conduits, the distinct role served by the CBC is unclear. Specifically, what market failure does the CBC address? Put simply, why does the CBC warrant a direct subsidy for its operating budget but not the *National Post*, *Maclean's*, *L'actualité*, *Vice* magazine or *Canadaland's* podcasts? What are the economic arguments for the public funding the full salaries of Peter Mansbridge for news coverage, Don Cherry for intermission hockey commentary, or Eugene Levy on *Schitt's Creek*, but not Christie Blatchford of the *National Post*, Greg Zaun for baseball commentary, or the Trailer Park Boys on Netflix?

The answer, in our mind, is that the CBC would best contribute to the public policy objectives described above by more clearly complementing the offerings of commercial distributors and producers, while still being subject to an "audience relevance" test. In other words, the competition should be for viewership of otherwise non-commercially attractive Canadian content, rather than for advertising revenues, other than incidental ones. The content should include publicly subsidized arts and culture from across Canada, cross-country information (respecting the diversity of voices), official and Aboriginal language services, in-depth documentaries and public affairs programming, promotion of Canada abroad, and newer and more experimental art. Funding should be commensurate with the demonstrated ability to engage Canadian, and even non-Canadian, audiences to these offerings. A funding baseline could be established by comparing the CBC to similar organizations around the world, taking cost structures and audience share into account.

A Way to Support Canadian Content in a World of New Technology

New technologies require a fundamental rethinking of how governments support Canadian content. Hunter, Iacobucci and Trebilcock (2010) argue that the only mechanisms that will remain effective in promoting Canadian content in a world of Internet-centric television are either direct subsidies to content producers or through a public broadcaster. That view is still fundamentally correct. Once Canadian producers receive these subsidies, they would need to produce compelling television in order to find broadcasters willing to exhibit their shows. But this market-driven outcome will occur only if governments remove the outdated exhibition quotas that are no longer effective in today's TV world.

It should be emphasized that we are not proposing a reduction in the funding that goes to cultural, arts or other Canadian content or programming. We are agnostic on that score. Instead, we are proposing a reallocation of the direct source of this funding away from imposed contributions by the BDUs, as a condition of getting their licence, toward the Department of Canadian Heritage. Our proposal is a reallocation of the reward scheme as a more efficient use of funds from the point of view of achieving public policy.

Competition and Communications Regulation

Regulatory policy should be based on how competition works in current practice. The prior federal government's approach to communications regulation encouraged the entry of more competitors into a market – such as a fourth wireless carrier – contending that this would benefit consumers (Beaudry and Speers 2016). Such structural approaches that emphasized redistribution of static surplus shares between providers and consumers are being supplanted by a new view that competition is more dynamic in industries, such as communications, with rapid technological change.

This modern approach focuses less on determining what a market should look like through prescriptive regulation; instead, it addresses abuses of market power and barriers to entry. The advantage of this strategy is that it preserves incentives to compete for the market through consumer-oriented innovations while constraining anti-competitive conduct. To adapt this approach, Ottawa should reform the communications regulatory regime by requiring the CRTC to defer to the Competition Bureau when it comes to anti-competitive conduct and merger reviews, unless there is a demonstrable market failure – such as a clear monopolization – that warrants a sector-specific intervention.

Dynamic Efficiency in Communications Regulation

The value of communications technology is in enabling users to better access content. Communications services are, therefore, complements to the content that users access, both economically and technologically. Providers of communications services do not merely compete on price but attract subscribers based on the available speed and quality of access to evolving types of content. This means competition in communications has a highly dynamic element: providers must constantly innovate to maintain market share or face a diminished value as new forms of carriage supersede earlier-generation technologies.

There is a trade-off between static and dynamic efficiency in the communications context (Laffont and Tirole 2000). A new communications technology may provide some market power, allowing monopolistic pricing, until surpassed by a subsequent technology generation. However, if the regulator mandates access for later entrants to an incumbent's network, it dilutes the incumbent's expected return that first motivated the company to invest in the next-generation technology.

