

Telecom Policy Review Panel

**Comments of the Consumer Groups (Public Interest Advocacy
Centre, the Canadian Internet Policy and Public Interest
Clinic, the Consumers Association of Canada, and the National
Anti-Poverty Organization)**

August 15, 2005

Executive Summary

1. What is at stake in this review is Canadians' interest in telecommunications, not simply revenue enhancement of telecommunications providers. The Consumer Groups are particularly alarmed that fundamental changes to the objectives of the *Telecommunications Act* may be addressed without sufficient time for public and expert consultation. The Consumer Groups note that the Panel's review may be productive without shaking these fundamental foundations.
2. Changes to framework arrangements for telecommunication regulations should not slavishly reflect current industry preoccupations, such as the current obsession, Voice over Internet Protocol (VoIP). Any regulatory framework incorporates tradeoffs between public scrutiny of the regulated industry and benefits from less regulation. Tangible evidence of advantage (and adequate consumer protection) are requirements for speculative change to the present regulatory environment.
3. Deregulation savings and burdens are infrequently quantified and removal of regulatory formalities most often favours those with more market power – rarely if ever consumers.
4. The present environment in Canada shows no signs of financial malaise for telecommunications providers and no public appetite for a whole-scale change. In such a situation, the Panel should move cautiously with regard to major reform.
5. Given the Panel may be urged to consider proposals to radically re-engineer the Canadian telecommunications environment, the Consumer Groups have put forward the following recommendations to provide balance in any consideration of change:
 - i) With regard to the policy objectives in the *Telecommunications Act*, subsections 7(a), (b), (c), and (i) should remain as is, given their fundamental importance as policy objectives for Canadian telecommunications.
 - ii) Subsection 7(h) should also remain as a stated policy objective, but should be expanded so as to expressly focus on the needs of disadvantaged users. Recommended wording: "to respond to the economic and social requirements of users of telecommunications services, in particular disadvantaged users;"
 - iii) Subsection 7(f) should be reworded as follows: "to ensure that market forces, where relied upon, and regulation, where required, are efficient and effective in achieving the objectives of Canadian telecommunications policy;"
 - iv) An additional clause should be added to section 34 of the *Telecommunications Act*, clarifying that the Commission shall or may regulate previously forborne markets, if it finds that competition is not sufficient to protect the interests of users, would be helpful in this respect.

- v) The contribution regime supporting delivery of service to high cost areas should continue to apply. However, it should be revised so as to place more reasonable limits on the amount of subsidy per subscribing household, to focus the subsidy on those most in need (i.e., permanent residents and/or non-wealthy households), to better accommodate local community needs and concerns, and to account for the increasing availability of competitive options in rural and remote areas.
 - vi) Movement towards symmetric regulation, where warranted and where such will not stifle competition, may assist consumers in achieving consistent customer service standards.
 - vii) ILECs should no longer enjoy one-sided limitation of liability clauses in their tariffs.
 - viii) Internet service providers should be subject to "common carrier" regulations under both the *Broadcasting Act* and the *Telecommunications Act* (specifically s.7 of the BDU regulations, and ss. 27(2) and 36 of the Telecom Act). In particular, ISPs should not be permitted to block access to third party websites or communications without a court order or regulatory direction, nor should they interfere with user communications, including withholding communications during disputes or otherwise.
 - ix) Expanding connectivity to geographic, special needs, and low-income communities requires government or regulatory intervention, despite technological innovations that are lowering the cost of service provision.
 - x) Subsidy programs should be continually reassessed so as to ensure that they are providing service where truly needed and that they are cost-effective.
 - xi) Government/regulatory intervention should focus on those communities and sectors most in need, and likely to benefit most from such access and empowerment. More resources should be devoted to supporting local community initiatives designed to extend broadband access to low income, unemployed, disabled, elderly, and other disadvantaged communities, and to assist those communities in making effective use of such access.
 - xii) Government/regulator should also intervene so as to ensure third-party access to broadband facilities on fair terms.
6. In particular, the Panel should seriously consider methods to increase redress for individual consumers in telecom matters, which redress has become largely shunted aside in the present regulatory environment. To this end, the Consumer Groups suggest:
- i) A "Telecommunications Ombudsman" should be created to address individual consumer complaints.
 - ii) The Ombudsman should have the power to make binding orders and award compensation up to \$1000 in individual cases.
 - iii) The Telecommunications Ombudsman should conduct inquiries into industry-wide systemic consumer protection issues.

- iv) The Telecommunications Ombudsman should be independent and have jurisdiction over all telecommunications service providers (TSPs), including wireline, wireless, Internet service, VoIP and long distance providers and resellers.
7. Regarding changes to Canada's connectivity policy, the Consumer Groups support the ubiquity of broadband access as a goal for all Canadians, however, not at any cost and not solely to be funded on the contributions of telecommunications customers. To this end, the Consumer Groups recommend to the Panel that:
- i) Government policy should focus not only on physical access to broadband and ICTs, but also on affordability, special needs access, awareness and training, and effective use by local communities. The status of all of these aspects of access should be measured and tracked on an ongoing basis.
 - ii) Expanding connectivity to geographic, special needs, and low-income communities requires government or regulatory intervention, despite technological innovations that are lowering the cost of service provision.
 - iii) Subsidy programs should be continually reassessed so as to ensure that they are providing service where truly needed and that they are cost-effective.
 - iv) Government/regulatory intervention should focus on those communities and sectors most in need, and likely to benefit most from such access and empowerment. More resources should be devoted to supporting local community initiatives designed to extend broadband access to low income, unemployed, disabled, elderly, and other disadvantaged communities, and to assist those communities in making effective use of such access.
 - v) Government/regulator should also intervene so as to ensure third-party access to broadband facilities on fair terms.
 - vi) The federal government should commit to stable, long term funding to community networking and public access programs and organizations, including the Community Access Program.
 - vii) Broadband deployment to unserved communities should be facilitated, where necessary, through tax-based subsidies rather than service/subscriber-based subsidies.
 - viii) Tax-based government funding programs for broadband deployment should be coordinated with the CRTC's contribution-based funding for the extension and upgrading of basic service to high cost areas, so that Canadians are not paying twice for essentially the same end-result.
 - ix) Facilities providers under either subsidy scheme (CRTC-administered or federal government-administered) should be selected via a technology-neutral competitive process based on

eligibility criteria drawn up by, or in close consultation with, the local community.

- x) The National Broadband Task Force's two recommended deployment models should be used as the basis for a new approach.

8. Advanced Information and Communications Technologies (ICTs) hold much promise as the agent for growth and equality of opportunity in Canada. The Panel should use its report to promote several key principles to ensure that the growth of ICTs proceeds in an orderly fashion and that this development benefits all Canadians:

- i) The federal government should renew and expand its support for local community initiatives to make effective use of ICTs.
- ii) The CRTC should be prepared to regulate Internet service prices and other aspects of service if and when it is clear that competition is insufficient to protect the interests of users.
- iii) The federal government should continue to work with stakeholders to develop industry guidelines, legislation and other measures designed to limit the risks that face consumers when they go online.
- iv) Consumer concerns about online dangers should be addressed by reducing the risks that face consumers when they go online, not by promoting the adoption of ICTs nor by simply assuring consumers that they are safe online.
- v) The federal government should continue its efforts to obtain international agreements and cooperative arrangements aimed at problems of online fraud, spam, spyware, privacy abuses, cross-border redress mechanisms, and other risks that consumers face when going online.

9. Another key area of policy development is protecting the privacy of Canadians. To date Canadians' privacy has been fairly well protected while using traditional telecommunications. This confidence is under stress. To reassure Canadians, who manifestly want more privacy protection in regard to telecom, the Panel should make privacy policy development a priority by considering the following suggestions:

- i) The federal Personal Information Protection and Electronic Documents Act should undergo a thorough and meaningful review, as scheduled, in 2006.
- ii) The federal Privacy Act should undergo a thorough and meaningful public review in 2006.
- iii) The federal government should propose and champion a Privacy Rights Charter similar to that proposed by Senator Finestone in 2000.
- iv) Federal legislative proposals to expand "lawful access" should be subjected to a full and fair public debate before being adopted.

- v) The federal government should take additional steps to ensure that electronic authentication mechanisms developed and/or used in Canada are designed and implemented so as to minimize if not avoid the collection, use, retention and disclosure of personal information.
10. Finally, as Canadians turn in increasingly large numbers to broadband network services of all kinds, issues of security, fraud, confidence and unfairness become paramount to consumers. The Panel should consider moving the dialogue forward on protecting Canadians from fraud and unfairness while accessing telecommunications. To this end, the Consumer Groups suggest a number of initiatives, including that:
- i) The federal government should continue its efforts to develop effective legislative and regulatory responses to online threats, both federally and across provinces and territories, where self-regulatory approaches have proven insufficient or where market forces are clearly insufficient to address the problem. In particular:
 - a. provinces and territories should be encouraged to adopt consumer protection legislation that proscribes unfair business practices such as mandatory arbitration clauses, and overbroad liability limitation clauses, and that requires effective forms of notice in the online context.
 - b. enforcement of existing laws as they apply to new online threats such as spyware should be improved.
 - c. where existing laws are clearly inadequate to address new online threats such as spam and spyware, legislation targeted at those threats should be developed.
 - d. legislative and regulatory approaches to these problems should not rely upon individual consumers or other private actors to enforce the law; instead, governments should take responsibility for a significant share of the enforcement burden themselves.
 - ii) The federal government should continue to facilitate and encourage multi-stakeholder initiatives to develop codes and guidelines for business best practices in the online context, and should ensure that consumer/public interests are well represented on such bodies. In particular,
 - a. That the Canadian Code of Practice for Debit Card Services should be used as the basis for a new or expanded Code of Practice focusing on online banking.
 - b. The federal government should continue to work with other governments to address the international aspects of online fraud, security, network dependability and consumer protection, though the OECD and other international bodies.
11. In closing, the Consumer Groups note that the CRTC has essentially disabled its own ability to evaluate the reasonableness of regulated prices of monopoly telecommunications services to customers by removing reporting of utility service

pricing. This is subversive of the Commission's responsibility to set just and reasonable rates.

12. In setting priorities for telecom policy review, the Consumer Groups submit that consumer confidence is the key to successful progress and only through prioritizing consumer protection measures can any other innovations succeed.

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Introduction

13. The Public Interest Advocacy Centre (PIAC) is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services, such as telecommunications.
14. The Canadian Internet Policy and Public Interest Clinic (CIPPIC) was established at the University of Ottawa, Faculty of Law in the fall of 2003. It is the first legal clinic of its kind in Canada. The clinic represents consumer and other public interests in such areas as intellectual property, consumer protection in e-commerce, domain name governance, personal information protection and privacy. CIPPIC aims to fill voids in public policy debates on technology law issues, ensure balance in policy and law-making processes, and provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology.
15. The Consumers' Association of Canada (CAC), founded in 1947, is an independent, not-for-profit, volunteer-based, charitable organization. CAC's mandate is to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems.
16. The National Anti-Poverty Organization (NAPO) is a non-profit, non partisan organization that represents the interests of low-income people in Canada.
17. Collectively, these groups will be referred to as the "Consumer Groups" throughout this submission.
18. The Consumer Groups welcome this opportunity to comment on Canadian telecommunications policy and hopes that the Panel will find the following submission helpful, especially given the Panel's broad mandate and short timeline for reporting.
19. The Consumer Groups have decided to focus our comments on several areas that are key to consumers. Largely because of time and resource constraints, we have chosen not to address certain groups of questions in the Panel Discussion Paper when the issue has more indirect impact upon consumers, such as spectrum management rules or where we believe the record before the Panel will likely be complete as a result of submissions by other stakeholders. The silence of the Consumer Groups on this matter is not, however, indicative of a lack of interest but rather the prioritization process based upon the above noted parameters. However, we reserve the right to comment on the submissions of other parties in these areas in our reply comments to the Panel.

20. Our comments will generally follow the order of issues and questions as outlined in the Panel's June 6, 2005 Consultation Paper, however, where an answer relates to questions in another part of the Consultation Paper, we have tried to provide a cross-reference in the text of the answer.

Overview of the Task of the Telecommunications Review Panel

21. It has been more than a decade since Parliament responded to the Canadian manifestation of the global liberalization of telecommunications markets by the passage of the *Telecommunications Act*¹ (the "Act"). The Act provided a significant modernization of the structure of regulation set out in the provisions of the *Railway Act*, permitting the regulator, the Canadian Radio-Television Telecommunications Commission (CRTC) to substantially modify its methods of supervision over the existing former monopoly providers of telephone service, largely with a view to increasing the influence of market forces over the offering of products and services. The Commission was allowed to refrain from regulating services offered by those providers where there was sufficient competition to protect the interests of consumers.
22. In the time since the Act came into force, the telecommunications industry has experienced the boom and bust of the dot com business phenomenon, the rise of digital wireless networks as major economic and cultural players, the consolidation of a plethora of new entrant telecom companies into a handful of major service suppliers, as well as the entrenching of the Internet and services offered through the IP protocol as the principal enablers of future communication. It is not untoward that a review of the capabilities of the current regulatory framework for telecommunications in Canada take place at this time.
23. Prior to setting out their Responses to the questions posed in the organizationally helpful Consultation Paper issued by the Panel, the Consumer Groups believe that there are a number of observations that we hope may be of assistance to the Panel; in the consideration of its task.
 1. What is at stake in the resolution of the issues within the ambit of the Panel's review is more than simply the making of arrangements for the most expeditious method of revenue enhancement for current telecommunications industry players. Telecommunications has been overwhelmingly accepted as the likely driver of the knowledge based economy. Telecommunications delivers, and will continue to deliver, products and services that will be accepted like basic telephone service as a natural component of participation in society as a citizen. Access, choice, control of transmission, rights and redress in electronic marketplace are natural outgrowths of the regulatory structure chosen. Any vision must have the

¹ S.C. 1993, Chap. 38, as am.

perspective of the design of a public interest and commercial ecosystem with appropriate checks and balances.

