
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

FIFTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THE TECHNOLOGY,
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EDITOR'S PREFACE

This fully updated fifth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern the issues facing lawmakers and regulators, as well as service providers and new start-ups, in 29 jurisdictions around the world.

As noted in the previous edition, the pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models continue to fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today's world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a 'light touch' in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do

not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address 'network neutrality' concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

I would like to take the opportunity to thank all the contributors for their analytical input into this publication. In the space allotted, the authors simply cannot address all of the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

John P Janka

Latham & Watkins LLP

Washington, DC

October 2014

LIST OF ABBREVIATIONS

3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb

List of Abbreviations

FTTH	Fibre to the home
FTTN	Fibre to the node
FTTx	Fibre to the x
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling-public call offices
UAS	Unified access services
UASL	Unified access services licence

List of Abbreviations

UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access

Chapter 3

CANADA

Richard Corley, Michael Koch and Monique McAlister¹

I OVERVIEW

This chapter is a review of technology, media and telecommunications regulation in Canada. Policymakers and regulators have sought to address challenges relating to the increasingly important role of mobile telecommunications, the growth of the internet as a telecommunications and content-delivery network, and related social issues, including with respect to network security, personal privacy and security, consumer protection, and competition concerns. The convergence of the telecommunications and broadcasting services offered by the incumbent wireline and cable operators and the structure of the mobile industry have prompted initiatives to encourage the entry of additional facilities based competitors, as well as changes intended to protect consumers from unexpected mobile charges, spam and other concerns.

II REGULATION

i The regulators and regulated activities

Industry Canada

Industry Canada is a department of the federal government. The Minister of Industry has the broad power to develop telecommunications policy and to regulate certain aspects of

¹ Richard Corley, Michael Koch and Monique McAlister are partners at Goodmans LLP, Toronto.

the telecommunications industry.² The Minister of Industry is responsible for licensing the use of Canada's radio frequency spectrum under the Radiocommunication Act.³

The Canadian Radio-television and Telecommunications Commission

The Canadian Radio-television and Telecommunications Commission (CRTC) is an independent regulatory agency established by the Canadian Radio-television and Telecommunications Commission Act.⁴ The CRTC regulates and supervises the broadcasting and telecommunications industries in the public interest. The CRTC's powers and objectives relating to telecommunications are mainly set out in the Telecommunications Act,⁵ and those relating to broadcasting are set out in the Broadcasting Act.⁶ The CRTC reports directly to Parliament through the Minister of Industry when reporting on telecommunications matters, and through the Minister of Canadian Heritage when reporting on broadcasting matters.⁷

In July 2014, Canada's new anti-spam legislation (CASL) came into force.⁸ The CRTC has taken on primary enforcement responsibility to investigate, take action, and levy administrative monetary penalties against those who violate CASL.

The Competition Bureau

The Competition Bureau is an independent law enforcement agency that is headed by the Commissioner of Competition. It is empowered to administer the Competition Act,⁹ which is a federal statute governing business conduct across the economy, aimed at preventing anti-competitive practices in the marketplace. Specifically, the goal of the Competition Act is to maintain and encourage competition in Canada, in order to:

- a promote the efficiency and adaptability of the Canadian economy;

2 The Minister has other portfolios, not directly relevant to the telecommunications industry, such as responsibility for administering the Investment Canada Act with respect to all investments, except those that fall within a prescribed type of business activity as set out in Schedule IV of the Regulations. See: Investment Canada Regulations (SOR/85-611), schedule 4, s.8.

3 RSC 1985, c R-2; see: Spectrum Policy Framework for Canada (Ottawa: Industry Canada, June 2007).

4 2 RSC 1985, c C-22.

5 SC 1993, c 38.

6 SC 1991, c 11.

7 The CRTC must comply with policy directions and specific powers granted to the Governor in Council (Canada's federal Cabinet) under both the Telecommunications and Broadcasting Acts.

8 An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act S.C. 2010, c. 23.

9 R.S.C., 1985, c. C-34.

- b* expand opportunities for Canadian participation in world markets while at the same time recognising the role of foreign competition in Canada;
- c* ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- d* provide consumers with competitive prices and product choices.¹⁰

It should be noted that the ‘regulated conduct defence’ offers a form of immunity from enforcement under the Competition Act for legislatively authorised or mandated conduct.¹¹

In respect of the telecommunications and broadcasting industries, the Competition Bureau and the CRTC play complementary roles, as reflected in an agreement governing how the regulatory bodies interface with respect to competition issues (the Interface Agreement).¹² While neither entity is required to defer to the authority of the other in investigating and regulating anti-competitive practices within their statutory jurisdiction, the Interface Agreement suggests that they may, in fact, do so in certain situations, depending on the maturity of the market in question or the nature of the impugned anti-competitive practice.¹³ In September 2013, the CRTC and the Competition Bureau announced that they had signed a letter of agreement calling for even closer cooperation between the two agencies.¹⁴ Both agencies continue to work together, along with the Office of the Privacy Commissioner, to administer and enforce CASL (Canada’s antispam legislation). The Competition Bureau’s role in enforcing CASL is to address false and misleading representations and deceptive marketing practices in the electronic marketplace, including false or misleading sender or subject matter information, electronic messages, and locator information such as URLs and metadata.¹⁵

10 R.S.C., 1985, c. C-34, s.1.

11 R.S.C., 1985, c. C-34, s.45(7). For the regulated conduct defence to apply, all of the following requirements must be met: (a) valid legislation, (b) conduct is legislatively mandated or authorised, (c) the authority to regulate has been exercised and (d) the regulatory scheme has not been hindered or frustrated by the conduct (or used as a ‘shield’ to engage in unauthorised anti-competitive conduct).

12 See: The Competition Bureau, CRTC/Competition Bureau Interface (Ottawa: 24 July 2012) – at <www.competitionbureau.gc.ca/>.

13 The Interface Agreement states that the CRTC is more efficient at managing certain issues in product or service markets that are not yet subject to effective competition. However, it suggests that if and when the CRTC deems that a specific market has become sufficiently competitive and withdraws from regulating it, the Bureau would be responsible for regulating anti-competitive issues that arise.

14 See: Letter of Agreement between the Chairman and Chief Executive Officer of the Canadian Radio-television and Telecommunications Commission and the Commissioner of Competition of the Competition Bureau – at <www.crtc.gc.ca/>.

15 See: Canada’s Anti-Spam Law: Role of the Competition Bureau – at <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03390.html>.