Once the technology is rolled out and proven to attract customers, mandating access will allow new entrants to drive down the consumer price to an upfront access fee based on the provider's broad incremental costs. However, it is unlikely that the access fee can accurately capture the uncertainties that the incumbent faced ahead of making the investment. Such incumbent firms face risks around the costs of new technology and consumers' willingness to pay for the enhanced service. Their rate of return needs to reflect that risk in order for them to invest. If the regulator systematically allows access and underestimates the risks to deploying previously unproven technology, an incumbent considering deploying next-generation infrastructure will reduce future investments accordingly.

The consequence of mandating access to an incumbent's infrastructure would be an otherwise slower pace for the rollout of new infrastructure. That is, in exchange for lower short-term prices, consumers sacrifice the long-run gains from innovative, new infrastructure.

The relationship between regulators and communications providers is fraught with different information levels on each side: regulators have imperfect information about the risks and costs that a provider faces (Hausman and Taylor 2012). Therefore, the regulatory approach must be adapted for a "second-best world" in which informational barriers stand in the way of the ideal competitive equilibrium.[8] Put simply, regulators must be attentive to the risk that their regulatory interventions may inhibit competition if they formulate regulation on incorrect assumptions or are wrong about the future.

This regulatory failure risk is compounded when technology changes quickly. The benefits of regulating should be weighed against possible losses from the market failure in question – such as the different information available to market participants – but also against the risk of losses if the particular measure inhibits economic efficiency.

This "knowledge problem" faced by communications regulators motivates the change from a primarily *ex ante* approach to a presumptively *ex post* framework (Ohlhausen 2015). Prescriptive rules are ill-suited to a dynamic industry that is being buffeted by disruptive technological changes and in which players compete through innovation. *Ex-post* enforcement is likely more appropriate in sectors with fast-changing technology than *ex-ante* regulation. Indeed, there are instances in which the *ex ante* rules are predicated on misjudgments about the future that may constrain communications providers' flexibility to adapt to and drive technological change.[9]

Competition through Competition Law

In contrast to *ex ante* prescriptive industrial regulation, competition law provides a general framework of remedies against unilateral and multi-firm conduct that prevents or lessens competition and against marketing practices that reduce consumers' trust in advertisement.

The *Competition Act* also features a regime for reviewing and challenging mergers where these may prevent or lessen competition. Additionally, the *Competition Act* forbids certain discrete classes of conduct that unambiguously impair consumer welfare (e.g., cartel arrangements, bid-rigging or deliberately misleading advertising).

Of relevance to the communications context, the "reviewable conduct" sections of Canada's *Competition Act* provide for remedies against tied-

8 The appropriate lens for welfare trade-offs in communications regulation is to distinguish between first- and second-order losses, as well as losses from regulatory delay (Hausman and Taylor 2012). First-order welfare losses result when a provider with a lower-cost technology is inhibited from entering a market – and the price reflects a provider with a higher marginal cost. Second-order losses occur from a provider with market power pricing above marginal cost – the classic monopoly situation. Losses from regulatory delay result from regulatory restraints on new services being offered, depriving consumers of their full willingness to pay.

9 The US Federal Communications Commission's takes an *ex ante* approach. In contrast, the Federal Trade Commission takes on *ex post* enforcement to protect consumers using competition law. In order to preserve the flexibility and incentives for dynamic competition, Ohlhausen (2015) argues that the Federal Communications Commission should recognize the risks inherent in imposing *ex ante* rules and defer instead to the *ex post* stance of countering demonstrably anti-competitive conduct when it actually occurs.

selling, vertical price restraints (e.g., restrictions on resale prices), abuse of a firm's dominant position, and agreements that impair competition. In the case of abuse of dominance, the Competition Bureau must demonstrate a lessening of competition flowing from the particular conduct. For their part, firms can review the jurisprudence that has honed the applicable tests for determining market scope and the presence of market power when assessing whether to take a particular action. Canadian jurisprudence has defined market power as the ability of a single firm or a group of firms to profitably maintain prices above the competitive level, or other elements of competition such as quality, choice, service or innovation below the competitive level for a significant period of time.[10] Notably, the Competition Bureau has elaborated on its approach to the application of abuse of dominance in the communications context.[11]

Additionally, the *Competition Act* provides for remedies against misleading representations. Recent cases concerning advertising regarding the company with the least dropped calls and premium text messages are examples of communications firms covered by competition policy.[12]

Finally, the merger provisions of the *Competition Act* allow for a merger to be blocked or proceed only on certain conditions if the Competition Bureau is able to demonstrate that it would substantially lessen or prevent competition.