2. Given the small window of review from a time and resources perspective, the Consumer Groups are alarmed that the Panel wishes to ventilate the objectives of the *Act* for potential change. With respect, the principles set out therein require far more involved public consultation and expert opinion than could be provided within the purview of this panel. There is no lack of thoroughness that would be shown by the panel in choosing to accept the set of values presented by the current *Act*.
3. Changes to framework arrangements for telecommunication regulations should not slavishly reflect the flavour of the month in industry prognostication. Since the initial Commission Decision regarding long distance competition and the passage of the *Act* there have been many industry diagnoses with varying degrees of urgency of their adoption with accompanying warnings of doom and gloom should the universe not be arranged in accordance with that thinking. Major players have concocted madcap schemes such as the ILECs plan in the 90's to double cable Canadian homes or policy bogeymen like the cableco's "death star satellites". Favourable response by policymakers to this feverish talk would have been ruinous for the industry and for consumers. Dr. Bauer's response herein at A1 also notes the difficult fit between industry predictions and the actual future that unfolded.
4. Any regulatory framework incorporates tradeoffs between levels of scrutiny of the regulated company and the potential company and system benefits that could otherwise be gleaned in a state of less regulation. The Consumer Groups urge that tangible advantage in the form of consumer protection should not be bartered for potential benefits of a purely speculative nature. Furthermore, our experience has shown that the benefits gleaned by deregulation are often unequally distributed. A review of telephone bills ten years after the CRTC's long distance competition Decision 92-19 showed that despite the happy talk, most Canadians were paying higher bills and prices lagged industry productivity gains.²
5. Process concerns should not trump substantive regulatory objectives. Just because the method of regulatory scrutiny is cumbersome, doesn't mean the idea of scrutiny should be jettisoned. It is frequently difficult to align the interests of the regulated in reducing procedure with the beneficiaries of the regulation. Deregulation savings and burdens are infrequently quantified, leaving the post mortems to the spin merchants. As well, while alternate methods of resolving issues and disputes can be successful, in most cases informality works against the interests of the least resourced party in the dispute.

² P.Lawson, A.Briggs, *A Comparative Analysis of Residential Telephone Service, 1992-2002*, PIAC, 2004. Online: <http://www.piac.ca/PIACTelcoRev.pdf>

6. The telecommunications industry in Canada (excluding broadcasting communications) generated almost \$25 billion in value added Gross Domestic Product (GDP) in 2004, that amount being 2.4% of the Canadian total for GDP. The industry has achieving penetration, price and connectivity levels for key services of basic telephone and Internet that are the envy of the developed world. The Decima survey filed, while potentially indicating issues requiring further policy development has not shown a public appetite for a whole scale change in the operating environment for telecom services that has been created by legislation and Commission decision. The Panel should make certain that these achievements are the minimum baseline which any reform should not adversely affect or compromise.

Implications of IP and other new technologies

A.1 Comment on the technological developments described above and provide your views on how telecommunications and ICT technologies will change over the next 10 years.

24. Please see the comments of Dr. Johannes M. Bauer (submitted with these comments) regarding question A.1.

A.2 Comment on the potential for different networks (i.e. wireline telephone and cable networks, terrestrial wireless, satellite and hybrid networks) to carry existing and new ICT applications. Provide any relevant information on the infrastructure costs, bandwidth, security, reliability, and other features of such networks.

25. Please see the comments of Dr. Johannes M. Bauer regarding question A.2.

A.3 Are “one pipe, multiple applications” networks likely to become the primary means for ICT applications to be provided to Canadians? If not, why not?

26. Please see the comments of Dr. Johannes M. Bauer regarding question A.3.

A.4 Are there likely to be multiple IP network providers offering service to the home, business and public sector? If so, how many and which types of network providers are likely to be providing service to each market? If not, which types of network providers are likely to serve each market and with which technologies?

27. Please see the comments of Dr. Johannes M. Bauer regarding question A.4.

A.5 Is the Canadian competitive environment in telecommunications likely to evolve into a form of duopoly (i.e. incumbent local exchange carriers (ILECs) versus cable companies)? If so, what would be the implications for the telecommunications and ICT markets? What would be the implications for the regulatory framework?

28. As we have noted in our response to Question B.29, there are indications that the elements of the Canadian telecommunications industry have become increasing

concentrated³. The careful roll-out of independent wireless providers of the previous decade has been turned into a shambles by the subsequent takeovers by ILECs and cablecos. Likewise M & A activity among the CLECs and independent LD providers has left few dominos standing.

29. Some of the organizations making up the Consumer Groups herein have, in the past, expressed dissatisfaction with the results of the *Competition Act* review that has frequently preceded the M & A activity. It is apparent that clearance has been obtained under the current “efficiencies test” under the Act, which is of little assistance to ordinary telecommunications users coping with the anti-competitive aspects of the removal of a competing entity.⁴ Very clearly, the concentration of ownership effected by this activity has worrisome implications for consumers in terms of choice, price and quality of the services desired.

30. Of note is the fact that the rise of the cable-telco duopoly has gone hand-in-hand with demise of content- carrier model for the “Information Highway” that was to guide the development of the networks of the future. The ideals of multi-competitors in carrier and programming vying for eyeballs and use in the marketplace died shortly after it had sold policymakers on this view of the future. Convergence has largely meant the return of vertical integration. As Peter Chernin of News Corporation stated:

“You need to have enough market dominance that people are forced to deal with you. There are a great arguments about whether content is king or distribution is king. At the end of the day, scale is king. If you can spread your costs over a large base, you can outbid your competitors for programming and other assets that you want to buy”⁵

31. Dr. Bauer’s responses in the Economic Regulation questions of the Discussion Paper provide some means of adapting the regulatory framework to meet the challenge of the evolving duopoly. It is of considerable importance that regulatory authorities and policy makers not engage in an exercise of pretending that the existence of weak competition or a duopoly is the same as a workably competitive market. The absence of rose coloured glasses is of particular relevance when assessing the existence of competition or anti-competitive effect in the low volume, residential segments of the consuming population. The fact that all remaining providers in a concentrated market may be content to compete only in some markets and on some aspects of products and services may trigger a need for “interventionist” practices to secure rights and protections that existing competition cannot deliver.

³ As noted in our response to B.29, Non-ILEC, Non-Cableco ISPs declined from 47% of the market to 16% of the market from 1998 to 2003.

⁴ See “Rogers Wireless kills CityFido”, Decima Reports, Vol. 9 Issue 3, for negative consumer implications arising from the takeover of Microcell by Rogers Wireless.

⁵ Quoted in “Global Media, Neoliberalism, and Imperialism”, Robert McChesney, *Monthly Review*, March 2001 at p. 4. Online; <http://www.monthlyreview.org/301rwm.htm>

32. The wireless industry in Canada presents a good example of the aforesaid observation. The forborne Canadian wireless market has resisted pressure for many years from customers to implement wireless number portability.⁶ This has meant that Canada is now the last major market in the developed world without mobile number portability, despite the underlying database structure existing for wireline local number portability and despite a very limited number of carriers (presently three – all controlled by major ILECs or cable companies – and one reseller). In fact, it has taken a direct dictum from the Government in the Budget Speech to convince both the wireless industry and the CRTC to take this quality of service issue seriously. Although the CWTA has promised in a press release to table a study by a consultant on implementing WNP and the CRTC has allowed them to proceed in this manner (despite the Budget speech objective) Canadians very likely will not see wireless number portability any time soon.
33. Other customer problems have illustrated the incomplete aspects of wireless competition. In (B.29) below, we note that severe billing problems plagued major wireless carriers and that consumers had few avenues of redress. These are problems that are likely exacerbated by concentration. The wireless service market itself has dropped from 4 real competitors to three, each owned by a cable company or major ILEC. Despite the Competition Bureau's approval, the Consumer Groups have grave concern over dwindling consumer choice and price increases,⁷ which appear already to be happening.
34. To reiterate, while regulation cannot create multiple viable competitive entities, it should not be set up to assume that the industry will be responsive to customer needs in the same fashion as if such competition exists. As well, particularly in concentrated telecommunications markets, policy makers or regulators must occasionally respond with interventions that address public interest concerns in an even-handed fashion.
35. Please see also the comments of Dr. Johannes M. Bauer regarding question A.5.

A.6 Is vigorous inter-regional competition by ILECs and cable companies likely? Please explain the basis for your views.

36. Please see the comments of Dr. Johannes M. Bauer regarding question A.6.

A.7 Assuming a “one pipe, multiple applications” environment does evolve, describe the effect of this environment on the market position of existing service providers (e.g. ILECs, cable companies, wireless service providers, Internet Service Providers) and any new entrants. Provide market share projections, if possible.

⁶ Please see PIAC's report *Mobile Number Portability* (May 27, 2005). Online: http://www.piac.ca/MNP_draft.pdf

⁷ See Letter from PIAC to Competition Bureau Re: Proposed Acquisition by TELUS Mobility of Microcell (Sept. 16, 2004), Online: <http://www.piac.ca/JorreLETTER.pdf>

37. Please see the comments of Dr. Johannes M. Bauer regarding question A.7.

A.8 Comment on the need for ongoing financing of advanced and legacy network infrastructure in Canada and on how such funding should be obtained by network providers in a “one pipe, multiple applications” environment. Since VoIP and other advanced ICT services may be provided separately from access networks, how should network infrastructure be financed in the future?

38. Please see the comments of Dr. Johannes M. Bauer regarding question A.8.

A.9 Provide any other comments on the implications of IP and other new technologies for the Canadian telecommunications and ICT sector that the Panel should take into account in developing its recommendations.

39. Please see the comments of Dr. Johannes M. Bauer regarding question A.9.

Wireless service: social implications

A.10 Comment on the development of wireless services in Canada over the next 10 years and the implications for Canadian productivity, competitiveness and social benefits.

40. The Consumer Groups are concerned that given the increasing use of wireless services by Canadians, its growing profitability for companies and the many and varied implications of coming mobile commerce (M-commerce) applications will greatly complicate this market for consumers in the near to medium term.⁸ At the moment, as illustrated by the mobile number portability (MNP) delay, the wireless industry appears rudderless. At the present time, if and when problems emerge in wireless, consumers may have to resort to political agitation or direct consumer action such as protest websites (see below, B.29) to compel change.
41. In addition, together with increasing use of IP protocol for communication, wireless presents a potential challenge to the overall viability of PSTN. Will there be sufficient revenues from the customer base to maintain this service in the future?
42. Please see also the comments of Dr. Johannes M. Bauer regarding question A.10.

⁸ M-commerce risks may include: unauthorized or unintended purchases, inadequate disclosures of terms and conditions, marketing to children, deceptive solicitations, spam, security of payment mechanisms, payment authentication disputes, privacy and location tracking, and provision of ‘illegal’ content. See Transatlantic Consumer Dialogue Resolution on Mobil Commerce, DOC NO. INFOSOC-32-05 DATE ISSUED: AUGUST 2005. Online: <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=283>

A.11 Please add any comments on the evolution of telecommunications networks or the telecommunications industry structure over the next 10 years that the Panel should take into account in developing its recommendations.

43. Please see the comments of Dr. Johannes M. Bauer regarding question A.11.

Telecom Policy Objectives

B.1 Should the existing policy objectives set out in section 7 of the Telecommunications Act be changed? If so, what should they be?

44. In our view, the existing policy objectives set out in section 7 of the *Telecommunications Act* remain largely appropriate.
45. The two grand pillars of this section are subsections 7(a) and 7(b) that call on the regulator:
- (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
 - (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
46. These two objectives are advanced by the universal service obligations of the main telecommunications carriers, as well as their obligation to provide reliable, high quality and affordable services to all Canadians. The goal of ubiquitous, reliable and affordable service has influenced the CRTC and its predecessors over the years to implement the quality of service reporting mechanisms now in place, TTY and message relay service for deaf and hard of hearing Canadians and creation of the high cost serving areas (HCSA) contribution regime to ensure service in rural and remote areas.
47. These two objectives are unassailable in a country as geographically large and varied as Canada. The sense of community facilitated by well-functioning telecommunications is as important to Canadian sovereignty and identity as any other longstanding major government policy such as universal health care. Subsection 7(b) of the *Act*, in referring directly to affordability, recognizes that cost should not become a barrier to reasonable access to the world of Canadian telecommunications.
48. It is worthwhile underlining, that neither of these objectives spell out that they are to be achieved only through market forces or by commercial or economic endeavor. Both objectives recognize that public policy comes from the society as a whole, not simply from the public in its role as a consumer of goods and services. The goals

recognize that important public policy goals cannot be defined solely within the market and that properly specified and implemented social goals are fully compatible with the business requirements of telecommunication service providers. These objectives have the key role of firmly rooting telecommunications policy and the industry itself in the Canadian society in which it exists – a society with a well-developed social, economic and political fabric.

49. The consumer groups suggest that any attempt to weaken or remove these objectives could rend the Canadian societal fabric that has been woven by Canadian telecommunications policy since the early 1900s. We would not change a word in either section.
50. The public interest aspect of the *Act's* objectives extend beyond the aforesaid two sections. To a lesser extent, subsections 7(c) and 7(h) and 7(i) play supporting roles in a vision of Canadian telecommunications that is not solely dictated by corporate economic priorities. Subsection 7(c) “to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications” has been interpreted by the CRTC and the courts to include not only economic efficiencies but also to safeguard Canadian telecommunications from “capture” by proprietary network technologies. This safeguarding of open access/open architecture/open source will only become more important as newer technologies such as VoIP and the long-sought “convergence” of telecommunications, broadcast and other “content” services places more control of the telecommunications system in the hands of the individual user at the “application” layer.
51. Subsection 7(h) calls on the regulator: “to respond to the economic and social requirements of users of telecommunications services”. This objective squarely places the onus on the CRTC to consider the effect of telecommunications policy and reality from the perspective of the individual telecommunications customer or user. The practical implications of this perspective provides the basis for, and argues for the fairness of, measures such as the requirements placed upon carriers to provide accessible telecommunications to persons with disabilities. It also supports the affordability of telecommunications for all Canadians, but especially those in disadvantaged groups. In the Consumer Groups’ view, the only improvement to subsection 7(h) would be an explicit acknowledgement of this role of safeguarding the disadvantaged, to emphasize that particular obligation.
52. Finally, of the “social objectives” contained in s. 7 of the *Telecommunications Act*, none have such immediate currency to the telecommunications customer as the goal of promoting the privacy of Canadian telecommunications users. In a world of increasing collection, use and disclosure of personal information in large marketing databases, incessant telemarketing and identity theft, the Canadian telecommunications sphere, under the watchful eye of the CRTC has maintained a strong commitment to privacy of subscribers and users of telecommunications. In many cases, the protection afforded to subscribers under this policy objective has equaled or exceeded anything that could be ordered or suggested by the federal or

various provincial privacy commissioners. To remove this objective, on the basis that privacy protection now exists in other statutes such as PIPEDA ignores the real advantages of a sector-specific consideration of larger privacy issues. For example, the CRTC's rulings on telemarketing, although currently undergoing revision in the form of recently introduced "Do Not Call" legislation, presented real tools to consumers to combat this highly-privacy-invasive form of marketing. What was lacking with the CRTC telemarketing remedies was not the policy rationale, but rather the enforcement tools the CRTC needed to bring the policy into effect.