Recognising the increasing importance of intellectual property to the Canadian economy, the Competition Bureau has sought to refine and clarify its approach to the enforcement of the Competition Act in cases where the impugned conduct relates to intellectual property. In 2000, after an extensive consultative process, the Competition Bureau published the Intellectual Property Enforcement Guidelines (IPEGs), which explained its approach to potentially anti-competitive conduct involving intellectual property. The Bureau is currently in the process of updating its IPEGs and on 2 April 2014, published a lightly revised draft update for review and comment.¹⁶

Canadian Intellectual Property Office (CIPO)

CIPO is an agency associated with Industry Canada, which is responsible for the administration and processing of the majority of intellectual property filings in Canada. CIPO's areas of activity include patents, trademarks, copyrights, industrial designs, and integrated circuit topographies.

Both CIPO and the Competition Bureau play an important role in promoting innovation, competition, and an efficient marketplace economy in Canada. On 2 April 2014 (on the same day as the Competition Bureau released its revised draft of its IPEGs), the two agencies announced that they had signed a memorandum of understanding (MOU) calling for closer cooperation between them.¹⁷

Other regulatory authorities and organisations

The Department of Canadian Heritage designs and administers programmes to ensure that Canadian broadcasting is imbued with the social, cultural and economic objectives as defined by the Broadcasting Act.¹⁸ The office of the Privacy Commissioner oversees compliance with the Privacy Act, which covers the personal information-handling practices of federal government departments and agencies, as well as the Personal Information Protection and Electronic Documents Act (PIPEDA),¹⁹ Canada's private sector privacy law. Further, as established by the Freedom of Information and Protection of Privacy Act,²⁰ each province in Canada has its own Information and Privacy Commissioner, whose role is to oversee compliance with provincial privacy laws. Every province and territory has its own public-sector privacy legislation that applies to provincial government agencies. For the private sector, some provinces have privacy legislation that has been deemed 'substantially similar' to PIPEDA and is applied instead of PIPEDA in some

16 See: Draft update of Intellectual Property Enforcement Guidelines – at <www.competitionbureau.gc.ca/>.

17 See: Memorandum of Understanding for Cooperation, Coordination and Information Sharing – at <www.competitionbureau.gc.ca/>.

18 See: Canadian Heritage: Broadcasting and Digital Communications – at <www.pch.gc.ca/eng/1294148855640>.

19 Privacy Act, RSC 1985 c P-21 and the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

20 R.S.O. 1990, c. F.31.

cases.²¹ The Commissioner for Complaints for Telecommunications Services (CCTS) addresses the concerns of consumers and small business customers relating to deregulated services.²² The CRTC Interconnection Steering Committee (CISC) undertakes tasks related to technological, administrative and operational issues on matters delegated to it by the CRTC. Finally, the Canadian Broadcast Standards Council (CBSC) deals with complaints from the public about Canada's private broadcasters' programming with respect to adherence to various self-regulatory industry codes and standards including those relating to violence, gender portrayals and advertising to children.

ii Ownership and market access restrictions

Large telecommunications carriers, including large radio spectrum licensees licensed under the Radiocommunication Act, are subject to restrictions on foreign ownership and control under that Act and the Telecommunications Act.²³ The restrictions, which in the past applied to all entities meeting the definition of a 'Canadian carrier' under the Telecommunications Act,²⁴ have in recent years been liberalised in an effort to improve access to capital for smaller carriers. As a result, only carriers with more than 10 per cent of the national market remain subject to the restrictions.²⁵ In practice, this means that only Canada's three incumbent cellular providers (the wireless incumbents)²⁶ continue to be subject to the restrictions. There are no ownership and market access restrictions applicable to resellers or other telecommunications service providers. For those carriers still subject to foreign ownership restrictions, the substance of the restrictions is similar to that applicable to licensed broadcasting undertakings, described below.

In contrast to the telecommunications landscape, all entities licensed under the Broadcasting Act are subject to Canadian ownership and control restrictions. As

21 Alberta, British Columbia and Quebec all have private-sector legislation which has been declared to be 'substantially similar' and will apply to private-sector businesses that collect, use and disclose personal information while carrying on business within those provinces. Ontario, New Brunswick, and Newfoundland and Labrador have privacy legislation, which applies to health information that has been declared substantially similar to PIPEDA with respect to health information custodians. Alberta and British Columbia have passed privacy laws that apply to employee information.

22 See: Commissioner for Complaints for Telecommunications Services – at <www.ccts-cprst.ca/>.

23 Pursuant to s.16 of the Telecommunications Act and regulations made pursuant to it, as well as s.9, s.10 and s.10.1 of the Radiocommunication Regulations.

24 'Canadian carrier' is defined as a telecommunications common carrier that is subject to the legislative authority of Parliament. As well, 'telecommunications common carrier' is defined as a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation. Telecommunications Act, S.C. 1993, c. 38A, s.2.

25 S.C. 1993, c. 38A, s.2, s.16.

26 Bell Canada, TELUS and Rogers Communications.

described below, the CRTC has exercised its powers to exempt from licensing and regulation internet and mobile broadcasting services.²⁷

The ownership restrictions for both broadcasting licensees and regulated telecommunications carriers may be summarised as follows:

- a* at least 80 per cent of the members of the board of directors of the operating company must be Canadian;
- b* non-Canadians may not beneficially own, directly or indirectly, more than 20 per cent of the voting shares of the operating company;
- c* non-Canadians may not beneficially own, directly or indirectly, more than 33.3 per cent of the voting shares of the holding company; and
- d* regardless of adherence to the above quantitative ownership restrictions, non-Canadians may not otherwise exercise 'control in fact' over the operating company or the holding company, which is a qualitative determination made by the CRTC.

In addition, for broadcasting licensees, the CEO of the operating company must be Canadian and there are additional restrictions on the ability of the holding company to control the programming decisions of the operating company where the CEO of the holding company is not Canadian, or where Canadians hold less than 80 per cent of the voting shares of the holding company or comprise less than 80 per cent of the board of directors of the holding company.

In addition to the foreign ownership restrictions, the CRTC restricts the level of concentration of ownership of television, distribution and cross-media holdings (i.e., radio, over-the-air television and newspapers) by a given entity in the markets.²⁸

Under the Investment Canada Act, the Minister of Industry and Minister of Canadian Heritage are responsible for reviewing the establishment and acquisitions of control of Canadian businesses, especially those of significant cultural significance, by non-Canadians.²⁹ By definition, such review can only apply to acquisitions of control of Canadian telecommunications and media businesses that are not subject to the foreign ownership restrictions described above.