Iacobucci and Trebilcock (2007) argue for a reform of Canadian communications regulation to embrace competition law principles and segment responsibilities to leverage the Competition Bureau's comparative advantages. They contend that technological change has displaced the advantage of a sector-specific regulator for potential anti-competitive conduct by communications providers and that the CRTC is ill-equipped to administer the analytical approaches taken in competition law. Indeed, the remedies provided by competition law involve greater rigour than the CRTC's approaches to discriminatory access and predatory pricing. Nonetheless, Iacobucci and Trebilcock (2007) highlight that while market power in competition law provides an effective lens to identify prices that are higher than what would emerge from free competition, the Competition Bureau is not a price regulator and lacks the capability for ongoing regulation, as it does not undertake hearings or issue licences. They allow a place for the CRTC to regulate prices or access conditions where a demonstrable market failure, such as a natural monopoly over a last-mile connection, inhibits an efficient outcome.

To summarize, in order to apply competition law to the communication system, the federal government should enact the following changes:

(1) anti-competitive conduct should be countered by the *Competition Act*;

(2) a regulatory solution should be imposed only where there is a demonstrable market failure that competition law cannot address; and

(3) regulatory measures should be as unintrusive as possible and carefully calibrated to address the demonstrated market failure, weighing the potential economic benefits from a particular intervention against the risk of imposing greater

10 See *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 2006 FCA 236 at para. 6; and see: Competition Bureau, The Abuse of Dominance Provisions: Enforcement Guidelines (Sept. 20, 2012) – online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html.

11 See Competition Bureau, Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (2008) – online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html.

12 See *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315 and *The Commissioner of Competition v. Rogers et al.*, 2013 ONSC 3224.

inefficiency (e.g., by increasing barriers to entry or diminishing incentives for competition).

While the CRTC should have the final jurisdiction over the communications sector, the Competition Bureau and modern competition principles should have a greater role in CRTC decisions.

Issues with the CRTC's Current Approach

Currently, the CRTC's mandate is a mix of economic and nebulous public interest objectives. Recent critical CRTC decisions apply economic language but exhibit inconsistent application of pro-competitive principles, lacking the rigour of the economically grounded legal tests that are required under the *Competition Act*.[13]

The problematic issues in the CRTC's current regulatory approach are:

a) It does not appropriately consider regulation's impact on competition and dynamic efficiency;

b) In the CRTC's essential facilities determination, a finding of market power (including the definition of the market) lacks the analytical rigour that would be required in a competition case, and the CRTC significantly underweights the risk that its decisions impair incentives for competition through investment and innovation;

c) Competition law provides *ex post* remedies that are often preferable to *ex ante* regulatory measures, but the CRTC fails to consider whether it can defer to competition law to counter discrete anti-competitive conduct rather than pre-emptively regulate;

d) The CRTC's framework that is meant to prevent anticompetitive behaviour lacks the analytical economic rigour that would be required for comparable remedies (e.g., abuse of dominance, refusal to deal, tied-selling) in competition law; and

e) The CRTC's review of mergers involving broadcasters lacks a coherent policy basis, re-treading ground covered by the Competition Bureau's merger review and imposing regulatory burdens that inhibit the pro-competitive reorganization of the communications sector.

These flaws in the CRTC's approach had numerous consequences in recent major decisions (see Box 1 for a summary and the Appendix for details of these cases).

Modernizing Communications Regulation

Best regulation practices are changing. Globally, the best regulators try not to shape how a market will look – as the CRTC has been prone to doing in recent rulings – but rather concentrate their efforts on market power abuses. These principles apply equally in Canada's communications industry, and the federal government should reorganize how it regulates communications and broadcasting so that:

1. The Competition Bureau has a mandate to provide analysis of market power and competitive effects to the CRTC;
2. The CRTC's analysis expressly considers the potential risks of regulatory intervention to long-run competition and dynamic efficiency and weighs these risks against the potential for, and losses from, anti-competitive impairments;
3. The CRTC's analysis considers whether competition law provides remedies for potential anti-competitive conduct or deceptive marketing and defers to competition law as a framework of general application;
4. The essential facilities doctrine is codified in the *Telecommunications Act*, with the CRTC's analysis of market power required to be legally equivalent to the determination of market power under the *Competition Act*, with that legal analysis subject to

13 In 2006, the federal government issued a policy direction to the CRTC that it "rely on market forces to the maximum extent feasible…" (see Schultz 2008). However, this does not have the same rigour as applying legal tests as they exist in the *Competition Act* to CRTC rulings.