53. Several of the "competition-oriented" policy goals of s. 7 also merit comment, to a large extent for the reason that they tend to be cited by commercial telecommunication providers to render ineffective or "cancel out" the social objectives in s. 7 mentioned above.
54. A particular example is subsection 7(f), which exhibits unhappy draftsmanship that conflates means and objectives, and thereby subverts the purpose of this important provision.
55. Competition (i.e., "reliance on market forces") and regulation are both *means* of achieving policy goals; they should never be stated as ends in and of themselves. By including "reliance on market forces" as a policy objective alongside other objectives such as reliable and affordable services, the CRTC is forced to focus on means rather than ends, and true policy goals may be inappropriately subverted.
56. If there is a desire to require the CRTC to rely on certain means of achieving the goals of telecommunications policy, or to give preference to one means over another means, it is appropriate to state so in a separate provision focusing on means. Indeed, the *Telecommunications Act* already contains such a provision: section 34 (Forbearance) *requires* that the Commission refrain from regulating where competition is sufficient to protect the interests of users. In any case, such a provision clearly does not belong in the policy objectives section of the Act.
57. Even if treated appropriately (i.e., as a preferred means rather than a policy objective), the wording of subsection 9(f) is problematic. It reads:

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;...
58. Under this provision, "increased reliance on market forces" is to be fostered regardless of whether it is efficient and effective, unlike regulation, which when required, must be "efficient and effective". We agree with a requirement for regulation to be efficient and effective in achieving the goals of telecommunications policy, but the same requirement should apply to other means used by the Commission, including reliance on market forces. Over ten years of experience

with increasing reliance on market forces in telecommunications has confirmed that they are not always efficient or effective. In particular:

- a. Competition, based on current technologies, is not economic everywhere. Subsidies are needed in order to ensure that basic service is delivered to "high cost areas". As long as this remains the case, regulation will continue to be necessary to administer such subsidies – and must do so in a competitively neutral manner, without subsidizing uneconomic competition. See B.27 and D.3 for more on this issue.
- b. Competition in a previously monopolized industry with large sunk costs takes time to develop. The regulator has a critical role to play in ensuring that new entrants have a fair opportunity to compete against incumbents where such competition is economic, while maintaining a level playing field.
- c. Competition can disappear over time, as new entrants (or incumbents) find that the profits from serving certain areas or population segments do not make business sense. The regulator has a key role to play in monitoring the state of competition in all markets (geographic, demographic, and service-related) and being prepared to intervene or re-regulate where appropriate. See B.32 for an example of a currently unregulated service for which regulation is clearly needed.

59. We note that s. 34 of the *Telecommunications Act*, provides for the deregulation of services where competition develops to the point that it is sufficient to protect the interests of users, but fails to provide for re-regulation where competition deteriorates to the point where it is no longer sufficient to protect the interests of users. As currently worded, this section could be interpreted as impeding the ability of the Commission to re-regulate where appropriate. An additional provision, clarifying that the Commission shall or may re-regulate previously forborne markets, if it finds that competition is not sufficient to protect the interests of users, would be helpful in this respect.

- a. A large part of competition theory assumes that consumers have full information and behave "rationally" based on that information. Aside from the flawed assumption about "rational" behaviour (which is worthy of more attention than we can give to it here), the similarly flawed assumption about "full information" suggests that regulators have an important role in ensuring that consumers in fact have access to full and accurate information about their options in the marketplace. See B.29 for more on this issue.
- b. Competition leads to new problems for consumers. Effective regulation (i.e., not that currently delivered by laws of general application such as the *Competition Act* or provincial *Consumer Protection Acts*) is needed to curtail telecommunications marketplace abuses. See B.29 for more on this issue.

60. And finally,

- a. Competition can't deliver all goals. The objectives of Canadian telecommunications policy, set out in s.7, include a number of goals the achievement of which is clearly beyond the capability of market forces alone. Indeed, in some cases, market forces actually impede the achievement of these objectives.

61. This is the case, for example, with the goals of:

- facilitating "the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions": Competition, by definition, is not "orderly". Moreover, it tends to exacerbate social and economic disparities (as a result of its focus on profitable customers and services) that weaken the social and economic fabric of the country.
- rendering "reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada": Competition, again by its very nature, does not necessarily deliver reliability – at the extreme, competitors can go bankrupt, leaving customers without service. Unregulated service providers may have a lesser interest in reliability, affordability, or quality of service than in maximizing shareholder value. Although in competitive markets, even unregulated service providers cannot succeed if they ignore customer needs, even in competitive markets important public interest goals may not be provided at the desirable level (e.g. public goods will not be provided or only at an insufficient level). Reliability is such a public good, as recognized by the *Telecommunications Act*. The tensions between business interests and public policy goals are worse in a poorly functioning market.
- promoting "the ownership and control of Canadian carriers by Canadians": Clearly, in the global marketplace, competition cannot deliver this goal on its own.
- promoting "the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada": Again, competition cannot deliver this goal on its own if the Canadian market is to be wide open to foreign ownership or competition.
- stimulating "research and development in Canada in the field of telecommunications and [encouraging] innovation in the provision of telecommunications services: while competition does provide an important impetus to innovation, experience to date shows that a surprising amount of this innovation is focused not on new technologies or applications that provide real added value to the marketplace, but rather on marketing. The proliferation of constantly changing service plans, pricing options, and other superficial aspects of telecommunications service that competition has

generated is beneficial to a degree, but also carries significant costs for consumers. See B.29 for more on this issue.

- responding "to the economic and social requirements of users of telecommunications services": Competition tends to respond best to the needs and demands of those with significant spending power – e.g., businesses and high-income residential consumers. It also tends to respond well to the needs and demands of the "mass market" – in fact, successful competitors are usually defined by their ability to tap into and exploit the mass market (to a large degree, however, on the basis of marketing and image rather than responding to the actual "economic and social requirements" of these consumers). Competition does not respond well to the needs and demands of minority population segments without significant discretionary income, or those with special needs that do not have mass market potential. See B.28 for more on this issue.
- contributing "to the protection of the privacy of persons": Because privacy protection usually entails costs to business – both direct costs and opportunity costs, and because the benefits to consumers of such protection are unquantifiable and largely hidden, competitive market forces in fact operate against this objective. In particular, the opportunity costs of privacy protection are increasingly significant in the "information age", as customer information has become a valuable commodity and information-sharing among service providers, in particular, has become a big business in and of itself. See B.31 and E.15 for more on this issue.

62. It is noteworthy that in the Decima survey "Telecom Policy Review Consumer Research Study" (jointly sponsored by Bell Canada, TELUS and PIAC), in answer to the first question asked,⁹ regarding policy goals of the Federal government in telecommunication, the respondents clearly expressed higher importance for the statements that corresponded roughly to the social issue policy goals in s. 7 of the *Telecommunications Act*, while consistently ranking the 'competition-oriented' policy goals as of much lower importance.
63. For all these reasons, the Consumer Groups submit that the policy objectives set out in section 7 of the Act should be reworded to focus on the need for efficiency and effectiveness, whatever mix of regulation and market forces are relied upon.

Recommendations:

⁹ "The federal government has announced that it is conducting a review of policy and regulation in the area of telecommunications services, such as the Internet, telephone, and television. I want to begin by asking you what you think should be the important responsibilities of government in this field. Please tell me for each of the following, whether you feel it is something that should be considered among the most important responsibilities of the federal government, important, or not at all that important?" at p. 3. The full survey report is found online at: <http://www.piac.ca/Telecom Policy Review - Consumer Final Report.pdf>

- Subsections 7(a), (b), (c), and (i) should remain as is, given their fundamental importance as policy objectives for Canadian telecommunications.
- Subsection 7(h) should also remain as a stated policy objective, but should be expanded so as to expressly focus on the needs of disadvantaged users. Recommended wording: "to respond to the economic and social requirements of users of telecommunications services, in particular disadvantaged users;"
- Subsection 7(f) should be reworded as follows: "to ensure that market forces, where relied upon, and regulation, where required, are efficient and effective in achieving the objectives of Canadian telecommunications policy;"
- An additional clause should be added to section 34 of the Telecommunications Act, clarifying that the Commission shall or may re-regulate previously forborne markets, if it finds that competition is not sufficient to protect the interests of users, would be helpful in this respect.

B.2 How detailed should the telecommunications policies set out in the Telecommunications Act be and, conversely, how much discretion should be left to regulators such as the CRTC and Industry Canada?

64. The policy objectives in s.7 of the Act are drafted in very broad language, and include a number of competing objectives, thus requiring the CRTC to make important judgments about how the broad objectives translate into policy, and in the case of competing objectives, which should prevail. The Consumer Groups submit that, while this places a heavy onus on the CRTC, it is preferable to attempting more specificity in the objectives themselves. In the context of a changing market, it is important that the regulator have flexibility to respond to changing conditions.

Economic Regulation

B.13 Are changes required to the contribution regime or other aspects of the regulatory framework that subsidize delivery of telecommunications services in high cost areas?

65. Please see the comments of Dr. Johannes M. Bauer regarding question B.13. In addition, the Consumer Groups make the following additional response.
66. Yes. In Decisions 99-16 and 2000-745, the CRTC established the foundations for a competitively-neutral national subsidy regime in order to fund the delivery of basic telecommunications service to high cost areas. These decisions were the result of lengthy public processes, in which all major stakeholders had input. As a result of this regime, incumbent telephone providers (ILECs) have (a) been able to continue providing service to high cost areas at rates below cost, and (b) extended service to communities that did not already have access to "basic telecommunications service", defined as:

- *Individual line local service with touch-tone dialing, provided by a digital switch with capability to connect via low speed data transmission to the Internet at local rates;*
- *Enhanced calling features, including access to emergency services, Voice Message Relay service, and privacy protection features;*
- *Access to operator and directory assistance services;*
- *Access to the long distance network; and*
- *A copy of a current local telephone directory.*¹⁰

67. The Consumer Groups submit that this regime has been generally successful in ensuring the delivery of the service defined above, at reasonable prices, to communities that might not otherwise be served. In an increasingly competitive market, service providers cannot be expected to deliver service to communities unless they perceive a business case for doing so. Where such business case is lacking, subsidies are necessary, and the CRTC's contribution regime is an appropriate form of subsidization. It should continue to operate as long as the CRTC considers that it is necessary.¹¹
68. However, in contrast to the general success of the contribution regime, the CRTC's "Service Improvement Plan" (SIP) program is flawed in a number of respects. Under the current approach,¹² the Commission requires ILECs to develop plans for the delivery of service, using least cost technology, to communities with at least one request for service, where the cost does not exceed \$25,000 per premise (including a \$1,000 customer contribution), assuming a 100% take rate in each locality. In an August 4, 2005 decision, the CRTC approved Bell Canada's request to impose a subsidy limit of \$62,500 per subscriber.¹³
69. The CRTC's approach requires incumbent telephone companies to proceed with costly service extensions and upgrades even where:
- the household in question is merely a cottage;
 - no other households in the area want the service;
 - the service being offered is sub-standard (e.g., "up to 14 kbps" Internet connection);
 - the service will require construction of unsightly facilities contrary to local municipal bylaws and/or customs;

¹⁰ Telecom Decision CRTC 99-16, para.24.

¹¹ One of the challenges faced by the CRTC regarding the contribution regime is that the contributions to universal service programs are based on a narrowing base (traditional voice service). Although the CRTC did require VoIP providers to fund the contribution regime in CRTC Telecom Decision 2005-34, *Regulatory framework for voice communication services using Internet Protocol*, a truly forward-looking policy would assess contributions from a very broad base, including new data-centric services, such as Internet access. This would make even more sense if broadband access should become part of universal service funding. See section D.6 below regarding the future definition of universal service.

¹² *Regulatory framework for the second price cap period*, Telecom Decision CRTC [2002-34](#).

¹³ Telecom Decision CRTC 2005-43.

- other members of the local community object to the proposed construction of facilities on environmental or other grounds; and
 - alternatives such as cell phone service and satellite-based Internet service exist.
70. While the recent modification imposing a subscriber-based subsidy limit is welcome, further changes are needed in order to ensure that the subsidized service meets the needs of telecom consumers in 2005, to place more reasonable limits on the amount of subsidy per household, to better accommodate local community needs and concerns, and to account for the increasing availability of competitive options in rural and remote areas.

Definition of "Basic Service"

71. See D.6 for a discussion and recommendations regarding the need to update the 1999 definition of "basic telecommunications service" still being used by the CRTC for regulatory purposes. In 2005, the ability "to connect via low speed data transmission to the Internet" no longer suffices. Standards of Internet usage have evolved to the point at which high speed connections are necessary in order for users to be able to communicate and access content on the Internet effectively. It is not worth subsidizing, at significant cost, the delivery of data transmission speeds of "up to 14 kbps" (currently case under some CRTC-approved Service Improvement Plans), especially where satellite-based alternatives are available for the delivery of high speed Internet access.
72. The CRTC's subsidy program for service improvements needs to be better coordinated with Industry Canada's subsidy programs for delivery of broadband service to high cost areas.

Over-subsidization

73. The CRTC's approach to subsidized service upgrades was, until recently, seriously flawed insofar as it incorrectly assumed a 100% take-rate and thus led to massive subsidies for individual households where only one or two households in an area with many more potential subscribers requested service.
74. Bell Canada set out the extent of this regime's perverse effects in its submissions requesting a modification to the Commission's criteria for the implementation of a project.¹⁴ In one case, application of the Commission's order would have resulted in a subsidy of over \$1.8 million to deliver "basic service" to one premise. On average, the subsidy per taker in 69 localities would have been about \$163,000. Bell noted that, over the three-year period of its SIP, the average take rate in areas where at least one request had been received was only 40%. Bell therefore requested that a subsidy cap of \$62,500 per actual customer be applied. In a decision dated August 4, 2005, the CRTC granted Bell's request.

¹⁴ See Follow-up to Telecom Decision CRTC 2002-34 - Bell's Service Improvement Plan <http://www.crtc.gc.ca/PartVII/eng/2002/8638/c12-72.htm>

75. The Consumer Groups submit that even this cap is overly generous, especially when it is being subsidized by surcharges on rates that low income and other customers must pay for basic service elsewhere. The CRTC's original cap of \$25,000 per household is more appropriate, in our view, and should be applied to *actual* subscribers, not potential subscribers. In other words, the 100% take rate assumption, having been proven wildly inaccurate, should be discarded.

Inappropriate subsidization

76. Despite submissions from consumer groups urging that subsidies be limited to permanent residents, and despite an application by Bell Canada for a review and variance by the Commission of its determination on this point, the Commission decided not to distinguish between permanent and seasonal premises, other than in the prioritization of communities to be served. As a result, cottagers qualify for significant subsidies. This is an inappropriate policy, especially in light of the lack of limits on subsidies per actual customer, and the fact that all subscribers, including low income customers, are paying higher rates in order to fund these subsidies. The subsidy should be limited to permanent residents, and/or to those with annual household incomes below a certain threshold such as \$250,000 (the threshold should be high since the purpose is to screen out wealthy customers, not to limit the subsidy to a minority of the population). Alternatively, a more modest subsidy should be made available to seasonal residents than to permanent residents.