Standing in sharp contrast to the government's decision to liberalise the restrictions on foreign ownership and control as it relates to providers with 10 per cent or less of the national telecom services market, is the October 2013 decision of the Minister of Industry to block the proposed acquisition of the Allstream division of Manitoba Telecom Services Inc by a foreign acquirer pursuant to the national security provisions of the Investment Canada Act.³⁰ This was the first, and so far only, affirmative rejection

27 Exemption order for digital media broadcasting undertakings (formerly the new Media Exemption Order), Broadcasting Order CRTC 2012-409.

28 See: Broadcasting Public Notice CRTC 2008-4 (Ottawa, 15 January 2008).

29 Investment Canada Act, RSC 1985, c. 28 (ICA). The Act applies when certain financial acquisition thresholds are met. Particular attention has been paid of late to the acquisition of Canadian companies by foreign state-owned enterprises.

30 Under the Act, non-Canadian investors seeking to acquire control of a Canadian business over certain financial thresholds must demonstrate that the transaction will result in a

of a foreign investment specifically on national security grounds. The decision – which was made without reasons, beyond an opaque statement that Allstream provides critical telecommunication services used by the government of Canada³¹ – has introduced significant uncertainty for potential investors and market participants. Allstream, it should be noted, holds less than 10 per cent of the national telecom services market. That the Investment Canada Act does not define ‘national security risk,’ nor give any guidance on which targets or investors pose particular concerns, increases the uncertainty.

Transfers of control and assignments

The Minister of Industry must approve transfers or assignments of radio licences and certain categories of radio spectrum licences.³² Industry Canada has laid out conditions and guidelines for the transfer and division of radio spectrum licences, in particular those for ‘commercial mobile spectrum’.³³

The CRTC must be notified, and in some cases must provide prior approval, for the majority of transactions that affect the ownership or control of broadcasting licensees.³⁴ Transactions requiring prior approval may result in public proceedings with an opportunity for public input.

Prior to consenting to any change in control of broadcasting licensees, the CRTC determines whether the transaction complies with the Canadian ownership and control restrictions (where applicable) and closely examines the potential for anti-competitive behaviour. Failure to adhere to the ownership requirements or CRTC regulations or policies can result in the CRTC either denying the transaction, or requiring the parties to amend their agreements or address the anti-competitive effects (e.g., by divesting certain assets) in order to bring the transaction into compliance. Often regulatory safeguards are put in place to promote adherence to the CRTC’s regulatory policies aimed at encouraging competition.

There is no prior approval requirement for ownership transactions involving telecommunications common carriers. However, the CRTC has the jurisdiction to review all telecommunication ownership transactions for adherence to the ownership rules. There are four types of reviews, ranging from those that are carried out on a confidential basis to those involving a public proceeding with the release of reasons.³⁵

‘net benefit to Canada.’ The Act also gives the government significant latitude to block a transaction that it determines may be ‘injurious to national security.’ See: Investment Canada Act, RSC 1985, c. 28 (1st Supp), at s.16 and Part IV.1.

31 See: Statement of the Honourable James Moore on the Proposed Acquisition of the Allstream Division of Manitoba Telecom Services Inc. by Accelero Capital Holdings.

32 Radiocommunication Regulations, Section 11.

33 See: Industry Canada CPC-2-1-23 – Licensing Procedures for Spectrum Licences for Terrestrial Services, as am.

34 Radio Regulations 1986, Section 11; Broadcasting Distribution Regulations, Section 4; Television Broadcasting Regulations 1987, Section 14; Specialty Service Regulations 1990, Section 10.

35 See: Telecom Regulatory Policy CRTC 2009-428.

The Competition Bureau must also be notified of and provided an opportunity to review proposed transactions over a certain threshold value.³⁶ In several recent high-profile media mergers,³⁷ the Competition Bureau has acknowledged the role of the CRTC's regulatory framework in its decision not to challenge the transactions.³⁸

The Competition Bureau and the CRTC may share similar concerns and implement complementary remedies in an effort to address concerns of potential anti-competitive behaviour. In some cases, the Competition Bureau has declined to intervene due to pending CRTC regulation.³⁹

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

The CRTC does not regulate the price, or most of the terms and conditions, of retail internet services. The CRTC does, however, regulate wholesale internet services provided in certain instances by incumbent local exchange carriers and cable carriers to smaller competitors who use these services or facilities to provide service to retail customers.⁴⁰ In addition, these major ISPs may not use an internet traffic management practice (ITMP) on these wholesale services that is more restrictive than the ITMP used in their own retail business, without prior CRTC approval. Without the CRTC's approval, ITMPs also may not result in 'noticeable degradation of time-sensitive' traffic (throttling), or the complete blocking of traffic.⁴¹

In October 2013, the CRTC initiated a public consultation as part of its review of the regulatory status of wholesale services and their associated policies.⁴² As of August 2014, two rounds of interventions have been filed in preparation for a public hearing scheduled for later in the year. Among the issues in play in that proceeding are the

36 Under Part IX of the Competition Act.

37 Significant consolidations include BCE Inc's acquisition of Astral Media Inc, Bell and Rogers Communications Inc's acquisition of Maple Leaf Sports & Entertainment, BCE Inc's acquisition of CTVglobemedia Inc, and Quebecor Média's acquisition of TVA.

38 In reaching its decision to consent to BCE Inc.'s Acquisition of Astral Media Inc., the Bureau stated that it carefully considered the regulatory framework, including the CRTC's Vertical Integration Code of Conduct and dispute resolution processes. See: The Competition Bureau, Competition Bureau Review of the Proposed Acquisition of Astral by Bell, Backgrounder (Ottawa: 4 March 2013) – at <www.competitionbureau.gc.ca/>.

39 See: The Competition Bureau, Competition Bureau Statement Regarding BCE's Acquisition of CTV (Ottawa: 1 February 2011) – at <www.competitionbureau.gc.ca/>.

40 See: CRTC policies regarding billing practices for wholesale high-speed access services: Telecom Regulatory Policies CRTC 2011-703, 2011-703, 2012-592 and 2013-70.

41 This policy was enforced against one of the major carriers in January 2012. See: Letter from Andrea Rosen, Chief Compliance and Enforcement Officer, CRTC, to Ken Thompson, Director and Counsel Copyright and Broadband Law, Rogers Communication Inc, Re: File Number 545613, on 20 January 2012.