Box 1: The Limited Economic Reasoning of Recent CRTC Rulings

The CRTC made a number of important rulings between 2013 and 2015. These rulings will have major implications for the broadcasting and communications sector in the coming years, but they are founded on limited economic reasoning. In these cases, the CRTC ruled that:

- fibre-to-the-premises constituted an essential facility and the CRTC granted competitors mandatory access to BCE's broadband services;
- BDUs have limits on requiring buyers to purchase packages of channels. Buyers can now "pick-and-pay" for only the channels they want;
- to qualify under the digital media exemption order, BDUs must offer Internet-streamed, on-demand video content to all Canadians regardless of whether they subscribe to a particular BDU;
- firms cannot offer their subscribers access to mobile TV without incurring data usage charges unless such a policy also applies to third-party mobile TV streaming; and
- Bell's acquisition of Astral Media could proceed on conditions of financial contributions to Canadian programming initiatives and the divestiture of various television and radio stations.

In all of these cases, the CRTC either did not describe clearly the economic rationale for its ruling or it did not take into account the potential pro-competitive reasons for firm behaviour it forbid. The CRTC rulings may have come out differently if they had followed the legal and economic rigour required in provisions of the *Competition Act*. See Appendix for details on these rulings.

a correctness standard on appellate review;

5. Abuses of market dominance (e.g., undue preference) clauses are removed from the *Telecommunications Act* and addressed under the *Competition Act*'s abuse-of-dominance provisions; and
6. The CRTC no longer has authority to review mergers in the broadcasting sector.

To be clear, the CRTC will still be the primary regulator of the communications sector. Requiring an independent analysis of market power and competitive effects by the Competition Bureau would leverage the comparative advantage of this agency in rigorous economic analysis of markets (as also argued by Iacobucci and Trebilcock, 2007). Moreover, it would ensure that the analytical framework for assessing market power in the communications context is consistent with that under the *Competition Act*.

In decisions concerning alleged essential facilities and purported market failures that would require direct regulation (e.g., prescribed terms of retail service or limitations on wholesale contract provisions), the *Telecommunications Act* should expressly require the CRTC to refer the matter to the Competition Bureau. The Competition Bureau should be mandated to provide findings on market power and competitive effects based on a theory of harm. As well, the Competition Bureau should be authorized to highlight any risk regulation poses to competition and identify any *Competition Act* provisions that might apply *ex post* to hypothesized conduct in question (i.e., supplanting the role of *ex ante* regulation).

The Competition Bureau's submission should be published with sufficient lead time to the proceedings so that parties may comment. If the CRTC does not adopt the Bureau's analysis, the

CRTC should provide reasons for its departure. As applies to determinations of law by the Competition Tribunal under the *Competition Act*, the CRTC's analytical approach to assessing market power should be subject to a correctness standard on judicial review. Should there be such judicial review of a CRTC decision, the market-power finding should be assessed in light of the Bureau's determination and the sufficiency of the CRTC's reasons for departing that analysis. As Krause and Bibic (2012) and Hunter, Gauvin and Krause (2008) argue, greater appellate scrutiny of CRTC decisions would ensure consistency and rigour in CRTC analysis.

However, should the CRTC find there is a market failure that competition law cannot remedy, it should formulate regulatory measures to address that failure. As Iacobucci and Trebilcock (2007) observe, the Competition Bureau is not a price regulator, and the CRTC has both unique sectoral perspective and capability for ongoing monitoring of compliance that would be critical to formulating a viable remedy.

Spectrum Allocation and Innovation, Science and Economic Development Policy

Another major policymaking body in Canadian communications policy is the Department of Innovation, Science and Economic Development (ISED), formerly Industry Canada. It works closely with the Competition Bureau, but sets policy for wireless spectrum and foreign ownership.