Local and Environmental concerns

77. Nowhere in the CRTC's mandate is there any provision for the consideration of local community and environmental impacts. Yet, some proposed service improvement plans have involved the construction of massive, unsightly towers in locations that are internationally recognized and widely valued for their pristine natural beauty and heritage. Were it not for significant opposition to the plans and exceptional efforts on the part of local groups and municipalities, unsightly towers might well have been constructed in these locations, in order to bring sub-standard service to a few cottagers.
78. Such an *ad hoc* approach to serious local and environmental concerns is inappropriate. The construction of telecommunications facilities – be they towers, poles, wires, or other facilities – can have significant negative effects on local environments. Local communities may have other concerns that deserve consideration as well. It is essential that policies designed to benefit local communities be implemented in a manner that respects those communities. That means meaningful consultations with community representatives and residents, openness to design modifications based on community input, some flexibility with respect to the criterion of "least cost technology", and a process to ensure that facilities are not constructed when a majority of residents oppose such construction.

Flexibility in light of new technologies and alternatives

79. Policies designed to extend and upgrade service to rural and remote locations should not ignore the potential for new technologies to deliver a much improved

level of service at lower cost or with less environmental impact, in the near future. Nor should they be so rigid as to favour an outdated or otherwise undesirable approach over an approach that delivers an improved and more desirable service, albeit one that falls short of the defined "basic service". The CRTC should establish a process that allows for exceptions to the general rule of delivering the defined "basic service" using least cost technology, based for example on community applications to the Commission, if the matter cannot be resolved with the service provider.

Expanding the range of service possibilities

80. Satellite options are often the most appropriate for remote locations, based on their wide footprint, high quality service, and minimal environmental impact. Yet, they tend to be offered by companies who are not in the business of voice service, and who cannot benefit from the subsidies available to ILECs for extension of "basic service" to unserved areas. Consideration should be given to auctions or other similar mechanisms for the delivery of telecom service to unserved areas, so as to remove the monopoly that ILECs currently have on this service and to expand the range of technological and service possibilities for such locations.

Symmetric Regulation

81. It may now be time for the CRTC to start to consider a movement towards symmetric regulation of ILECs, CLECs and resellers. In doing so, the CRTC must move extremely cautiously to avoid discounting the economies of scale and other advantages of incumbents and certain deep pocket competitors. However, a move to symmetric regulation (by including all CLECs and resellers, etc. in certain aspects of consumer protection regulation) would be a welcome step. It makes little sense to promulgate general protection rules in an industry that may only now be becoming competitive. If, as predicted, large numbers of consumers switch to smaller carriers of VoIP signals, for example, little would be gained by insulating these carriers from quality of service rules, when their product is intended and marketed as a replacement for basic service from incumbents. As for resellers, the CRTC's indirect approach of requiring ILECs and CLECs dealing with resellers to insist upon contractual conditions guaranteeing, for example, privacy measures is inefficient and difficult to police. Symmetric regulation of resellers and others in certain key areas may ensure consumer protection as the market transitions to more fulsome competition.

Recommendations:

- **The contribution regime supporting delivery of service to high cost areas should continue to apply. However, it should be revised so as to place more reasonable limits on the amount of subsidy per subscribing household, to focus the subsidy on those most in need (i.e., permanent residents and/or non-wealthy households), to better accommodate local community needs and concerns, and to account for the increasing availability of competitive options in rural and remote areas.**

- **Movement towards symmetric regulation, where warranted and where such will not stifle competition may assist consumers in achieving consistent customer service standards.**

CISC

B.18 Is the Carrier Interconnection Steering Committee (CISC) an efficient mechanism for developing interconnection standards? Should any changes be made to CISC's mandate and process?

82. Although CISC plays a vital role in defining technical solutions to telecom problems facing Canadian carriers, CISC is an inappropriate forum for dealing with policy issues. Indeed, the CISC terms of reference explicitly disavow any policy making work. However, whatever purely technical questions that CISC does deal with is leavened in many cases with a healthy dose of policy making which seems inappropriately delegated by the Commission to CISC. It is fair to say that CISC has become a 'dumping ground' for issues that the Commission feels should be addressed but has not done so due to lack of time or effort. A case in point is the recently created *ad hoc* committees tasked with providing reports on how to implement solutions in the areas of 'accessibility' for people with disabilities, 'privacy' and message reply service in a VoIP environment resulting from CRTC Telecom Decision 2005-28. The CISC committees must come to policy determinations and often seek the view of Commission counsel on the interpretation of their mandate and its scope. In addition, the Billing Management Tools Committee broke down in squabbles between the Consumer Groups, as represented by PIAC, and the ILECs over the content of bills – a predictable result since the main issue was the appropriate level of transparency in billing– a policy issue, not a technical one. The result of this mish mash is that policy issues, especially those touching on consumer interests, are not properly decided when "punted" to CISC, and thus consumer problems of a systemic nature continue to exist without real plans for resolution. The bottom line is simply delay of an issue until it becomes chronic enough to prompt a Part VII application to the Commission. This is precisely what occurred with the dispute over cutting off tariffed service (local service) to customers for arrears of non-tariffed services (long distance) detailed in CRTC Telecom Decision 2004-31.¹⁵

¹⁵ See also PIAC, Media Release: "CRTC Tells Canada's Telephone Companies To Stop Disconnecting Paying Customers" (May 12, 2004), online: <http://www.piac.ca/NoDisconnect.pdf>

Social Regulation

B.27 What policies should be adopted to ensure the maintenance of basic telecommunications services to remote areas? Are additional policies needed to ensure affordability?

83. See B.13 for recommended changes to the contribution regime, and D.6 regarding the appropriate level of service to Canadians in 2005.
84. Additional policies may be needed to ensure that residents of rural and remote areas can access high speed Internet service at reasonable prices. Currently, high speed Internet service is often available to such residents, but at a relatively high price that most cannot afford. Consideration should be given to ways in which such service can be made more affordable to ordinary consumers. This could include extension of wireline service.

Ensuring affordability and accessibility generally

B.28 Should additional measures be taken to ensure provision of services for the full range of Canadian consumers, including disabled consumers, that are suitable in terms of price, quality of service and selection? If so, how should these be funded?

85. As has been noted earlier in this submission, the ability to access telecommunications service is an important driver for the economic health of communities and acts as a significant enabler for the provision of educational, health and cultural programs and services. In addition, telecommunications allows individuals to be productive within commercial and public ventures without being resident in the locale of that venture.
86. It is frequently not just a matter of ensuring that special needs communities have access to the same services and products as other Canadians. Telecommunications has created the means, for example, for disabled Canadians to participate more fully as citizens and human beings by addressing their physical and mental challenges. Very clearly, this result is in keeping with Canadian values and telecommunications objectives.
87. Where it is unrealistic to fund desirable access to services through user charges, provision of the service should take place in a way that is competitively neutral and maintained through contribution by all stakeholders. It is clearly inequitable to finance such necessary developments on the basis of contribution from one class of subscribers (apart from the users themselves) if it is a system wide obligation.
88. The Consumer Groups note that in parallel to this review is the proceeding Forbearance from regulation of local exchange services, CRTC Telecom Public Notice 2005-2, *Forbearance from regulation of local exchange services*, which

seeks to determine a framework for eventual forbearance from regulation of local service. The risks of premature forbearance of local telephony have been canvassed in Dr. Bauer's evidence in this submission and in his evidence in PN 2005-2.

89. For low-income Canadians, as for all Canadians, local phone service is an essential service. However, forbearance without adequate levels of competition may spur price increases for residential consumers to stay on the network. Low-income Canadians may be at risk of having to choose between essential services such as telephone and basic living expenses if there are sustained or sudden rises in local telephone rates.

90. In CRTC Telecom Decision 96-10 (Local Service Pricing Options), the Commission noted the following:

In PN 95-49, the Commission indicated that one of its objectives was to determine how best to ensure that local service remains universally accessible at affordable rates. In this Decision, the Commission concludes that basic telephone service is currently affordable throughout Canada. However, the Commission must also ensure that local service remains affordable in the future.

91. The Consumer Groups note that if the terms of local forbearance eviscerates the CRTC's mandate to safeguard universal affordable service, there may well arise a sudden need for some other mechanism to ensure affordable service to all Canadians. While the extent of the affordability problem would have to be studied and identified, in the view of the Consumer Groups, solutions would be best addressed by a prophylactic approach to price increases for low volume consumers across the board.

Consumer Protection

B.29 Are other measures required to protect consumers in light of technology and industry changes to deal with quality of service, fair contract conditions, effective redress and access to accurate and comparable marketplace information?

92. The restructuring of the telecommunications industry and the increased reliance upon market forces to deliver services has created actual or potential gaps in consumer protection in the areas set out in Question B.29. While a theoretically optimal regime for consumer protection of ordinary or low volume consumers of telecommunications products and services would provide such protection through competitive market discipline to ensure high quality of service and effective customer redress for supplier problems, the evidence to date in the telecommunications and other former monopoly-based utility industries shows the difficulties inherent with reliance upon market forces to achieve the same. This experience has also dogged efforts to prepare utilities for competition through such mechanisms as performance-based ratemaking (PBR) and other non-cost based

regulation. It is thus important to recognize that issues of quality of service are not readily addressed by newly emerging competitive markets and may show patterns of service deterioration that substantially limit the ability of all consumer segments to share in any benefits from any new regulatory paradigm. As a consequence, the Consumer Groups urge the adoption of several key measures and/or consumer protection frameworks to meet these gaps.

Other Monopoly Services

93. Our views on necessary consumer protection measures and principles are informed by the restructuring experience with utilities, not only in Canadian telecom but in other industries in other jurisdictions. The general tenor of such observations urges caution in adopting any regime that relies solely on market forces to deliver benefits.
94. In the airline industry, American deregulatory efforts over the past several decades may have made some inroads in the in reduced prices upon the majority of routes in the United States (with less price discounting success in Canada)¹⁶. Passenger perceptions of a diminution in service quality and reduced levels of passenger satisfaction have also accompanied the industry deregulation.¹⁷ Airline industry promises to improve barely staved off a Passenger Bill of Rights in the U.S. Congress in 1999, and rising passenger complaints about lost baggage, cancelled service and other woes have multiplied such that new hearings have been planned by the House of Representatives Transportation Committee to examine airline performance on the previous promises.¹⁸ In Canada, new entrant airlines have not apparently been able to alter patterns of consumer unfriendly behavior. A recent report by the Canadian Transportation Agency showed substantial increases in passenger complaints despite competitive inroads made by domestic competition.¹⁹
95. While energy industry restructuring and deregulation in the same period has generally not provoked a customer perceived decline in service quality, it should be noted that preexisting and continuing regulatory codes and standards concerning safety and reliability have largely controlled the exercise. As well, competition has largely been confined to production commodity and retailing of the energy, with the transmission and/or local distribution utility continuing to be responsible for much of the customer arrangement. Nevertheless, the industry was and is not free of marketplace misconduct. In Ontario, aggressive misrepresentation and “slamming” tactics provoked amendments to the *Consumer Protection Act*²⁰ to prevent such

¹⁶ G. Gowrisankaram, “Competition and Regulation in the Airline Industry”, FRBSF Economic Letter, January 2002. Online: <http://www.frbsf.org/publications/economics/letter/2002/el2002-01.pdf>

¹⁷ Consumers Union “Deregulated”, July 10, 2002. Online: <http://www.consumersunion.org/pdf/cudereg.pdf>

¹⁸ Keith Alexander, “Have Airlines Delivered on Passengers’ Bill of Rights”, Washington Post, July 12, 2005. Online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/11/AR2005071101683.html>

¹⁹ http://www.cta-otc.gc.ca/cta-otc2000/report-rapport/2005/atc-2005_e.pdf

²⁰ S.O. 2002, Chapter 30, Schedule A.

activity and the evolution of Codes of Conduct for Market Participants, policed through a licensing regimes by some new entrant energy retailers.

96. In New Zealand, the radical restructuring of the electricity industry in the 1990's and the subsequent public response and political repercussions led to the creation of an Electricity Complaints Commissioner administering a consumer Code developed and adopted by electricity companies. The Commissioner works to resolve complaints and improve service delivery .The focus of potential public discontent with the electricity reforms is evident as the Commissioner can:

... consider complaints about a wide range of issues but cannot comment on the amount companies charge for their services. However, the commissioner can check that a company has applied its charges appropriately and given proper notice of changes to those charges.²¹

97. We will later make observations concerning consumer protection problems manifest in the telecommunications industry, but it should be apparent that the need for a consumer protection safety net dealing with the issue areas set out in this question transcends the particular vicissitudes of the Canadian telecommunications industry.

Quality Of Service

98. The liberalization of telecommunications regulation in Canada has seemingly been unable to achieve advancements in customer service quality together with increased choice of provider. This inability seems to collide with the consistent importance that Canadian customers place on quality of service. The Decima survey filed in this proceeding shows that 91% of respondents thought that the maintenance of good quality telecommunications service was a most important or important government responsibility.
99. When the restructuring of telecommunications regulation occurred in Canada, it was not immediately apparent to the regulator that the ILECs might be willing to sacrifice their reputation for good service for financial reward and/or for price competition purposes. In Telecom Decision 97-16, the CRTC continued a monitoring model in an overall performance-based ratemaking (PBR) regime to address quality of service issues with significant indicators to flag issues such as service repair. In that Decision, there were no explicit financial ramifications for an ILEC that failed to meet requisite standards for such indicators. Perhaps the Commission implicitly believed that threat of competition would be sufficient to discipline ILECs in terms of any potential failure to meet quality standards.
100. By Decision 2002-34, which set the second-generation price caps, it was evident from the decline in ILEC performance that more incentives were needed to ensure compliance:

²¹ <http://www.electricitycomplaints.co.nz/images/04.pdf>

707. The Commission is not persuaded that competitive pressures in either the retail or competitor services markets are sufficient to ensure that ILECs meet approved service quality standards. Moreover, as discussed in Part II of this Decision, the Commission notes that there has been only limited competitive entry in the local exchange market and that entry has primarily occurred in the business sector in urban areas. In addition, many competitors have not yet constructed their own facilities, but instead rely on the resale of ILEC services, especially Centrex service, in order to provide local service to end users. In these circumstances, the drive to improve earnings at the expense of quality of service is not adequately checked by competitive pressures.

708. In light of the above, the Commission considers that the existing monitoring regime is not sufficient to ensure that ILECs' service quality performance meets the Commission's approved standards. In the Commission's view, it is necessary to establish incentives to ensure ILEC compliance with quality of service performance standards for services provided to the ILEC's own customers, as well as services provided by the ILEC to competitors.