42 See: Telecom Notice of Consultation CRTC 2013-551.

definition of an essential facility, the treatment of next generation access services such as fibre-to-the-home facilities and the costing of wholesale services.

Flow of traffic

The CRTC has established conditions under which ISPs may use retail ITMPs to control the flow of traffic on their networks.⁴³ ITMPs may include technical approaches, which ISPs use to manage traffic to prevent or respond to network congestion, and economic approaches,⁴⁴ which link internet service rates to how much the customer uses the internet. All retail ITMPs require prior disclosure to the CRTC. The CRTC has published guidelines for responding to complaints about ITMPs, and for enforcing the regulatory framework.⁴⁵ The development of internet protocol version 6 (IPv6), which allows for the prioritisation of traffic, may force the CRTC to revisit these issues from both a technical and economic perspective.⁴⁶

Thus far in 2014, there has been a marked decrease in throttling complaints to the CRTC.⁴⁷ In the United States, the Federal Communications Commission (FCC) is reevaluating its 'net neutrality' rules, following a US Court of Appeals decision in January 2014 that vacated the FCC's anti-discrimination and anti-blocking rules.⁴⁸

The ability of ISPs to prefer certain data streams, however, continues to be contentious, especially as it relates to the delivery of television services. In March 2014, the CRTC indicated that it was contemplating allowing cellphone providers to exempt over-the-top (OTT) services from internet data caps.⁴⁹ In August, however, the CRTC indicated that it would not allow cellphone providers to pick and choose which OTT services are exempt in a way that would privilege their own content.⁵⁰

43 Review of internet traffic management practices of Internet service providers, Telecom Regulatory Policy CRTC 2009-657.

44 Economic ITMPs may include monthly bandwidth capacity limits, where customers who exceed a predefined threshold must pay more for the amount of bandwidth they use.

45 See: Telecom Information Bulletin CRTC 2011-609.

46 The CRTC has not yet made definitive plans for IPv6 rollout, but has made the following rulings, in Telecom Decision CRTC 2012-96 at 8-19: (a) The CRTC will not petition CISC to authorise the use of public IPv6 addresses for current carriers' (IPv4) networks, despite the current shortage of IPv4 addresses; and (b) in the roll-out, the CRTC will not remove the requirement for cable carriers to provide static IP address allocation capability for their third-party internet access services.

47 See: Status Report – Complaints Related to Internet Traffic Management Practices (ITMPs), 30 June 2014.

48 See: *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014); 11-1355.

49 See: CRTC Let's Talk TV, Phase Two, the Choicebook.

50 See: Anja Karadeglija, 'CRTC asking new questions on mobile-TV and wireless data throttling,' 6 August 2014. The Wire Report, online: <www.thewirereport.ca/>.

Intellectual property enforcement

The enforcement of copyright on the internet will take a small step forward in January 2015 when the notice-and-notice regime mandated by Bill C-11 (the Copyright Modernization Act) will come into force. Under this regime, copyright holders can require that ISPs notify subscribers of infringement and then retain the records of such notice to enable the copyright holder to pursue legal action.⁵¹ This regime is the Canadian alternative to the American notice-and-takedown regime under the Digital Millennium Copyright Act of 1998, which mandates the removal of infringing content.⁵² In a decision that could have important implications for the enforcement of rights online, the British Columbia Supreme Court enjoined Google from indexing or referencing certain websites that were being used to advertise and sell products in breach of the plaintiff's intellectual property rights.⁵³ While leave to appeal has been granted, the British Columbia Court of Appeal declined Google's request for a stay of the interim injunction.⁵⁴

ii Universal service

Broadband internet access

Canadian governments continue to focus on subsidising and otherwise promoting broadband access for remote, rural and high-cost areas.⁵⁵

In its 2011 'obligation to serve' decision, the CRTC for the first time set a series of 'target' speeds for broadband service. It did not implement a mechanism to subsidise advancements in this area as a 'basic telecommunications service', however.

The CRTC's current three-year plan identifies a review of its basic telecommunications services, seeking to profile what is 'required by all Canadians to fully participate in the digital economy,' and the financial and funding implications thereof.⁵⁶ It is possible that this review could lead to new measures to be implemented in 2016–2017.⁵⁷ The federal government, for its part, has promised in its 2014 budget to provide C\$305 million over five years to extend and enhance broadband services to rural and northern communities.⁵⁸

Business has also prioritised northern broadband access in recent years, with the biggest development being the increasing proliferation of fibre-optic transportation projects. Whereas broadband access is currently provided to the far north almost exclusively through satellite backhaul, new projects like the public-private Mackenzie Valley line and the private Artic Fibre line provide the prospect of alternatives.

51 See: Bill C-11: An Act to Amend the Copyright Act.

52 112 Stat. 2860 (1998), s. 512.

53 See: *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063.

54 See: *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 295.

55 See: Broadband Canada: Connecting Rural Canadians – Other Federal and Provincial Programs – at <www.ic.gc.ca/>.

56 CRTC Three-Year Plan, 2014–2017. See, for example: Telecom Notice of Consultation CRTC 2014-44.

57 CRTC Three-Year Plan, 2014–2017.

58 The Road to Balance: Creating Jobs and Opportunities Act, Ch 3.4.

Mobile access

Industry Canada has begun consultations on a new spectrum allocation licensing process for rural areas.⁵⁹

iii Restrictions on the provision of service

Wireless roaming

Mobile wireless networks are comprised of numerous components; the base element is radio spectrum, over which all wireless signals are transmitted. In order to obtain a licence spectrum carriers must provide, among other things, roaming arrangements for other carriers (i.e., temporary spectrum for the customers of those carriers, when those customers go beyond the carriers' network coverage areas) at commercially negotiated rates, terms and conditions. To fulfil these requirements, wireless service providers enter into wholesale roaming, tower sharing, and network sharing arrangements. Providers may also negotiate wholesale arrangements with wireless carriers for varying degrees of access to those carriers' facilities or services.