Spectrum Allocation

Spectrum allocation presents an area, the radio spectrum, where an otherwise open-access, public good must be regulated to provide an orderly allocation with the greatest public benefit. This involves technical considerations as well as development of allocation mechanisms, such as centralized coordination of radio-spectrum ranges for particular functions and auctions for spectrum blocks to maximize the public's benefit from the exclusive use of this public resource. Auctions are a very efficient way of allocating this spectrum. However, Ottawa's rulebook is not the best way to enhance competition.

As has been thoroughly reviewed by Church and Wilkins (2013), the previous government rejected deferring to competitive forces and designing auctions to allocate spectrum to the highest value usage. Instead, its auction approach aimed at achieving a particular market structure involving caps on participants and set-asides for new entrants. This policy limited transfers of wireless spectrum licenses to other carriers without a clear analytical framework for assessing competitive consequences.

Church and Wilkins (2013) outline the suboptimal technological consequences that may result from this policy such as high consumer prices and the slow introduction of the latest technology. They further argue that actual market pricing contradicts the assumptions about lacklustre competition underlying the previous federal government's desire to bring new carriers into the wireless market. That approach reflects the outdated belief that having more competitors is always better and does not recognize the competitive constraints faced by incumbents (C.D. Howe Institute Competition Council 2011).

More fundamentally, the previous government's approach, which remains in place today, to shaping industry structure through a restricted spectrum auction, departs from a deference to market forces and competition law principles. Abuse of dominance provides a remedy for market foreclosure as a result of acquiring essential inputs. As well, the Competition Bureau has recourse against asset acquisitions that prevent or lessen competition.

Therefore, fostering competition rather than increasing the number of competitors should be the principle informing spectrum policy, with deference to competition law in the case of a demonstrable market failure. In the allocation of wireless spectrum, ISED should assign spectrum bands for functions and design auctions to maximize the public benefits from this public good. However, ISED should not pick winners or seek to regulate the structure of the communications industry through spectrum allocation. If there are competition concerns arising from wireless spectrum acquisitions, the *Competition Act* provides remedies.

Remove Foreign Ownership Restrictions

The Canadian government places restrictions on foreign ownership, both on spectrum purchase and on firms engaged in communications and broadcasting. At present, the *Telecommunications Act* and its regulations require that a communications company be Canadian controlled. Non-residents cannot control more than 20 percent of a communications operating company, 33.3 percent of a holding company and 46.7 percent of voting shares. The *Broadcasting Act* requires Canadian ownership and control of the broadcasting system, including broadcast distribution undertakings. However, these restrictions do not apply to firms with less than a 10 percent share of the Canadian market.

We recommend that Ottawa eliminate foreign ownership restrictions both in spectrum and in communications and broadcasting. These restrictions limit the size of Canadian companies and their available investment capital. Removing foreign ownership rules for both spectrum and companies themselves would bring Canadian firms into a more integrated global or North American market, whether through new entry or acquisition by US or other firms. Eliminating ownership rules would benefit Canadian consumers through lower capital costs and quicker technology adoption. Canadian communications firms would become more integrated in a contiguous communications market, which would allow firms to share the large fixed costs of setting up networks to serve many customers (C.D. Howe Institute Competition Policy Council 2011).

Foreign ownership restrictions are also unnecessary when ISED can use the national security provisions and other provisions of the *Investment Canada Act* to block potential purchases that could compromise critical communications infrastructure, or threaten the goals of broadcasting policy. The question of whether the attainment of cultural policy goals requires forbidding or discriminating against foreign ownership *per se* is a hot topic – often too hot for rational discussion. While the business side of producing and exhibiting Canadian content is mostly the business of Canadians at the moment, this is because of restrictions on foreign capital and business expertise.

One would think that Canadian owners, executives and producers might have an inherent knowledge of the Canadian cultural market that gives them an advantage over foreign competitors, even if ownership were more open to foreigners. And foreign owners would certainly not be exempt from the rules of the Canadian marketplace, such as those governing distribution and exhibition rights, limits on media concentration or support for Canadian content. There are many examples of cultural products and media that recognizably and successfully speak to the experience of one country's culture, but have been financed, produced or distributed by entities from another.[14] In

14 Moviegoers of not too long ago may recall widely acclaimed offerings such as *Il Postino*, *Like Water for Chocolate, Shakespeare in Love, Priscilla, Queen of the Desert* and *Fargo* and associate the stories respectively with Italy, Mexico, England, Australia and the US. Yet, the first three were released by an American-based company (Miramax) and the last two by a European-based company (PolyGram). There are many similar examples in publishing and music recording.

short, opening the door to foreign capital and expertise would likely deepen the pool of resources available to Canadian cultural productions and workers, without sacrificing the production and dissemination of Canadian content.