101. CRTC Telecom Decision 2005-17 set mandatory rate adjustments for ILECs that miss Quality of Service indicators, with maximum adjustments set at 5% of total revenues. As well, the Decision takes aim at ILEC practices of meeting overall yearly averages for indicators but falling well short at critical monthly intervals. It is too early to gauge the effect of the Decision on ILEC compliance, but the only principal question in terms of the necessity of such regulatory intervention relates to the potential need to increase the size of the rate adjustments.
102. In CRTC Decision 85-20, the CRTC adopted service quality standards that would guarantee that 90% of customers would be satisfied with service quality standards. An April 1988 publication of Bell Canada noted the commitment to ensure that 90% of subscribers are satisfied with the service they receive, and that Bell had been able to meet these standards more than 95 per cent of the time.²²
103. The Decima survey, compiled from respondent interviews that extend beyond the Bell franchise area showed results that had strayed from the previous 90% levels of two decades prior. The satisfaction levels for telephone connections and signals, customer billing systems and level of customer service were 88%, 81% and 75% respectively. Given the technological advancements in the form of digitization and advances in customer information systems (which should have boosted the first two numbers), it seems clear that some significant slippage in quality of service has taken place.
104. The neglect and gaming of quality of service regulations in circumstances where the regulatory environment does not provide financial disincentives for the dominant provider to do so has hardly been restricted to Canadian ILECs. A 2003 report

²² Bell Canada, "Communications on Company Topics and Programs – Quality of Service", Corporate Public Relations, April 1988.

from the state of New York was highly critical of the New York Public Service Commission's Quality of Service incentive plan for Verizon, on the basis that it had not provided sufficient incentive for the company to meet established standards. One of the criticisms was that because the standards apply statewide:

"Specific areas of the state have chronic and unrelenting levels of inadequate service that are masked by the current ...service quality measurements".²³ This report suggests that geographic averaging, even on the basis of rural or urban, can mask serious problems."

105. Declines in service quality were not envisioned by the architects of the U.S. restructuring of the telecommunications industry. The U.S. *Telecommunications Act* of 1996²⁴ was supposedly geared to improving service. The preamble of the Act states that the objective

"...to promote competition and reduce regulation in order to secure lower prices and **higher quality services** for American telecommunications consumers and encourage the deployment of new telecommunications technologies." (Emphasis supplied.)

106. The experience has been decidedly contrary to the legislative intent. In 2000, the National Association of State Utility Consumer Advocates submitted to the Federal Communications Commission²⁵:

Ironically price cap regulation triggered the past decade's trend of ever diminishing service quality. Telephone service has gone from being the United States' proud hallmark to being a pounding headache for far too many residential and business customers. Despite sufficiently high rates and impressive improvements in the technology available to the telephone industry made possible with those rate dollars, incumbent local exchange companies have not remained committed to service quality. There is intense and undiminished consumer anger over service quality problems in most parts of the country. The extent to which they are now at long last emerging as the focus of state commission and media priority is clear from recent state regulatory and legislative proceedings in the SBC/Ameritech region. That trend can only be reversed through the development and enforcement of appropriate performance standards, reporting requirements *and* strict enforcement measures including audits and effective fines..... No other cost cutting method so quickly frees up cash as does diverting monies previously used for service quality controls. Previous rate of return regulation included a regulatory braking mechanism if the monopoly neglected service quality (i.e., such management failure could be reflected in authorized rate of return and authorized customer rate levels by regulators committed to protecting

²³ See New York State Legislative Assembly Committee report on Verizon, p.41 (conclusions); online: http://assembly.state.ny.us/member_files/092/20030507/index.html

²⁴ 110 Stat. 56 (1996)

²⁵ NASUCA, "In the Matter of 2000 Biennial Regulatory Review-- Telecommunications Service Quality Telecommunications Act of 1996 Reporting Requirements". Online: http://www.nasuca.org/filings/rulemaking_2-6-01.php

consumers). Society is paying an enormously high price in declining service for the trade-off that was struck with price cap regulation, even as promised competition as a substitute protection has not emerged.

107. Sometimes the quality of service failures related to services provided to Competitive Local Exchange Companies (CLECs) and took place for anti-competitive reasons. The Michigan Public Service Commission found that the ILEC Ameritech had frozen out the competition by:

Providing inferior quality of service to CLECs and CLEC customers, misrepresenting the status of its service quality, taking a nonchalant and dilatory approach to fixing problems, taking unnecessary risks with CLEC customers, all while systematically blaming the CLECs for problems caused by Ameritech's own errors and dilatory behavior.²⁶

108. Such gaming the system for financial reward is a recurring theme in American jurisdictions. A ratepayer representative California study of service quality problems involving Pac Bell that found high levels of customer service complaints and Company reporting discrepancies concluded:

Why doesn't Pacific Bell provide better service quality to Californians? The answer is painfully simple. They don't have to provide better service. While the service quality rhetoric bounces back and forth between Pacific Bell and the Commission, little significant action has been taken on either side to improve conditions for California residents and businesses.²⁷

109. If, as we have noted, customers place a high value on service quality, and incumbents face the threat of new entrant competition, why is this happening? The Canadian telephone utility tradition was also arguably one of maintenance of high levels of customer service. This may be becoming a much-diminished tradition.²⁸

110. The causes of this service deterioration seem to be much the same as that identified in the Pac Bell and NASUCA studies referenced above. In the restructured regulatory environment, many consumers remain wed to the incumbent providers. This is partly due to a continuing lack of facilities-based competition in key sectors like local service and Internet service. It also stems from a well-noted tendency of customers to stay with an incumbent carrier, due to familiarity, opportunity costs,

²⁶ In the matter of the complaint of the Competitive Local Exchange Carriers Association of Michigan et al. against Ameritech Michigan, 2001, Case No. U 13193. Online: <http://www.miact.org/CLECA/CLECA%20emergency%20complaint%20U-13193.doc>

²⁷ L.S. Young, "Somebody 's Going to Have to Die:": Office of the Ratepayer Advocate, 1999. Online: <http://gis.esri.com/library/userconf/proc00/professional/papers/PAP247/p247.htm>

²⁸ See CRTC, Report to the Governor in Council on the Status of Competition in Canadian Telecommunications Markets (Nov. 2004), Table 4.3.4, p. 37, indicating over 90% in most, and over 95% market share in some, provinces. Online: <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2004/gic2004.pdf>

and concerns with reliability or longevity of competitors or actual barriers to competition.

111. This leeway for neglect may be exacerbated as former monopoly telecommunications providers develop different business models in a ‘competitive’ environment – shifting resources from, for example, low margin residential local service to higher margin wireless service, or simply putting more resources into marketing than into customer service.²⁹
112. However, it may be argued by some that fundamentally the quality of service decrements that are appearing are solely a result of patterns of market dominance and/or a failure of competition to take root. If competitive concerns were resolved, this theory goes, service quality problems would vanish. The experience to date in forborne telecommunication service markets belies that argument.
113. The poster child for the successful approach of forbearance in telecommunications services has been Internet services. In CRTC Decision 99-16, the Commission determined that basic telephone service included access to the Internet at local rates. At the same time, it determined that the level of competition among Internet providers was sufficient to allow the CRTC to forebear from regulation. This effectively removed the regulator from the consumer protection loop.
114. And while this CRTC decision is a touchstone for the ideological framework that argues for the extension of forbearance to VoIP as an Internet service, it did not make the myriad Internet consumer protection issues and problems disappear. Issues such as billing problems, poor technical support, and actual speeds that are less than advertised speeds were some of the problems of service that remained to be addressed by the existence of competition. Closely related are contractual problems with ISPs such as mandatory arbitration clauses and clauses allowing unilateral contractual changes that create a less than level playing field for consumers.
115. The Commission’s hands-off approach has seemingly few converts among the general public. In March 2004, PIAC conducted a public survey with the assistance of POLLARA Inc. for inclusion in its report on the retail Internet market entitled *Consumer Issues With Internet Service: Is Industry Self-Regulation Working?*³⁰. In the survey, 62% of respondents felt that government should develop and enforce consumer protection rules when it comes to the Internet. The largest percentage of this same group attached the highest importance to the development of rules for service quality (62%), protection against spam (62%) and resolution of disputes

²⁹ P. Lawson, “For whom the Bell tolls”, for *Straight Goods* magazine, (October 1, 2002). Online: <http://www.piac.ca/For%20Whom%20Bell%20Tolls.htm>

³⁰ PIAC, August 2004. Online: http://www.piac.ca/PIAC_ISP_Report.pdf

with businesses (56%). These are remarkable results for a service that has been highly touted as competitive.³¹

116. The ISP market might be a likely preview of the quality of service disappointments that customers would feel in other forborne telecommunications markets. Price-driven competition elbows out customer service issues where provider rivalry exists.
117. While the wireless industry is also cited frequently as a successful exercise of the forbearance powers of the Commission, there is little cause for ordinary consumers to believe that a market nirvana has been achieved. There remain to be addressed numerous and serious quality of service issues in recent years including service quality, transparency of billing and ease of service switching for which no redress exists outside of the judicial process. These difficulties are not simply the fall-out from marginal providers. Billing problems with Bell Mobility in 2004-5 resulted in many customers not receiving bills for months, then receiving massive bills, full of errors³². Customer service representatives were unable to cope with the volume or type of these questions and many customers simply could not get through to attempt to correct the problem. As noted above, customers largely put up with these major billing headaches and did not exercise en masse a movement to other carriers, possibly due to the lack of mobile number portability (see above, answer to Question A.10). This did not stop them complaining to the CRTC and on the Internet.³³
118. In the view of the Consumer Groups, telecommunications services provided to residential retail consumers need to have baseline standards of consumer protection concerning key elements of the marketing, delivery, billing of the service, as well as dispute resolution with customers. This includes the traditional telephone indicators currently reported and subject to adjustment in accordance with CRTC Telecom Decision 2005-17. The need for the latter standards has been accepted in the past because of the perceived importance of basic telephone service. Since 1982, the Commission has required reporting on significant indicators that significantly impair the effectiveness of the network for its customers. As we move into the provision of services that augment or replace basic telephony, specifically services provided through IP and wireless platforms, is there any reason to believe that standards for customer service are irrelevant or unnecessary? There exists a

³¹ It should be noted that between 1998 and 2003 non cable, non ILEC ISPs went from 47% of the market to 16%

³² See, amongst many other articles, CBC News, "Bell Mobility Clients Hit by Billing Errors" (November 4, 2004), online: http://vancouver.cbc.ca/regional/servlet/View?filename=bc_bell20041104

³³ Some customers were so unsuccessful in even reaching Bell Mobility customer service staff that they took to publishing Internet "blogs" detailing in minute detail their billing woes. See, among others, for example, Eric Giguere, "Why I Hate Bell Mobility", online: <http://www.ericgiguere.com/essays/why-i-hate-bell-mobility.html> and Ryan Lowe, "Bell Mobility Billing on the Fritz", online: http://www.ryanlowe.ca/blog/archives/001071_bell_mobility_billing_on_the_fritz.php

reasonable amount of evidence already that such standards are desirable for wireless and the Internet services.³⁴

119. The need for customer protections and effective enforcement does not necessarily mean replicating the structure of regulation that exists now. Very clearly, much of the customer needs in quality of service issues could be met without requiring *ex ante* applications for Commission approval by service providers. We have suggested, in the context of this submission, a one-stop independent mechanism to deal with the application of Commission standards and policies (together with applicable consumer and commercial law and policy) in the position of Telecommunications Ombudsman (see c.16).
120. The Telecom Ombudsman would be beneficial for two reasons. First, the proposed mandate of the Telecom Ombudsman would cover not only ILECs but also CLECs, resellers, wireless carriers and Internet Service Providers (ISPs). For those customers experiencing quality of service problems with ‘unregulated’ carriers in forborne markets, this will allow them some potential remedy for quality of service issues beside the courts (typically QoS issues are difficult to prove, of a ‘minor’ status in the courts’ eyes and typically involve small or difficult to quantify losses). For ILEC customers, this alternate route will provide redress in individual cases,. Such cases may not trigger a QoS rebate except in the aggregate, but may still be serious lapses requiring a remedy. The Telecom Ombudsman would be best placed to deal with these individual issues and would develop a level of expertise in efecting an appropriate remedy. The Telecom Ombudsman could also make findings regarding QoS issues which would inform the CRTC QoS proceedings and could make recommendations to the industry as a whole based on QoS experience in individual cases.

Fair Contract Terms And Conditions

121. Consumers of forborne telecommunications services in Canada, including wireless, Internet and long distance, face a bevy of unfair contracts and clauses in contracts. Such practices negate the benefits of inducing efficiencies in the market by allowing suppliers to escape genuine subscriber consent or foreseeable repercussions when they fail to deliver the product or service that is required. One sided arrangements inevitably prevent customer mobility and informed choice.
122. Many of the impugned practices that prevent fair contracting are well known to policy makers. A checklist for fair contracting rules is set out in the recent amendments to the Ontario *Consumer Protection Act, 2002*. That Act outlaws or severely restricts:

³⁴ See, as an example of customer frustration with customer service in Internet and wireless service, Jeff Pappone, “Calling, one customer, unserved”, Ottawa Business Journal, 3 August 2005, online: <http://www.ottawabusinessjournal.com/331987461967876.php>

- Negative option contracting or marketing;
- Mandatory arbitration clauses;
- Prohibitions on or limitations on customer participation in class actions;
- Unilateral contractual changes or with only minimal notice requirements.

123. Unfortunately, all of these types of clauses are common in Canadian telecommunications contracts. For example, negative option marketing occurs when new or existing customers are automatically enrolled in new or different services unless they take steps to indicate their disapproval. In many cases, it strains credulity to believe that a customer gave implicit consent to a new product or service that the customer might not be aware he or she was receiving.
124. Mandatory arbitration clauses (restricting consumer access to the court system in the case of contractual disputes) similarly impart an unfair advantage to the supplier. These clauses generally favour companies by relying on arbitrators chosen by the company and by making the process a private mediation rather than a court-enforced application of the rule of law by independent judges. These arbitration clauses typically are married with restrictive choice of law and forum clauses. Making consumers travel to defend or pursue claims and making them argue ‘foreign’ law simply defeats many consumer complaints. Limiting access to class actions removes the an effective way to achieve consumer redress and public awareness where, for example, a problem is common and widespread but the total amount of loss to each customer may be too small to justify commencing an individual court claim. Most serious and common perhaps is the regime governing changes to fundamental contractual terms. Where fundamental contractual terms are implemented by a clause acknowledging the customer’s “prior consent” to such undetermined changes, the unfairness is manifest. Nearly as abusive are clauses providing for a short notice period for fundamental changes (less than 30, and often only a few, days or even hours) or after the fact change notification. In many cases the company specifies the type of notice (e-mail, website posting, letter) which may risk a sizable number of customers not becoming aware of fundamental changes in a timely manner or at all.
125. Please see the table below³⁵ for the incidence of these types of clauses in standard Canadian telecommunications providers’ (wireless, local and long distance, cable, Internet access and VoIP) contracts:

³⁵ Table is part of an unpublished study conducted in July 2005 by the Canadian Internet Policy and Public Interest Clinic (forthcoming, Fall 2005).