The CRTC in 2014 is engaging in a review of these wholesale arrangements, to determine if the market is sufficiently competitive.⁶⁰ The year has seen significant enforcement in this area, specifically with respect to: (1) the imposition of exclusivity clauses in wholesale mobile wireless roaming agreements with certain new market entrants; and (2) the wholesale mobile wireless roaming rates charged to new entrants.⁶¹

Wireless Code

Responding to a request from wireless carriers concerned about the assertion of jurisdiction by the provinces, the CRTC established the new Wireless Code, which came into force in December 2013. The Code imposes service requirements on mobile wireless operators providing service to consumers and small business customers, including:

- a* banning three-year contract terms and providing customers with the ability to terminate their contracts after two years without cancellation fees;
- b* limiting data charges in excess of the usage defined in their plans at C\$50/month;
- c* limiting national and international data roaming charges in excess of the usage defined in their plans at C\$100/month;
- d* permitting cellphones to be unlocked after 90 days, or immediately if the customer pays for the device in full; and
- e* permitting customers to return cellphones within 15 days, accept or decline changes to the key terms of a fixed-term (i.e., two-year) contract and receive a contract that is easy to read and understand.⁶²

59 See: Industry Canada, Spectrum Management and Telecommunications – Consultation on Policy Changes in the 3500MHz Band (3475-3650MHz) and a New Licensing Process in Rural Areas.

60 See: Telecom Notice of Consultation CRTC 2014-76.

61 See: Telecom Decision CRTC 2014-398.

62 See: The Wireless Code – at <www.crtc.gc.ca>.

The Code has since been challenged by the major mobile providers, who argue that certain provisions ought not apply retroactively, to pre-existing contracts.⁶³

After eight months of experience, it is unclear whether the Code has delivered better prices for customers or growth for industry.⁶⁴

iv Security

Law enforcement agencies

The Criminal Code, the Competition Act, the Canadian Security Intelligence Service Act and the National Defence Act currently provide lawful access powers to law enforcement agencies (LEAs).

In order to lawfully intercept or wiretap private telecommunications, LEAs must – absent exceptional circumstances – obtain a judicial authorisation or warrant pursuant to the Criminal Code.⁶⁵ Similarly, the Supreme Court of Canada in *R v. Spencer* stated that police cannot obtain the identity of an internet user from the user's ISP without a warrant or court order, so long as the user has a 'reasonable expectation of privacy'.⁶⁶

However, the standard by which a warrant may be obtained for 'transmission data' (e.g. the author and recipient, though not the content, of an e-mail) will likely soon be lowered if Bill C-13, a new Act, is passed.⁶⁷ These requests for transmission data may be made by any peace officer or public officer, the latter being broadly defined in the Bill.

This lesser standard will, given *Spencer*, likely be subject to judicial scrutiny.

Politically, Bill C-13 contains many similar provisions to previous iterations of failed 'lawful access' legislation,⁶⁸ and has been criticised for attempting to cloak those same goals under the popular veil of cyberbullying prevention.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act is set to be broadened to apply to online casinos.⁶⁹

Privacy Commissioner

The Privacy Commissioner, who reports directly to the House of Commons, oversees compliance with the Privacy Act and the Personal Information Protection and Electronic

63 See: Federal Court of Appeal File No. A-337-13.

64 See: Derek Abma, 'Wireless code effects include higher prices, slow customer growth: analysts.' 12 August 2014. The Wire Report, online: <www.thewirereport.ca/>.

65 RSC 1985, c C-46.

66 Such an expectation would exist in the normal course. See: *R v. Spencer*, 2014 SCC 43.

67 See: Bill C-13, An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, s. 487 and s. 492. Bill C-13 passed its second reading in the House in April, 2014. The new Act would change substitute a standard of 'reasonable grounds of suspicion,' for the existing 'reasonable grounds for belief.'

68 Most recently, Bill C-30, An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts, which stalled after its second reading in the House of Commons.

69 See: Bill C-31, the Economic Action Plan 2014 Act, No. 1.

Documents Act. With the continuing growth of social media and internet applications such as those offered by Facebook and Google, her role in protecting the personal information of Canadians in the online world is expected to continue to expand. The Commissioner will also become responsible for overseeing compliance with the proposed Bill S-4, the Digital Privacy Act,⁷⁰ if and when this Bill is passed.

Unsolicited telecommunications

In 2008, the CRTC established a National Do-Not-Call list (DNCL) to help Canadians choose to avoid unsolicited telemarketing. Since then, companies have incurred significant penalties for violating do not call rules, with over C\$3 million in fines levied so far.^{71,72} In recent years, the CRTC has increased its efforts to monitor and enforce against unsolicited telecommunication; measures include a prohibition on automatic dialing-announcing devices for telemarketing (even where there is an existing business relationship) and the requirement of permanence for internal telemarketer do-not-call lists.⁷³

Anti-spam legislation

CASL is intended to help protect Canadians from e-mail spam, malware and other electronic threats. Absent consent and subject to certain exceptions, CASL prohibits the sending of commercial electronic messages (CEMs),⁷⁴ the installation of computer programs onto computer systems (both as defined in the CASL),⁷⁵ and the rerouting of electronic messages to unintended destinations. Violations of the CASL can incur fines of up to C\$1 million for individuals and C\$10 million for organisations.

The anti-spam provisions of the CASL came into force on 1 July 2014, with significant effects on electronic business communication. Subject to limited exceptions,

70 See: Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act.

71 See: 'Report on the Operation of the National Do Not Call List for the period April 1, 2012 to March 31, 2013, Presented To the Honourable James Moore, Minister of Industry.' 30 September 2013. <www.crtc.gc.ca/>.

72 Companies are also punished for violations by third-party telemarketers acting on the companies' behalves, as Bell Canada learned in 2010 with a record C\$1.3 million fine. See: CRTC Notice of Violation, File No. PDR 9174-890, 20 December 2010. Even small violations can incur significant fines; in 2013, Comwave Telenetworks paid a fine of C\$100,000 for failing to update its calling list from the DNCL on a monthly basis. See: CRTC Notice of Violation, File No. PDR 9174-1143, 28 March 2013.

73 See: Compliance and Enforcement Policy CRTC 2014-155.

74 A 'CEM' is generally defined to mean an electronic message that, having regard to its content, encourages participation in a commercial activity, namely any transaction, act or conduct or any regular course of conduct that is of a commercial character, regardless of whether there is an expectation of profit.