Conclusions and Recommendations

The federal government must reform Canada's communications regulatory regime to recognize the sector's rapid technological change. Regulation should move beyond outdated presumptions of the sector being a natural monopoly and focus instead on enabling dynamic competition among service providers. The mandate of Canada's communications regulator should be to ensure competitiveness, facilitate market forces and intervene only in the case of demonstrable market failures that cannot be counteracted through competition law.

In a reformed Canadian communications regulation regime, responsibilities should be clarified and streamlined. We recommend that:

1. The Department of Canadian Heritage take the helm on promotion of cultural programming. Specifically, it should replace broadcasters in financing Canadian content, and the CRTC should eliminate Canadian content exhibition quotas.
2. The CRTC defer to the Competition Bureau for *ex post* enforcement against anti-competitive conduct or deceptive marketing. A sector-specific regulator like the CRTC will still have a role in the future. But changing technologies means that it should draw on some of the regulatory principles that exist in broader competition law.
3. The CRTC should be required to adopt a more rigorous approach to its own regulatory interventions, particularly in weighing risks of creating inefficiency through *ex ante* rules against assessed benefits. For mandating access to essential facilities, the CRTC's market-power determination should be legally equivalent to the determination of market power under the *Competition Act*. Given the redundancy and dubious benefit, the CRTC's role in reviewing broadcasting mergers should be eliminated.
4. ISED allocate spectrum to maximize public benefit without any pre-determined policy aim for industry structure and remove foreign ownership limits.

Appendix: Recent Broadcasting and Communications Cases

Many recent high-profile cases would likely have been resolved in a different way if CRTC decisions were more infused with competition policy principles. We address these cases in turn.

Assessing Market Power for "Essential Facilities": Fibre-to-the-Premises Mandatory Access[15]

In this decision, the CRTC found that fibre-to-the-premises (FTTP) constituted an essential facility and granted competitors mandatory access to BCE's broadband services on the basis that: i) the essentiality test is not applied service-by-service and consumers are likely indifferent to the various technologies; ii) the relevant product market was wholesale high-speed access (HSA) services; iii) wholesale HSA services, of which FTTP are part, are required to provide the downstream retail service; iv) denial of wholesale HSA service would limit competition in the downstream market such that incumbent carriers had market power in wholesale HSA services, including FTTP; v) last-mile HSA facilities could not be feasibly duplicated by competitors; and vi) there was a competitive incentive to continue investing in FTTP even if mandatory access for competitors diminished the economic benefit to the incumbent.

This decision is problematic because: i) the CRTC failed to consider whether the pricing of non-FTTP services, including the already mandated HSA access to legacy technologies, would constrain the pricing of FTTP such that the incumbent lacked market power for FTTP pricing; and ii) the CRTC gave only cursory consideration to whether mandatory access would curtail investment in FTTP and did not consider the potential lessening of dynamic competition from the reduction in returns in a risky new technology.

Indeed, the competition analysis would have been more rigorous in the *Competition Act* context: specifically, the CRTC should have considered whether other HSA services constrained FTTP pricing. Instead, the CRTC included FTTP in the overall product market for HSA services but then failed to consider whether the FTTP provider had market power in provision of that particular service.

Furthermore, the CRTC should have considered the impacts on dynamic efficiency, considering whether FTTP represented competition through enhanced product quality. With an economic framework, the regulatory result may have indeed been the same as what transpired. However, a more rigorous economic analysis would have brought more clarity to questions of incumbents' market power.