Canadian Telecommunication Service Providers – Abusive Contractual Clauses

	Land Line	Internet	Cellular Phone	Voice Over IP	Total
Total Number of Telecommunication Service Providers	6	10	7	3	26
No Provision Regarding Notice of Change(s)	2	2	3	1	8
Unilateral Change(s) by Company					
Can Make without Notice	3	1	1	0	5
Can Make with Notice	1	7	3	2	13
• 30 Days or More Advance Notice	0	2	2	0	4
• 29 Days or Less of Notice	1	5	1	2	9
• Ineffective Delivery of Notice ³⁶	0	6	0	1	7
• Fail to State Methods of Delivery	1	0	3	0	4
Limited Liability					
Gross Negligence	0	0	0	0	0
Negligence	2	3	0	1	6
Mandatory Arbitration	0	2	1	1	4
Restricted Jurisdiction³⁷	0	2	0	2	4
Restricted Law	0	1	0	1	2
Termination by Customer					
No Notice Provision	1	2	0	0	3
Unspecified "Advance" Notice Required	3	0	0	0	3
Greater than 14 Days Notice Required	0	2	6	1	9
Early Termination Fee \geq \$100 ³⁸	0	4	7	0	11

³⁶ Ineffective delivery of notice includes a company having the discretion to merely post its notice of change(s) on its website.

³⁷ Jurisdiction refers to a geographic location.

³⁸ The termination fee only applies to customers bound to fixed-term contracts. We have decided to use a fee of \$100 or more because anything equal or greater than \$100 seems unfair to customers; however, there may be certain circumstances where charging customers \$100 or more would be fair. Note that most companies have a grace period of 15-30 days where customers can terminate their contract without paying a termination fee.

126. These objectionable features appear in clauses in the contracts of all types of Canadian telecom service providers.³⁹ It is unlikely that consumers will find a supplier that will provide a balanced set of contractual terms.
127. Several other abusive contractual clauses (which are not yet proscribed in provincial consumer protection legislation) have emerged in both regulated and forborne telecom markets and deserve special censure. These are:
- Extremely long contractual terms given the service at issue with severe financial penalties for early termination of the contract.
 - Liability limitation clauses disclaiming most or even all responsibility on the part of the provider for such problems as fraud arising out of the services, negligence on the part of employees, or any consequential losses following on a disruption of service.
128. Lengthy contractual terms are now *de rigueur* in Canadian wireless telecommunications contracts (excluding prepaid service) from all carriers (see above chart indicating at least \$100 or greater ‘break fee’ for all Canadian wireless carriers). This is also the case with some Internet service providers. Contract terms range from 1-3 years or even more. Consumers are enticed into these deals with the promise of free or highly discounted handsets or other terminal equipment such as PDAs. However, customers soon find that switching providers means paying out the contract’s liquidated damages clause – up to the entire amount that would be owing under the service agreement to its established termination date – in a lump sum. This type of clause appears to be a penalty that may or may not be enforceable at common law, however, few customers challenge such clauses and either pay the termination fee or, due also in part to the lack of mobile number portability in Canada, merely continue service with a wireless provider they do not want.

³⁹ **List of Telecommunication Service Providers in CIPPIC Contractual Clauses Study**

Land Line	Internet Service	Cellular Phone	Voice Over IP
Bell	Sympatico	Bell Mobility	Primus
Primus	Rogers	Fido	Skype
Sprint	Videotron	KMTS Mobility	Vonage
Telus	Sprint	Rogers Wireless	
Sasktel	Telus	Sasktel Mobility	
Aliant	Look	TBayTel Mobility	
	Cybernet	TELUS Mobility	
	Lara		
	Shaw		
	Primus		

Access to Accurate and Comparable Marketplace Information

129. While a plethora of commercial information exists in the media and the web concerning telecommunications products and services, there is a paucity of information on the key elements associated with customer decision making. These include apples to apples comparisons of products and services, key measurements of quality of service indicators, and the overall flexibility to adapt to future technological change in the product and service. While the CRTC's report to the Governor in Council monitoring the state of competition is helpful to consumer elites and industry stakeholders, in general terms, telecommunications consumer rights are opaque to average consumer. The identification of regulated services, the nature of the billed charges as well as avenues of redress is clearly a difficult exercise.

Misrepresentation

130. However, informational problems may involve more than simply a lack of information. Sadly, a consumer may be well-informed but may have been supplied with misinformation from telecommunications service providers. Needless to say, such an occurrence is disruptive to the to the assumption that customer education will be adequate to discipline the market. There have in fact been far too many cases of misrepresentation by telecommunications providers with little oversight to ensure accuracy.

131. In a move characteristic of an oligopoly, a number of long distance telecom companies instituted a monthly "Network Charge" 2001-2002, in order to cover the new revenue-based contribution levy. The terms used for the charge, and the amount of the charge, were remarkably similar across different companies. While the companies were perfectly entitled to impose this charge on their customers given the CRTC's decision to forbear with regard to long distance, they were not entitled to characterize it as a CRTC-ordered surcharge and to suggest (or insist) to customers that they had no choice but to impose it – which some did, and continue to do.⁴⁰

132. Quite apart from the fact that the source of this charge was misrepresented, there are ongoing costs to consumers as a result of the misleading nature of this (mis)characterization. In order to appreciate this, the Panel should recall that the network charge was added by long distance carriers in response to the costs of the high-cost serving area (HCSA) contribution charge mandated by the CRTC in Decision 2000-745. The history of such charges dates back to efforts by Long Distance (LD) carriers to "offset" the contribution charge initially mandated by the seminal competition Decision 92-19 and calculated on LD revenues. In the following years, the CRTC revised the contribution regime to include all telecommunications service providers, (such as ILECs, APLDS, CLECs, resellers, WSPs, international licensees, satellite service providers, Internet service providers

⁴⁰ See attached affidavit of Jordan Halpern, dated 5 August 2005.

(if a telecommunications service is provided), payphone providers, data and private line service providers) and began calculating the contribution based on Canadian Telecommunications Service Revenues. However, since 2001, while the contribution required of each company has dropped as a percentage of revenue, no carrier has voluntarily lowered the ‘off-setting’ network charge in a proportionate or indeed any amount. In fact, most have *raised* the network charge. Please refer to the chart below in Fig. 1, representing the disconnect between the contribution charge percentages and the rates charged by all carriers for “network charges” or similar fees.

Fig. 1: Network Fees Stay High Despite Dropping HCSA Contributions

	2001	2002	2003	2004	2005
Contribution Rate	4.5%	1.3%	1.1%	1.1%	1.1% (interim)
"Network Service Charge" ⁴¹					
Bell	\$1.25	\$1.25			\$2.95
Aliant		\$1.25 ⁴²	\$1.95 ⁴³	\$2.95	\$2.95
MTS		\$1.25	\$1.25 ⁴⁴	\$1.95	\$1.95
Telus	\$1.25	\$1.25			\$4.95
SaskTel		none			\$1.95
Sprint/Rogers		\$2.95			\$4.25
Primus		\$2.95	\$2.95	\$2.95	\$3.95

133. Thus the lack of regulatory oversight over the assessment and description of these charges to ensure that they at least describe real costs has brought about a hidden tax. In so doing, the implicitly sanctioned misrepresentation has bilked consumers of enormous amounts.

Effective Redress Mechanisms

134. Consumers are limited to very indirect methods of obtaining redress when their contractual or policy rights as telecommunications users are violated. The CRTC lacks enforcement powers (order-making power and fining power, which many other tribunals do have) so that even when it finds companies clearly are violating the *Telecommunications Act*, they can do little to discipline offenders. This has led,

⁴¹ Monthly surcharge applied by LD service providers to all LD plans. Also as of 2005 referred to as "Network Service Charge", "Long distance administration fee", "System Administration Fee", and "System Access Fee", depending on the company. 2002 data based on PIAC research in 2002. 2003-2005 data based on telco service rep statements to CIPPIC researcher in August 2005.

⁴² Was MTT and NBTel and NewTel during period prior to merger into Aliant. PIAC files indicate MTT, NBTel and NewTel all raised charges to \$2.95 from \$1.25 some time during 2002.

⁴³ date of increases from \$1.25 and then to \$2.95 not known.

⁴⁴ increased to \$1.95 in Nov.2003.

for example, in the case of telemarketing, to an unhappy arrangement where the CRTC has called upon the main telecommunications carriers to sanction telemarketers who break the CRTC rules with termination of service. Unfortunately, telemarketers are amongst the carriers' biggest clients: an inherent conflict of interest that has made this indirect enforcement of CRTC orders in this area nearly useless.⁴⁵

135. Many times, however, the CRTC has simply not followed up on its own orders and has left compliance of carriers on "consumer issues" to the companies themselves. This has led to simple flouting of CRTC orders on consumer matters by carriers. For example, the CRTC in Telecom Decision 94-19 ordered the ILECs to make "basic toll schedules" (that is, long distance charges without a "plan" or bundling with other services) available to subscribers. Yet the carriers ignored this ruling; their customer service and even regulatory staff often were unable to provide these toll schedules years after the decision came out. It was only after a proceeding was initiated by PIAC on behalf of consumer groups and ultimately settled before hearing that the companies agreed to a simple placement of basic toll information in the telephone directory and on their long distance "plan" website pages.
136. Similarly, Bell overcharged subscribers for years for rental sets on party lines. In this case, only a chance combination of a customer complaint about the charge to PIAC, which PIAC pursued, and PIAC's own research on service pricing for the 1992-2002 comparison of residential telephone rates allowed consumers to obtain any redress. PIAC further built on the complaint by contacting Bell about the party line rental charge and being clearly informed that the billed charge had been approved by the CRTC. PIAC then undertook a Part VII application to force Bell to look into the over-billing.⁴⁶ It was months before Bell admitted the error.
137. The BTS rates option suppression and the party line rental sets overcharging reveal many weaknesses in customer redress in telecom – even with regulated carriers and regulated services. First, ILECs are able to operate in a willful or at least willfully blind manner towards tariff conditions or CRTC ruling so long as customers don't notice. There is no independent body, nor is the CRTC itself auditing carriers' compliance with their own tariffs. Despite its claims otherwise, there is no evidence that Bell would have corrected this overcharging without PIAC's intervention. Although customers eventually got rebates, there was no further sanction from the Commission for this mistake. Given this lack of effective consumer redress or CRTC enforcement, there is no meaningful incentive for companies to avoid overcharging retail customers.
138. Finally, it took a third major Part VII proceeding by the Consumer Groups to halt service provider threats to cut off (and actual cutting off of) local service for non-

⁴⁵ See evidence of Michael Binder before Commons Industry Committee on Bill C-37, April 13, 2005. Online: <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=125375>

⁴⁶ Telecom Decision CRTC 2004-8, *Public Interest Advocacy Centre – Part VII application for enforcement and relief regarding Bell Canada's unauthorized rate increases for party-line rental sets.*

payment of toll charges, in what the CRTC found was a violation of ILEC Terms of Service.⁴⁷ This practice had been brought to the attention of the service providers some years prior to the Part VII application, which was brought only after a protracted effort to change the practices voluntarily.

139. As for seeking direct redress for individual concerns, consumers have little incentive to approach the CRTC. In the first place, many services, such as wireless and Internet service are forborne. Very little in life is as baffling to the average consumer as being told that although there is a regulator, that the regulator has decided not to regulate, at least not to enforce minimum service standards. In the second place, even with regulated local service, for example, the consumer must resort to the cumbersome and formalistic “Part VII application” under the *Telecommunications Rules of Practice*.⁴⁸ Few if any consumers have the legal knowledge or the funds to pursue such an application in the CRTC. The process is also not fast; most decisions are reached in over one year and often more. As noted, the CRTC cannot fine companies; it can, however, order restitution of improper charges (again, subject to limits in the tariffs).
140. However, for negligence or fraud, the consumer usually must resort to the court system. Even in the courts, however, the ILECs may plead their very restrictive limits on liability for service (discussed further below), making the prospects of an action very unattractive, as only a portion of the potential consumer losses could possibly be recouped.

Fraud (Modem Dialers)

141. A particularly egregious recent example of the lack of consumer redress is the problem of modem dialers or “modem high-jacking”. In this scam, a fraudster propagates a computer virus on the Internet that users unwittingly download. The virus then finds the user’s modem and, if it is connected to the phone service, dials a long distance number to a high toll rate country. The high charge is covered first by the Canadian telecom provider under an agreement with an international long distance carrier. Then the Canadian carrier looks to its Canadian subscriber for reimbursement. The trouble is, the Canadian subscriber does not even know about the calls, which are performed automatically. This kind of fraud should not result in financial consequences borne by the subscriber, who has not initiated the billed service use. However, consumers who sought redress (and there have been several thousand in the last 3 years alone, with charges in the hundreds of thousands) were first told by companies they were fully responsible for the entire charge. This position was softened by some companies as consumer outrage grew, so that a percentage forgiveness policy was put in place by some companies. However,

⁴⁷ Telecom Decision CRTC 2004-31, *Terms of Service – Disconnection for partial payment of charges*.

⁴⁸ Although there is a less formal process for a subscriber to make an application to the CRTC in respect of quality of service, accessibility, tariffed services, disconnection or reconnection (Part VI of the Act), this process is moribund.

consumers must always complain, and can never escape paying. In most cases, this amounts to hundreds of dollars in charges for fraudulent activity.

142. Despite a Part VII application by three consumer groups including PIAC, the CRTC upheld the policy of the companies as a rational response to the problem. It bears repeating that that ‘rational response’ proffered by the providers and accepted by the CRTC is that consumers bear the largest burden in cases of fraud – in complete contrast to the cheque settlement system or credit card policies of major issuers in Canada. Consumers have responded to this appalling lack of redress by commencing a class action in Ontario for modem high-jacking victims seeking complete redress as well as punitive and exemplary damages from the carriers.
143. However, in retrospect, this situation could have been dealt with in a more responsive manner by the companies or in a proactive manner by the CRTC. Instead, consumer the service providers and the regulator ignore consumer issues until they become chronic and insoluble in all but the most high stakes way – a class action or an appeal to Cabinet.

Roles of various agencies in consumer protection

B.30 What should be the roles of the CRTC, Industry Canada, the Competition Bureau and consumer protection agencies in dealing with consumer protection and other social regulation issues?