75 It is important to note that 'Computer Systems' can include smartphones, tablets, and other devices.

the provisions prohibit the sending of CEMs unless the recipient has expressly or implicitly consented to receiving the message; and the message meets certain form and content requirements and enables the recipient to withdraw consent. Implied consent can stem from referrals, the exchange of business cards, and membership in associations and clubs, subject to certain conditions. CEMs may also be sent to those with whom the sender has an 'existing business relationship' or 'personal relationship' (both as defined in the CASL). The CRTC received over 1,000 complaints relating to these provisions in the first 20 days of their implementation.⁷⁶

The computer program provisions of CASL will come into force on 15 January 2015. The provisions will prohibit, subject to limited exceptions, a person from installing computer programs, during the course of commercial activity, on a computer system, unless express consent from the user is obtained; the installation is in accordance with a court order; or the program is installed across an entire network of computers, to address a security need or to effectuate a network update or upgrade. The prohibition applies only if the computer system is located in Canada; or the person (or the person directing such person) installing the computer program is in Canada. Also, a person may not aid, induce, procure or cause to be procured the doing of any of these acts.

The CASL also prohibits the alteration of the transmission data contained in an electronic message that results in the delivery of a message to a destination other than, or in addition to, the destination that was specified by the sender.⁷⁷ An exception to this prohibition exists where the sender or recipient has provided express consent (or prior express consent), or where the alteration is made in accordance with a court order.⁷⁸ In addition, the CASL provides that a person cannot collect electronic addresses with a computer program designed primarily for that purpose, or to use such addresses.

IV SPECTRUM POLICY

i Development

Industry Canada is responsible for developing policy for, as well as the effective management of, radio frequency spectrum.⁷⁹ As part of its mandate pursuant to the Radiocommunication Act, the Minister of Industry Canada issues spectrum licences, generally for a 10-year term. In instances where spectrum supply cannot meet demand, such as for what Industry Canada refers to as 'commercial mobile spectrum', one of two competitive licensing processes is used:⁸⁰ comparative review or auction.⁸¹

76 See: The Canadian Press, 'CRTC flooded with more than 1,000 anti-spam complaints.' 4 July 2014 <www.cbc.ca>.

77 CASL, s. 7.

78 CASL, s. 7.

79 See: Spectrum Policy Framework for Canada (Ottawa: Industry Canada, June 2007).

80 See: The Spectrum Auctions section of Industry Canada's website for details on Canada's spectrum auctions and processes followed: <www.ic.gc.ca>.

81 Since 2001, Industry Canada has increasingly utilised auctions to award licences.

The proliferation of smartphones and tablets has led to exponential growth in the demand for commercial mobile spectrum, as mobile carriers must upgrade their network capacity and speeds. In 2013, Industry Canada pledged to allocate 750MHz of spectrum for mobile wireless services by 2017. It has since auctioned off the 700MHz band, and authorised both the repurposing of the 2,500MHz band for mobile broadband purposes (BRS) and the use by mobile satellite spectrum licensees of an ancillary terrestrial component. Consultations have also proposed the splitting of the 3,500MHz spectrum, which currently facilitates only fixed wireless service, in order to add capacity for mobile wireless services.⁸²

The design, and features of spectrum auctions has become a source of public controversy between Industry Canada and the wireless incumbents, with the former seeking to ensure a fourth national carrier. During the summer of 2013, Canadians were bombarded with advertisements from both sides,⁸³ with the issue subsiding in September of that year only after Verizon Wireless announced it would not be entering the Canadian market either through acquisitions of existing entrants or participation in the upcoming 700MHz auction.

ii Broadband and next-generation mobile spectrum use

Canada's wireless incumbents have invested heavily in the development and deployment of (long-term evolution) LTE networks to supplement their existing high-speed packet access networks.

The highly valued spectrum in the 700MHz frequency band was auctioned in January and February 2014. This auction included restrictions on the wireless incumbents' eligibility to bid on blocks of spectrum,⁸⁴ but nonetheless supported their deployment of these next-generation wireless networks.⁸⁵

iii Spectrum auctions

The Framework for Spectrum Auctions in Canada (the Auction Framework) describes the general approaches that Industry Canada uses to the issuance of spectrum licences.⁸⁶

In order to determine whether an auction process is necessary and appropriate, Industry Canada will consider:

a whether the demand for spectrum is expected to exceed the available supply; and

82 See: Industry Canada, Spectrum Management and Telecommunications – Consultation on Policy Changes in the 3500MHz Band (3475-3650MHz) and a New Licensing Process in Rural Areas.

83 See: The Big Three's 'Fair for Canada' campaign and corresponding federal campaign.

84 With the goal of fostering competition, spectrum caps were ruled to be within the Minister of Industry's authority to impose; see: *Telus Communications v. Canada (Attorney General)* 2014 FC 1.

85 See: 700MHz Spectrum Auction-Process and Results – at <news.gc.ca/>.

86 See: Framework for Spectrum Auctions in Canada, Issue 3 (Ottawa: Industry Canada, March 2011), which replaces the 2007 Auction Framework.

- b* whether government policy objectives can be fully met through the use of an auction.⁸⁷

Auctions will often not be appropriate, such as for:

- a* broadcasting licences;
- b* priority users, who rely on radio communication for law enforcement, emergency and public safety services, and for national defence; and
- c* global satellite services.

The next major auction of wireless spectrum licences will be the 2,500MHz band, scheduled to begin in April 2015.⁸⁸ This spectrum is well-suited for delivering both mobile wireless services to urban areas as well as fixed broadband services to rural Canadians. The licences themselves will be subject to a number of new rules, including spectrum caps, smaller licence areas, transfer restrictions and a material deployment ('use it or lose it') requirement.⁸⁹

Finally, in order to ensure a fair and competitive auction process, Finance Canada is considering granting the CRTC new powers to fine and regulate telecom providers.⁹⁰

V MEDIA

i Restrictions on the provision of service

The Broadcasting Act defines 'broadcasting' as including 'any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus'.⁹¹ 'Program' is also broadly defined, capturing sounds and images that are intended to inform, enlighten or entertain.⁹²

Every broadcasting undertaking is required either to hold a licence issued by the CRTC, or to be exempt from such requirements. Of the exemption orders issued by the CRTC, the most significant is that which exempts internet broadcasting and mobile broadcasting services, as described below.⁹³

Different classes of licences exist for each type of undertaking (e.g., distribution; programming), as well as for networks as a whole. All licensees are required to adhere

87 See: Framework for Spectrum Auctions in Canada, Issue 3 (Ottawa: Industry Canada, March 2011), which replaces the 2007 Auction Framework.

88 See: Industry Canada, 'Harper Government Announces New Measures to Benefit Canadian Wireless Consumers.' 10 January 2014.