Notably, in this matter, the Competition Bureau declined to opine on whether the incumbents possessed market power with respect to FTTP. However, the Bureau indicated that a finding that FTTP was in the same product market as residential wireline would point to a lack of FTTP market power.[16]

15 Telecom Regulatory Policy CRTC 2015-326 at paras. 36-52 – see: http://www.crtc.gc.ca/eng/archive/2015/2015-326.htm.

16 Competition Bureau, *Submission by the Commissioner of Competition Before the Canadian Radio-television and Telecommunications Commission – Telecom Notice of Consultation CRTC 2013-551 – Review of wholesale services and associated policies* (June 27, 2014), online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03755.html.

Mandating Pick-and-Pay: Channel Unbundling under the Let's Talk TV Proceedings[17]

In this decision, the CRTC required pick-and-pay on the basis that the measure would improve consumer choice and flexibility despite acknowledging certain BDU arguments that bundling packages may, in fact, also enhance consumer choice.

The analysis lacked any discussion of the competitive constraint on bundling from other BDUs' offerings or the pro-competitive rationale for bundling.[18] The CRTC's analysis contrasts with what would be required under the tied-selling provision of the *Competition Act* – i.e., a demonstration that bundling would lessen competition. This highlights an example of where, having not identified any market failure, the CRTC should have deferred to market forces and could have looked to competition law for the appropriate test of whether intervention would benefit consumers.

Requiring BDUs to Offer BDU-owned Video-on-Demand Services to Non-subscribers: Prohibiting Video-on-Demand Service Exclusivity under the Let's Talk TV Proceedings[19]

In this decision, in order to qualify under the digital media exemption order, the CRTC required BDUs to offer "hybrid" video-on-demand services (i.e., Internet-streamed, on-demand video content) to all Canadians regardless of whether they subscribe to a particular BDU.

Admittedly, BDUs may continue to offer exclusive VOD content but will be subject to the normal broadcasting requirements, including Canadian content. BDUs have noted that this places them at a competitive disadvantage to the exempt non-BDU providers of Over-the-Top content (e.g. Netflix) who do not face such requirements.

In prohibiting exclusive hybrid VOD services, the CRTC did not consider, at least in its public ruling, any pro-competitive explanation for offering exclusive video-on-demand services to BDU subscribers as a means of competing for subscribers with rival BDUs or examine how or in what market the exclusive services would impair competition. Again, a more rigorous analysis of the competitive consequences would have been required under the tied-selling, exclusive dealing or abuse-of-dominance provisions of the *Competition Act*.

Importantly, the Competition Bureau had provided a submission for these proceedings,[20] in which the Bureau contended that exclusive VOD content could put competing ISPs at a competitive disadvantage in attracting subscribers. It is notable that the CRTC did not reference this submission or discuss the competitive implications in rendering its decision. As discussed, the absence of the CRTC's express consideration of the competitive implications of exclusive VOD is a gap in the decision.

The Bureau's submission in this proceeding also underscores the importance of imposing the rigorous analytical frameworks required under the *Competition Act* to proceedings that involve competition. While alleging that exclusive VOD

17 Broadcasting Regulatory Policy CRTC 2015-96 – see: http://www.crtc.gc.ca/eng/archive/2015/2015-96.htm.

18 See Hunter, Iacobucci and Trebilcock (2014), Crawford and Yurukoglu (2012) and Crawford and Cullen (2007) for further rationales for bundling.

19 Broadcasting Regulatory Policy CRTC 2015-86 at paras. 92-106 – see: http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm.

20 Competition Bureau, "Submission by the Commissioner of Competition Before the Canadian Radio-television and Telecommunications Commission – Broadcasting Notice of Consultation CRTC 2015-87" (April 25, 2015) – see: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03910.html.

content could hinder competition for subscribers, the Bureau's submission failed to either discuss the possession of market power or consider that offering exclusive content to subscribers could represent a non-price, pro-competitive response. Moreover, the Bureau's submission failed to consider the BDU's incentive for making the VOD content available (i.e. would the BDU invest in the VOD channel if prohibited from exclusivity?). In a proceeding under the *Competition Act*, the Bureau would have faced the burden to show that the BDU possessed market power and the exclusive access to content impaired competition.

Zero-rated Mobile TV as Undue Preference: Prohibition on Unlimited Mobile TV Services to Wireless Subscribers[21]

In this decision, the CRTC prohibited zero-rated, (i.e., without incurring data usage) streaming of mobile TV services by Bell and Vidéotron as an undue preference for their subscribers to access provider-owned services compared with third-party mobile TV services.