144. With the advent of telecommunications industry restructuring, there has been an accompanying debate as to the best regulatory authority to resolve issues of policy or the implementation of policy in the context of the restructured industry . Many of the functions carried on by the players listed in Question B.30 superficially resemble each other. For example, both the CRTC and Industry Canada carry out monitoring functions in the telecommunications industry. Similarly, the CRTC must come to determinations that are similar to Competition Bureau adjudications concerning the state of competition and anti-competitive conduct in relation to the Commission’s forbearance duties and implementation of measures in furtherance of its statutory objectives. In the view of the Consumer Groups, while it is useful that the various regulatory and policy components operate in a way that is non-duplicative, the method for achieving this goal does not mean a concentration of authority within fewer loci. Rather, it is ensuring that the expertise and required function of each component is exercised in a way that maximizes its particular strengths and resources.

Competition Bureau

145. The most frequently heard criticism of the structure of the current system is that if competition is to provide the engine of consumer protection in the new environment, then the regulator should be the competition experts in the

Competition Bureau. Clearly the proponents of this view seek not only a different kind of regulator but also a much-reduced level of scrutiny. Whatever the attraction of a one stop regulator residing in the competition authority, there exists some key differences between the kinds of functions required of a competition authority and that exercised by sector specific regulator such as the CRTC. A 1999 OECD report from 1998 explored these functional differences:

Similarly international studies have cautioned against indiscriminately lumping regulatory functions together: Compared with sector-specific regulators, competition agencies seem better suited by their accumulated expertise, experience and basic institutional characteristics (“institutional culture”) to protect competition from anti-competitive behaviour and mergers. For the same reasons, it seems generally true that compared with competition agencies, sector-specific regulators are better suited to undertaking economic regulation. . Such regulation is ongoing rather than periodic in nature, and heavily based on sector-specific knowledge. Things are not so clear when it comes to access regulation. The objective of such regulation is to promote as well as protect competition in certain situations where access to a portion of a vertically integrated incumbent firm’s assets is vital to the development of a satisfactory level of competition. On the one hand, because of experience with abuse of dominance cases, competition agencies are more suited to performing this task than are sector-specific regulators. On the other hand, ensuring a level playing field requires processing a large volume of cost data in order to set access terms, and then following up with continuous monitoring to ensure compliance with those terms. These are functions that seem more in tune with what sector-specific regulators normally do.⁴⁹

146. The superficial similarities between the regulators mask more profound differences with respect to their roles. The 1998 PIAC report Communications Regulatory Agencies for Canadians described the contrasting attributes:

Competition law is not at all well suited for complete oversight of such essential infrastructures as communications, energy, water transportation, etc... Historically, competition policy and law has been formed around, and focussed [*sic*] on, manufactured goods where many companies compete in a market. The importance of immediacy of access and use of essential infrastructures, such as communications, is not accommodated with the reactive nature of competition law. Competition law intervenes *after* market failures or anti-competitive behaviour have occurred or where abuse of market power develops and exits when the specific problem is resolved. Whereas regulatory agencies are concerned with a broader mandate including macro and micro policy implementation, regulation, market oversight/monitoring, and intervention in the development and maintenance of a competitive market. As well, the communication system must deliver on a range of policy objectives beyond just

⁴⁹ OECD, “Relationship Between Regulators and Competition Authorities, June 1999. Online: <http://www.oecd.org/dataoecd/35/37/1920556.pdf>

the economic (ITU, 1993, p. 45). Moreover, the economic interventions by regulatory agencies tend to be ongoing, not just one-time corrective initiatives as is the case under competition law. For example, some of the ongoing regulatory issues which can not be solved by competition law or unregulated markets include: numbering; spectrum assignment; rights-of-way; designation of essential services; pricing of essential services; quality of service; availability of service; content; interconnection; privacy; obscenity/content; standards; and intellectual property rights (Melody, 1997, p.25).⁵⁰

147. Borrowing from reviews of international studies, the report went on to describe the principal characteristics that are desirable in a telecommunications regulatory agency:

Ideally, a regulatory agency should be concerned with issues relating to policy making [*sic*], service provision and regulation. Policy should largely be concerned with long term [*sic*] social and economic objectives, rather than day-to-day regulatory activities of policy implementation or problem solving. A high degree of professionalism and expertise is required for both policy and regulatory analysis and implementation. The service provision activities are the concern and responsibility of independent market actors within the decided regulatory framework. At a broad level, the ideal attributes of the agency would include:

- Independence from government
- Policy implementation
- Ensure the accountability of industry actors
- Manage day-to-day problems, issues
- Consumer protection, issues and interests
- Resolve disputes (industry, consumer)
- Monitor industry activities
- Advise government on policy matters
- Ensure the achievement of various policy objectives
- Develop/exhibit specialized skills⁵¹

148. The current Commissioner of Competition has noted the efforts already in place to avoid duplication with the CRTC in much the same way suggested in the aforementioned OECD report:

In addition, the Bureau has attempted to provide greater clarity within the existing legislative framework to determine when a matter should be addressed by the CRTC or the Bureau. We have done this by recognizing areas where the CRTC has primary jurisdiction (access to essential facilities, interconnection), areas where the Bureau has primary jurisdiction (forborne telecom services,

⁵⁰ A. Reddick, *Communications Regulatory Agencies for Canadians*, PIAC 1998, pp.36-7. Executive Summary online: <http://www.piac.ca/regagenc.htm#Executive%20Summary>

⁵¹ A. Reddick, *supra*, at p. 37.

price fixing, bid rigging, price maintenance), and areas of shared jurisdiction (broadcasting mergers, marketing practices, abuse of dominance). It is our expectation that such a delineation minimizes costly duplication of scarce resources by both agencies⁵².

149. The Commissioner has also urged that the framework for competition measurement and analysis be similar between regulators and that the Bureau be able to have access to confidential information filed with the Commission to complete its analysis. These are sensible suggestions.
150. While it is trite to say, the Consumer Groups believe that the CRTC and the Competition Bureau should concentrate at what each is good at doing, and what each has the structure, history and resources to carry out. The Competition Commissioner, has, through the *Competition Act*, the authority to intervene before the CRTC to call evidence and make representation concerning matters pertaining to competition. Making the Competition Bureau, the sole referee on the telecommunications market would deprive stakeholders of the specialized expertise of the Commission as well as the advocacy of the Commissioner associated with competition issues.

Consumer Protection agencies

151. The Consumer Groups find it difficult to project an expanded role for provincial consumer protection offices in policing consumer protection concerns. Provincial consumer affairs has received proportionally fewer resources than other ministries in most provincial governments and are currently overwhelmed with complaints from all sectors of the economy. In addition, there are compelling jurisdictional concerns that prompt provincial consumer protection agencies to properly defer to the federal regulator.
152. There is little expectation that this will change, but there is a need for a united approach to fix the problems arising particularly in the context of marketplace misconduct. As we have seen, such conduct is manifest in a variety of different ways and through the use of schemes that touch upon areas of both provincial and federal jurisdictions. As well, there is considerable merit in the study of approaches taken to similar issues by different jurisdictions. For example, we have cited developments in provincial consumer protection legislation –i.e.abusive contractual clauses (see B.29 above).

Privacy Commissioner

153. Please see below (B.31) the discussion of the role of the Office of the Privacy Commissioner of Canada and its interaction with the CRTC.

⁵² Speaking Notes of Sheridan Scott, International Institute of Communications 4th Annual Conference December 2004. Online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=808&lg=e>

Industry Canada

154. The relationship between the policy and decision-making functions of the federal government ministry responsible for telecommunications and the CRTC has long been a subject of comment and debate centring around the theme that there was no one really in charge⁵³. While in general terms, the CRTC has been responsible for administering the way in which the industry delivers upon the policy set by legislation and government directive, there are clearly circumstances where the CRTC has itself made policy. The restructuring of the Canadian telecommunications industry was commenced by the CRTC in the seminal Decision 92-19, that occurred prior to the introduction of the current *Telecommunications Act* containing objectives and powers more conducive to the superintendence of the new paradigm.
155. The current supervisory ministry, Industry Canada, exercises its responsibilities, in the main, through the Spectrum, Information Technologies and Telecommunications (SITT) Sector of the department. Industry Canada's web site notes that:
- The Spectrum, Information Technologies and Telecommunications Sector uses its policy and regulatory rule-making powers, and marketplace and industry sectoral development services to:
- ensure that Canadians have access to a world-class telecommunications and information infrastructure and the skills necessary to participate in the networked economy;
 - promote the international competitiveness of Canadian information technologies and telecommunications industries;
 - aid in making Canada a world leader in the adoption and use of e-commerce;
 - promote the strategic use of information technologies by all sectors of the Canadian economy; and
 - ensure effective and efficient use of the radio frequency spectrum
156. One cannot help but note that the principal public objectives of SITT are bereft of key concepts such as value for service, universal access, and quality of Canadian life. The objectives are strangely silent with respect to the promotion domestic competition and its importance in delivering the products and services Canada needs.
157. As one of the custodians of the public interest in the operation of the telecommunications industry in Canada, Industry Canada's principal

⁵³ see Andrew Roman, "The Telecommunications Policy Void in Canada" 1990 CJC , Vol 15 No. 2

telecommunications arm must have goals that are more reflective of the interests of both producers and users. If SITT is intended to simply be a conduit for industry support and cheerleading, then its contribution towards making national policy should be brokered through another decision maker that has more broadly construed roles. This step should not be necessary, although it may mean that more specific operational concentration on user issues and in particular the needs of ordinary telecommunications users must take place.

Privacy

B.31 Are changes required to the regulatory approach to the protection of privacy in relation to telecommunications services, as it is currently administered by the CRTC and the Privacy Commissioner?

158. Recently, a Federal Court of Appeal decided a case dealing with both privacy requirements under the *Telecommunications Act* and the privacy requirements of the Personal Information Protection and Electronic Documents Act (PIPEDA). This case, *Englander v. TELUS*, [2004 FCA 387](#), determined that TELUS failed to adequately inform customers of the potential use of white pages information in marketing lists and for other purposes. The Federal Court of Appeal, however, in noting the CRTC's interpretation of the PIPEDA, that (at para. 70):

... the CRTC appears to be of the view that its privacy standards may differ from those set out in the PIPED Act. This startling proposition may have to be examined when the occasion arises.

159. However, the Consumer Groups find this proposition neither startling nor inappropriate.

160. Consumers have greatly benefited from the experience of CRTC in dealing with its direction "to contribute to the protection of the privacy of persons" from s. 7(i) of the *Telecommunications Act*. The CRTC has used s. 7(i) to introduce reasonable privacy requirements on the telemarketing industry in many decisions. Recently, the Commission confirmed the requirements for consent to use confidential customer and other information under the ILECs Terms of Service.⁵⁴ That decision correctly continued to place the onus on service providers to obtain objectively verifiable evidence of customer consent. This is a standard that indeed may be higher than that required under PIPEDA, but one that manifestly empowers consumers, who most often face evidentiary problems when asserting privacy, or indeed any customer service claims.

⁵⁴ Telecom Decision CRTC 2005-15, Part VII application to revise Article 11 of the Terms of Service (17 March 2005). See also: *Confidentiality provisions of Canadian carriers*, Telecom Decision CRTC 2003-33, 30 May 2003 (Decision 2003-33), as amended by Telecom Decision CRTC 2003-33-1, dated 11 July 2003 (Decision 2003-33-1),

161. The Consumer Groups therefore do not see a problem with a sector-specific telecommunications privacy regime under the *Telecommunications Act* while the PIPEDA sets baseline standards overall. The main problem, as pointed out in the Federal Court of Appeal, is one of coordination. Jurisdictions should be coordinated or at least there should be an explicit acknowledgement of concurrent jurisdiction. This may require an amendment to the *Telecommunications Act* making explicit the Commission's power to interpret the PIPEDA, or clarifying the CRTC's jurisdiction where, as in this case, the privacy right at stake also dovetails with other core CRTC jurisdictions such as rate-setting. What is important, in the Consumer Groups' opinion, is that the coordination of these two sources of privacy rights always results in the higher level of personal privacy for consumers being achieved.
162. The Consumer Groups note that the Privacy Commissioner of Canada has announced an External Advisory Committee to assist the OPCC with strategic direction.⁵⁵ It may be possible to add a CRTC representative to this Committee to help coordinate these jurisdictions. If this or another Committee is created to deal with this coordination, it might be subject to overview by the House of Commons Committee on Privacy, Security to provide a legislative oversight of the key issues of privacy in the communications world.

Other Consumer Protection issues

B.32 Are other changes in the Canadian telecommunications policy and regulatory framework warranted in order to protect the interests of Canadian consumers?

Liability of Network Providers (ILEC's legacy liability limitation)

163. The nearly bulletproof protection from liability enjoyed by ILECs requires review. A typical liability provision is Bell Canada's General Tariff Terms of Service, Item 10, article 9.1 (Customer Liability for Calls), which reads:
- 9.1 Customers are responsible for paying for all calls originating from, and charged calls accepted at, their telephones, regardless of who made or accepted them.⁵⁶
164. This was accepted by the CRTC to mean, in a Part VII proceeding brought by the consumer groups on modem high-jacking (see above) that even when a computer's modem had been taken over by a virus without user intervention and knowledge, that subscriber was still liable for 100% of the long distance charges incurred by fraud from their phone.

⁵⁵ OPCC Press Release (February 13, 2004): "Privacy Commissioner's Office establishes new External Advisory Committee" http://www.privecom.gc.ca/information/misc/not_040213_e.asp

⁵⁶ Although this tariff applies only to local service, an identically worded provision in Bell's standard contract applies to long distance services.

165. Clearly, the regulatory acceptance of such limited liability is a relic of the monopoly era and former limitations on tracing fraud. Now fraud committed via the Internet but executed on the telephone system (as in modem high-jacking) requires an acknowledgement of the responsibility of both client and network provider. With the emergence of VoIP, this type of fraud will most likely increase – while inappropriately placing all of the responsibility for security into the hands of subscribers. Other IP carriers do not enjoy this advantage and as the problem increases, it may even be considered a barrier to entry. It is the view of the consumer groups that such liability protection is outdated and should be abolished. Indeed, the Consumer Groups suggest a broad-ranging inquiry by the CRTC into “fraud on the network” aimed at defining roles and solutions to security-related problems in the Internet age.