89 See: Industry Canada, Licensing Framework for Broadband Radio Service (BRS) — 2500MHz Band. 10 January 2014.

90 The Road to Balance: Creating Jobs and Opportunities Act, Ch 3.4.

91 Broadcasting Act, S.C. 1991, c. 11, s. 10(1)(e).

92 See: Telecom Decision CRTC 9702.

93 Exemption order for digital media broadcasting undertakings (formerly the new Media Exemption Order), Broadcasting Order CRTC 2012-409.

to licence conditions and regulations aimed at promoting the broadcasting policy objectives contained in the Broadcasting Act, including the acquisition and distribution of Canadian content.

With the CRTC's approval, vertical integration – or the integration of content services and distribution networks within the same corporate structure – has grown in Canada. To address this phenomenon, the CRTC has issued a code of conduct, which provides general guidelines that govern the commercial arrangements between distribution undertakings, programming undertakings and exempted digital media undertakings.⁹⁴

In October 2013, the CRTC launched 'Let's Talk TV', a wholesale review of the regulations and policies governing Canadian television. This proceeding seeks to ensure the current regulatory framework is responsive to the technological innovation that has reshaped the way that television content can be accessed by Canadians.⁹⁵ The first two phases of nationwide consultation have already been completed. These included conversations with Canadian consumers across various platforms to identify the issues and priorities facing the Canadian television system. The third phase is a formal review of the television system and includes a comprehensive public hearing to be held in September 2014 and simultaneous online discussion forum, seeking the opinions of the broadcasting industry and consumers on proposals by the CRTC for a new television framework in Canada.⁹⁶ These proposals, include a controversial mandated 'pick and pay' or 'à la carte' channel packaging model that would allow Canadians to choose individual channels on a discretionary basis, rather than the existing large pre-assembled packages.

The genesis for this proposal is the federal government's mandate that Canadian families should be able to choose the combination of television channels they want, which will require channels to be unbundled.⁹⁷ If adopted, this will be the first system of its kind in the world. The CRTC will also be considering its policies regarding the creation of Canadian programming, access to non-Canadian programming, the relationship between distributors and programming undertakings and the relationship between distributors and subscribers. The CRTC's decision on Let's Talk TV will be released in 2015 and will have far-reaching ramifications for the entire Canadian broadcasting system.

ii Internet-delivered and mobile video content

Internet and mobile broadcasting services are exempt from the majority of the Broadcasting Act and the regulations and policies of the CRTC, pursuant to the CRTC's Exemption Order for Digital Media Broadcasting Undertakings (the Digital Media

94 See: Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011, Corrected Appendix 1.

95 See: Let's Talk TV: A Conversation with Canadians – at <www.crtc.gc.ca/eng/talktvparlonstele.htm>.

96 See: Broadcasting Notice of Consultation CRTC 2014-190.

97 Government of Canada, Speech from the Throne to open the second session of the 41st Canadian Parliament, 16 October 2003.

Exemption Order).⁹⁸ The Digital Media Exemption Order exempts from licensing and regulation services that provide broadcasting services that are delivered and accessed over the internet, or delivered using point-to-point technology and received through mobile devices.

Exemption under the Digital Media Exemption Order is conditional upon adherence to particular requirements, including prohibitions against providing an undue preference to any person (including itself) or subjecting any person to an undue disadvantage; and offering television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail internet access service. Providers of internet and mobile broadcasting services are further subject to disclosure requirements as it relates to their digital broadcasting and must adhere to certain CRTC requirements and dispute resolution mechanisms in the event of dispute.

Recent years have seen an expansion of OTT services such as Netflix, which provide services to Canadian consumers without utilising regulated distribution or programming platforms. This bypass of the regulated system has resulting in a growing concern about the competitive impact on regulated Canadian distribution and programming undertakings and their ability to meet their Canadian content and other regulatory requirements. In both 2011 and 2012, the CRTC stated that, while OTT broadcasting was growing, there was no clear evidence that it was harming the traditional Canadian broadcasting system.⁹⁹ The CRTC instead chose to maintain a ‘watching brief’ on whether and how to address the proliferation, and implications of, OTT broadcasting in the Canadian communications landscape.

Since that time, the CRTC has continuously resisted calls to ‘regulate’ OTT services by requiring them to make financial or Canadian programming contributions to the traditional broadcasting system, or alternatively, to relax the regulatory requirements of traditional broadcasters so they can compete more effectively with OTT players. In the meantime, Canadian broadcasters are launching their own OTT services as a competitive response to Netflix, such as the ‘Shomi’ service recently launched by Rogers Communications and Shaw Communications. There is speculation as to whether such efforts will prove complementary or cannibalistic to traditional television.¹⁰⁰ These issues will undoubtedly be raised during the CRTC’s upcoming Let’s Talk TV public hearing.

VI THE YEAR IN REVIEW

October 2013 was an important month on a number of fronts. That month the CRTC launched a public consultation as part of its review of the regulatory status of wholesale

98 Exemption order for digital media broadcasting undertakings (formerly the new Media Exemption Order), Broadcasting Order CRTC 2012-409.

99 See: Results of the fact-finding exercise on the over-the-top programming services – October 2011 – at <www.crtc.gc.ca>.

100 See: Anja Karadeglija, ‘Rogers-Shaw OTT product’s effect on cord-cutting up for debate.’ 26 August 2014. The Wire Report, online: <www.thewirereport.ca/>.

telecommunications services and associated policies, and also launched its 'Let's Talk TV' review of the regulatory and policy framework governing television in Canada.

The CRTC's review of wholesale telecommunications services has given rise to public hearings, scheduled for later in 2014, which are to consider, among other matters, the definition of essential facilities, the costing of wholesale services, and the treatment of next generation access services such as fibre-to-the-home. This year the CRTC has also been actively engaged with wholesale arrangements in the mobile wireless market specifically including enforcement with respect to: (1) exclusivity clauses in wholesale mobile wireless roaming agreements; and (2) the wholesale rates charged to new entrants for mobile wireless roaming services. The auction of spectrum in the 700MHz frequency band in January and February 2014 was a further important development, and reflected the government's determination to further encourage mobile wireless competition in Canada.

Also in October 2013, and in sharp contrast to the government's 2012 decision to liberalise the restrictions on foreign ownership and control with respect to small market share providers, was the decision of the Minister of Industry to block the proposed acquisition of the Allstream division of Manitoba Telecom Services Inc by a foreign acquirer under the national security provisions of the Investment Canada Act.