The CRTC speculated on the potential impact of zero-rate streaming on the growth of mobile TV services but did not provide an analysis of any alleged market failure or examine the competitive consequences of this conduct. The CRTC did not describe how or in what market competition might be impaired nor did it consider pro-competitive explanations for the conduct such as competition for subscribers with other mobile providers using owned-content.

The CRTC's analysis contrasts with the *Competition Act*'s abuse of dominance provisions that require a demonstration of competition lessening. The lack of any analysis of the market, market power or lessening of competition in the CRTC's undue preference determination underscores the more rigorous legal standards required under the *Competition Act*. It is unclear why the communications context requires the less rigorous test through undue preference compared to the abuse of dominance standard required in other industries.

Interestingly, a critical aspect of this decision, which is being appealed to the Federal Court of Appeal, concerned the dispute around whether the mobile TV provider was operating as a broadcaster and, therefore, outside the *Telecommunications Act*. The CRTC found that the use of communications facilities brought the provider within the *Telecommunications Act* and its prohibition on undue preference. The example underscores the artificial separation between "broadcasting" and "communications" in a context of convergence where viewers may access the same content through various means.

Duplicating Merger Review for Broadcasters: CRTC's "public interest" Approval in the Bell/Astral Merger[22]

After a lengthy process, the CRTC approved Bell's acquisition of Astral Media on conditions of financial contributions to Canadian programming initiatives and the divestiture of various television and radio stations. The CRTC's "public interest" review and conditional approval followed an extensive examination and conditional approval by the Competition Bureau.[23]

21 Broadcasting and Telecom Decision CRTC 2015-26 – see: http://www.crtc.gc.ca/eng/archive/2015/2015-26.htm.

22 Broadcasting Decision CRTC 2013-310 – see: http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm.

23 Competition Bureau, "Competition Bureau Review of the Proposed Acquisition of Astral by Bell" (March 4, 2013), online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03544.html

In the backgrounder of its conditional approval document, the Bureau noted the entities' programming services are high-demand "must haves" for other distributors. The Bureau also identified concerns about the market power that the new vertically integrated entity would wield in negotiating with programmers and the potential for raising rivals' costs. Consequently, the Bureau's conditional approval required divestitures to address competitive concerns around increased prices, less innovation and reduced TV programming choice.

Following the Bureau's conditional approval, the CRTC held a public process to consider the public interest and evaluate "a wide set of factors," including the nature of programming and service to the communities involved, as well as regional, social, cultural, economic and financial considerations. Focal, though not determinative, was the funding (so-called "tangible benefits") to Canadian programming that the combined entity would be required to contribute. Discrete issues considered by the CRTC were the concentration of ownership in television and radio, impacts on independent production, vertical integration and anti-competitive behaviour.

On the latter two competition-related aspects, the CRTC made summary findings without clear economic reasoning. Specifically, the CRTC stated that vertical integration could "impede the efficient delivery of programming at affordable rates and reasonable terms of carriage and ultimately work against a competitive and dynamic marketplace in the Canadian broadcasting system" and asserted that "consolidation provides the whole entity (i.e., both programming and distribution undertakings) with greater opportunity and more incentive to act in an anti-competitive manner." The CRTC, therefore, imposed conditions in respect of competition atop the conditions required by the Competition Bureau.

The review achieved the extraction of some savings to shareholders from the takeover, channelling a slice of these economic gains to fund Canadian programming. However, the economic benefit from the duplicative review is unclear. The CRTC gave only a cursory analysis of competitive effects reflected in its sparse reasons on vertical integration and anti-competitive conduct compared to the Competition Bureau's more rigorous backgrounder.

Moreover, a public interest review process aimed at funding for Canadian content from a merger in the broadcasting sector risks negatively affecting the competitiveness of broadcasters who must compete with globally available conduits for content that are unencumbered by such profit-skimming from a proposed transaction. That is, Canadian broadcasters are encumbered by costs and constraints that their unregulated international competitors do not face, stifling their flexibility and attractiveness to investors. Again, accepting Canadian programming provides a public good, it is not clear that a tax on merger transactions involving a broadcaster is the most efficient revenue base to fund that benefit.

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