This decision has introduced significant uncertainty for potential investors and market participants.

On the broadcasting side, the 'Let's Talk TV' review has begun a wide-ranging conversation on the future of television in Canada. The first two phases of this nationwide consultation have already been completed, and the third, including comprehensive public hearings and an online discussion forum, is being held in September 2014. Under consideration are proposals by the CRTC for a new television framework in Canada that could include an 'à la carte' channel packaging model that would allow Canadians to choose individual channels on a discretionary basis, which would be the first system of its kind in the world. Policies regarding the creation of Canadian programming, access to non-Canadian programming, the relationship between distributors and programming undertakings and the relationship between distributors and subscribers are also under review. The resulting decision is to be released in 2015 and could have far-reaching ramifications for Canadian broadcasting.

VII CONCLUSIONS AND OUTLOOK

Regulators are constantly required to revisit earlier decisions and adapt the regulatory framework to meet the rapidly changing telecommunications and media landscape driven by technological innovation and experimentation in business models.

For example, the proliferation of vertical integration in the broadcasting industry, in particular the acquisition of television content suppliers by distribution services, carries not only cost-savings opportunities for industry, but also a set of anti-competitive incentives. The CRTC has responded with new rules to ensure the fair treatment of independent services in relation to their larger and vertically integrated competitors,

the protection of confidential commercial information, and the timely resolution of disputes.¹⁰¹

With respect to telecommunications carriers, Canadian regulators have taken a more passive role, opting to locate oversight more so under general competition law. Retail wireline services continue to be deregulated, with an emphasis instead on wholesale regulation, which emphasises downstream retail markets and an avoidance of preferencing within integrated vertical chains.

In contrast, the wireless market has seen increased regulation, with regulators seeking primarily to increase competition among carriers. Policymakers have also prioritised social objectives, as achieved through consumer protection mechanisms. These initiatives include the implementation of CASL and the Wireless Code, an increased focus on unsolicited telemarketing, and new privacy legislation aimed at improving the ability of law enforcement to investigate electronically.

Such significant change inevitably leads to some conflict, as evidenced by the ongoing tension over the government's attempts to ensure a fourth national wireless competitor, and the CRTC's concerns over throttling in the wholesale internet services market. Conflicts lurk and flare beyond the competition realm as well; for example, whereas the federal government would seem to favour law and intellectual property enforcement regimes that prioritise efficiency over privacy concerns, the Supreme Court stands as somewhat of a check, with the juxtaposition between the *Spencer* decision and Bills C-13 and S-4 a good indication of future battle lines. Even the far north of Canada is not immune from conflict, where the debate between fibre-optic and satellite systems rages on. With so many issues at a crossroads, it seems the Canadian technology, telecommunications, and media regulation landscape is likely to undergo another year of significant change.

101 See: Framework for Spectrum Auctions in Canada, Issue 3 (Ottawa: Industry Canada, March 2011), which replaces the 2007 Auction Framework.

Appendix 1

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Richard Corley is a partner at Goodmans and leads the firm's outsourcing practice group. Richard has over 25 years of experience advising clients on complex outsourcing transactions, technology M&A, joint ventures, cleantech and technology-related competition law matters.

Richard is recognised as a leading Canadian lawyer in numerous publications including: *The Legal 500 Canada* – Leading Individual, Technology, Media and Telecoms 2014, *Chambers Global* (Information Technology: Band 1 ranking), *The Lexpert / American Lawyer Guide to the Leading 500 Lawyers in Canada*, *The Canadian Legal Lexpert Directory*, *The Lexpert Guide to the Leading US/Canada Cross-border Corporate Lawyers in Canada*, Legal Media Group's *The Best of the Best*, *The Best Lawyers in Canada* and *The International Who's Who of Business Lawyers* for internet, e-commerce and data protection.

He is a frequent speaker at professional conferences and seminars on outsourcing and technology-related topics and was retained by the Competition Bureau of Canada to help develop competition guidelines for intellectual property and the internet.

Richard obtained an LLM from Yale Law School, his LLB from Osgoode Hall Law School (silver medallist) and clerked for Chief Justice McLachlin at the Supreme Court of Canada.

MICHAEL KOCH

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Michael Koch is a partner at Goodmans whose practice focuses on regulation and public law litigation, including communications, competition and copyright law. Michael has played a role in each of the major proceedings to establish the competitive framework for the Canadian telecommunications industry since serving as counsel to the CRTC in 1994.

Michael regularly represents clients before the CRTC, the Copyright Board of Canada, the Competition Bureau and Industry Canada and has acted for both the Competition Bureau and the CRTC. He has argued over 30 statutory appeals and judicial review proceedings before courts at all levels, including the Federal Court of Appeal and the Supreme Court of Canada. Michael provides strategic, industry-specific advice and representation to telecommunications and media companies, and to investors and other clients interacting with the communications and internet industries.

Michael's speaking engagements have included subjects in administrative law, communications regulation, copyright and competition law for LSUC, OBA, University of Toronto, Osgoode Hall Law School and internationally. Michael is recognised as a leading lawyer by legal publications including the *Canadian Legal Expert Directory*, the *Expert/American Lawyer Guide to the 500 Leading Lawyers in Canada*, *Chambers Global*, *Who's Who Legal* and *Euromoney*. He received his LLB from the University of Toronto.

MONIQUE MCALISTER

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Monique McAlister is a partner at Goodmans. She is a regulatory and commercial lawyer, focusing on all aspects of the communications and digital media industries. Monique provides advice on a broad spectrum of issues, including competitive applications and policy submissions; copyright law; foreign ownership restrictions on cross-border media investments; licensing applications, renewals and amendments; distribution agreements; programme supply and programme production agreements; advertising and promotional contests; and consumer protection and disclosure requirements for e-commerce. She has acted as counsel on major applications and policy submissions to the Canadian Radio-television and Telecommunications Commission (CRTC), Industry Canada, the Copyright Board and the Competition Bureau. Monique has been named the '2014 Toronto Communications Lawyer of the Year' by *Best Lawyers in Canada*; and is recognised as a leading lawyer by *Chambers Global*; by *Euromoney's Guide to the World's Leading Technology, Media and Telecommunications Lawyers* and *Euromoney's Guide to the World's Leading Women in Business Law* for technology, media and telecommunications; and by *Who's Who Legal: Canada* for regulatory communications. She received her LLB from Osgoode Hall Law School.

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