CRTC Regulation of ISPs

166. In 1999, the CRTC decided to forebear from the regulation of new media activities on the Internet under the *Broadcasting Act*. It did not address the issue of regulation of ISPs under the *Telecommunications Act*, other than to note that it would continue requiring dominant carriers to offer access to their facilities to retail Internet service competitors at fair prices.⁵⁷

167. At the time, the Commission noted, among other things, that “key technological developments must take place before new media services and distribution systems compete more directly with traditional media”.⁵⁸ Six years later, it appears that such direct content competition is in fact occurring, as a growing proportion of online Canadians say that they use the Internet to view the news (20% in 2000; 30% in 2003).⁵⁹ This figure is substantially higher for regular Internet users: 51% in 2000 and 56% in 2003. Indeed, another 2003 survey indicates that 33% of Canadians were getting news on the Internet at least once a week, and 45% at least sometimes.⁶⁰ The same survey found that 17% of Canadians got news on the Internet daily, 10% a few times a week, and 7% about once a week. With the tremendous expansion of online news services, both commercial and non-commercial, there is no question that these figures will have increased over the past two years.

168. More importantly, however, Internet service has become a standard telecommunications service for Canadians, with high rates of access and use. Increasingly, Canadians rely on the Internet for job-seeking and business

⁵⁷ Telecom Public Notice CRTC 1999-14.

⁵⁸ para.96.

⁵⁹ Statistics Canada, CANSIM, table (for fee) [358-0006](#) and Catalogue no. [56F0003X](#) (free); <http://www40.statcan.ca/101/cst01/comm09a.htm>.

⁶⁰ “Report Card on Canadian News Media”; <http://www.cmrcrm.ca/english/reportcard2004/05.html>.

promotion, banking, commerce, government information and services, education, news, entertainment, and personal communications.⁶¹

169. In their role as transmitters of information and communications, ISPs play a very similar role to that of broadcasting distribution undertakings (BDUs) - cable or DTH. Both are intermediaries, providing access to content. Section 7 of the Broadcasting Distribution Regulations prohibits a BDU from altering or deleting a programming service except under very limited circumstances. This is a type of "common carrier" obligation for BDUs. It would be strange if this type of obligation were applied to BDUs but not ISPs, now that Canadians are relying upon ISPs for access to so many important services and sources of information.
170. The vast majority of Canadian Internet users now access the Internet via broadband connections (see D.1). However, the overall residential market share of non-telco, non-cable ISPs dropped from 50.3% in 1999 to 20.8% in 2003, based on subscriptions. The residential market share of competitors is even smaller in terms of revenues, 14.8% in 2003. As a result, in any location there are seldom more than two service providers offering residential broadband access – the local telephone company and the local cable company.⁶² This trend has undoubtedly continued through 2004 and 2005.
171. These statistics strongly suggest that in a few years, while the importance of the delivered content grows, residential customers could have a very limited number of ISPs to choose from – possibly only two (telco and cable), and in some remote locations perhaps only one. This, in turn, means that if an ISP is permitted to block websites at its discretion, there could be extremely serious consequences for access to information and public expression.
172. While it addressed the issue of offensive and illegal content on the Internet in the "New Media" decision,⁶³ the Commission did not address the issue of ISP control over access to Internet content. However, in a decision made just prior to the "New Media" decision, the CRTC granted telcos the authority under section 36 of the *Telecommunications Act* to "control or influence the meaning or purpose of telecommunications carried by it for the public".⁶⁴ In doing so, though, the CRTC stated: "In this context, controlling the content or influencing the meaning involves, for example, creating the service's home page and selecting links to other websites." This statement suggests that the CRTC did not envision telco ISPs blocking access to websites.

⁶¹ See Statistics Canada, "Households using the Internet from home, by purpose of use", Statistics Canada, CANSIM, table (for fee) [358-0006](#) and Catalogue no. [56F0003X](#) (free); <http://www40.statcan.ca/101/cst01/comm09a.htm>

⁶² CRTC, Report to the Governor in Council on the Status of Competition in Canadian Telecommunications (Nov., 2004). Online: <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2004/gic2004.pdf>

⁶³ paras.117 – 124.

⁶⁴ Telecom Decision CRTC 99-4 (31 March 1999).

173. In late July 2005, this issue became the focus of national attention when Telus blocked access via its Internet facilities to a labour union website, citing concerns about employee safety and confidential information. As a result of the blocking, subscribers to telus.com, telus.net, and all of the downstream ISPs who lease and resell Telus facilities were unable to access the website for several days. Moreover, a study by the OpenNet Initiative found that at least 766 additional, unrelated websites were blocked by the Telus action.⁶⁵ Telus lifted the block only after it had obtained a court order restraining the website owners from posting certain material on the site.
174. The incident generated great concern and focused attention on whether ISPs, given their gatekeeper role, should be allowed to engage in such censorship. Under s.27(2) of the *Telecommunications Act*, telecom carriers are not permitted to "*unjustly discriminate or give an undue or unreasonable preference toward any person, including [themselves], or subject any person to an undue or unreasonable disadvantage*". Moreover, under s.36 of the Act, "*except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.*"
175. Yet this is precisely what Telus was doing, in its role as a carrier of telecommunications, when it blocked access to the union website. In the wake of this incident, there has been much debate over the legality of Telus' action, and interested parties await a determination from the CRTC as to whether Telus has in fact breached rules applicable to it as an ISP.
176. In a related vein, Nancy Carter filed a privacy complaint with the OPCC regarding "hostage e-mail", where her ISP withheld her e-mail during a billing dispute.⁶⁶ The Privacy Commissioner found in her favour (see OPCC summary #66) and the case ultimately was settled when Ms Carter took her case to the Federal Court for enforcement. However, the case illustrates the high-handed manner of ISPs dealings with user communications when operating in an unregulated atmosphere.

⁶⁵ OpenNet Initiative, "Telus blocking of labor union web site filters 766 unrelated sites" (Aug.2, 2005); <http://www.opennetinitiative.net/modules.php?op=modload&name=News&file=article&sid=68>

⁶⁶ Inter.net Canada's dial-up Service Agreement still asserts the right to hold suspended account e-mail hostage. See Inter.net Canada :: Service Agreement. Online: <http://www.ca.inter.net/en/join/agreement.php> It reads:

6. Cancellation, Suspension and Refund [. . .]

Upon suspension:

- (i) Inter.net Canada will continue to gather and retain any mail or other files on our servers until end of suspension; and
- (ii) all of your files including, but not limited to, e-mails and homepages will not be erased, but access will be denied.

The suspension of your subscription does not relieve you from any amounts owing Inter.net Canada before such suspension becomes effective plus any costs including, but not limited to, costs incurred for the collection of any outstanding amounts.

177. The Consumer Groups submit that clarification is needed as to the legislation and regulations applicable to ISPs, and that previous determinations to completely forbear should be reconsidered. In this respect, the Consumer Groups note that the CRTC does not appear to have forborne with respect to section 27(2) in connection with retail Internet services.
178. In 1999, the market was crowded with numerous ISPs independent of telco and cablecos. The Internet was not as pervasive as today, and the amount of reliance upon the Internet by users was significantly less both for commercial and other purposes. There may have been good reason to forbear from regulating all aspects of ISPs at that time. However, in 2005, when websites have become a critical communications tool for businesses and non-profit organizations, it is appropriate to revisit the "hands off" approach to ISPs at least with respect to those important issues which are likely impervious to change by market forces. In this circumstance, like telephone carriers, ISPs should be prohibited from carrying out their gatekeeper function without the appropriate public interest authorization.

Recommendations:

- **ILECs should no longer enjoy one-sided limitation of liability clauses in their tariffs.**
- **Internet service providers should be subject to "common carrier" regulations under both the *Broadcasting Act* and the *Telecommunications Act* (specifically s.7 of the BDU regulations, and ss. 27(2) and 36 of the *Telecom Act*). In particular, ISPs should not be permitted to block access to third party websites or communications without a court order or regulatory direction, nor should they interfere with user communications, including withholding communications during disputes or otherwise.**

Regulatory Institutions

C.14 Should the enforcement functions be separated from the rule-making function (e.g. assigned to different institutions – or to independent offices within the same institution?)

179. The CRTC should have an interest in ensuring that their orders and decisions are respected. The behavior of the parties that are subject to a Commission order potentially affects the future course of Commission action with respect to issues on the table.

C.16 Should a separate institution or an independent office within an institution be established for dispute resolution and, if so, what should be the extent of its powers?

Telecommunications Ombudsman

180. The Consumer Groups believe that the Panel should endorse the concept of a “Telecommunications Ombudsman”. The Consumer Groups tender as part of their submission a recent report by PIAC entitled “Telecommunications Ombudsman For Canada” on this issue and urge the Panel to adopt its conclusions.⁶⁷ It is possible that a carefully crafted office that concentrates on individual consumer issues will fill much of the void in consumer protection in telecom. As noted in the report, the Telecommunications Ombudsman could be an independent arbitrator but with powers to order solutions (including monetary compensation up to \$1000) in individual customer complaints against all telecommunications providers (wireline, wireless, Internet service, VoIP), whether in forborne or regulated markets. In addition, where industry-wide consumer protection issues emerge, or where alerted to such system problems by consumers, the Telecommunications Ombudsman could conduct an industry-wide investigation and issue a report with guidelines or best practices for the industry.
181. The Consumer Groups note the overwhelmingly positive support for both the individual dispute-resolution role (85%) and the industry consumer protection oversight role (86%) in the Decima Consumer Research Study cited above. It is the Consumer Groups’ submission that these results bear out the experience of service providers, regulators and consumer groups with regard to consumer complaints: too little is available to help consumers with legitimate telecommunications disputes with their carriers and too little proactive emphasis has been placed on customer service issues by the CRTC (largely due to a reactive mandate).

Recommendation:

- **A “Telecommunications Ombudsman” should be created to address individual consumer complaints with all telecommunications service providers (TSPs), including wireline, wireless, Internet service, VoIP and long distance providers and resellers.**
- **The Telecommunications Ombudsman should conduct inquiries into industry-wide systemic consumer protection issues that are revealed through the individual complaints or that are brought forward by consumers.**
- **The Telecommunications Ombudsman should be appointed by the Governor in Council, but should possess the necessary independence to enable confidence in the impartiality of the office. The Ombudsman should have the power to make binding orders and award compensation up to \$1000 in individual cases.**

⁶⁷ PIAC, *Telecommunications Ombudsman for Canada*, August 2005. Online; http://www.piac.ca/telecom_ombudsman.pdf

C.17 If the CRTC retains its dispute resolution powers, should it be granted the power to award damages? Alternatively, should the court's powers to award damages in telecommunications disputes be increased (e.g., punitive damages) to ensure litigation can be an effective alternative to detailed regulation?

182. The controlling principle should be that the ability of the decision-maker to fashion a remedy to fairly settle a dispute should not be unreasonably constrained. Where monetary compensation or penalty is appropriate to restore the status quo ante or to deter certain kinds of conduct, then it is reasonable to ensure that the decision maker has those powers. It is the view of the Consumer Groups that where the CRTC is properly seized with matters that arise from the application of the Commission's lawful authority then the Commission should have the powers to effect a remedy that confirms its superintendence and promotes adherence to the rules. In the past, ILEC operations that were not in accordance with Commission policy or customer contracts could be sanctioned through the rate setting process through the removal of costs from the revenue requirement or orders requiring expenditure at shareholder expense. Such avenues of redress may be difficult under current and future patterns of regulation so that it is essential that aggrieved stakeholders may have access to more than declaratory relief from the regulator. Such damages could be crafted either by regulation or Commission decision to fit the type of complaint launched. The Consumer Groups would urge caution with respect to the availability of damage awards in competitor disputes. This power should be exercised like a shield rather than a sword, to prevent misconduct and flouting of Commission rules, rather than a mechanism to game the system for competitive advantage.
183. If the CRTC does not obtain the power to award damages, the unrealistic limits on ILEC liability in the tariffs (see B.32) should be lifted so that subscribers are not circumscribed by a framework that effectively shuffles their means of redress into a forum that is powerless to meet their needs. As regulated entities gain the ability to determine their financial destiny independent of getting recovery of all reasonable and prudent costs (the old test under cost of service), it is important that they also have full responsibility for their actions independent of compliance with specific CRTC directives. In the past, the system of regulation allowed for substantial flexibility on the part of the Commission to fashion appropriate remedies for subscribers in terms of rates and terms of access. In many cases now, without Commission intervention, subscribers should have access to courts of competent jurisdiction that can award more realistic damages based on usual negligence principles or other legal theories such as unjust enrichment. As well, high-handed behavior calculated for purely financial reasons should sound in punitive damages in the appropriate case.

C.18 What measures should be taken to clarify the jurisdiction of the various institutions with dispute resolution powers in the area of telecommunications?

184. See B.31 above regarding accommodation of the OPCC and the CRTC. There may also be a need for a more formal mechanism of consultation between the regulating entities to ensure that either a consensus exists as to the roadmap for regulation or policy making or the disagreement is clearly defined. Such a consultative instrument might be a periodic Roundtable convened by the Minister that would discuss general and specific issues while avoiding determining specific regulatory applications and matters.

C.19 What measures should be taken to simplify and expedite the process for dispute resolution at the CRTC or at Industry Canada?

185. There are at least two kinds of “dispute resolution” that might be considered in terms of alternative measures. One involves the application of a party or parties before the fact finder to determine if a particular set of circumstances exists, and the consequences under established rulemaking if they do. In this kind of circumstance, the Commission has adopted expedited proceedings that essentially compress the proceedings before the fact finder to a short time period wherein all relevant evidence and submissions are heard. While this method of proceeding may well be appropriate in resolving technical issues of concern to the parties, it does present some problems.

186. First, the issue determined is frequently of concern to more than the aggrieved parties. How does one deal with a precedent from an expedited proceeding where not all stakeholders or particularly stakeholders representing the public interest were present? Secondly although shorter timelines and less formal proceedings, as well as oral hearings, may appear to simplify and expedite hearings at the CRTC, they in fact inhibit participation by consumer groups and others without “deep pockets”. Such expedited procedures remove procedural safeguards and place unreasonable timelines on smaller parties. The ability to gather information through an interrogatory process is restricted and such proceedings ignore the realities of information asymmetries between consumer and public interest groups and major industry players. The Consumer Groups do not recommend abjuring with formality when the consequences leave them with just any resolution rather than a just resolution.

187. The second type of dispute resolution concerns a more general scoping out and consensus building process more akin to Alternate Dispute Resolution. It is forward looking and is geared to establishing rules and frameworks that can accommodate the concerns of stakeholders, or at least clarify the areas of dispute. While resource concerns and informational problems have to be addressed, it is likely that these fora will be a significant way for public interest concerns to be addressed in the future.

C.20 Should the current dispute resolution regime for telecommunications matters be modified in any other way? If so, how?

188. As we have noted in our response to C.19, the Consumer Groups believe that additional efforts should be invested in processes that do not necessarily replace formal procedures but create conditions of advanced knowledge and understanding of stakeholder position that may either advance consensus on the resolution of the issues at the formal stage or narrow the focus of the debate for the regulator and/or decision maker. While there may be a need to ensure that non commercial stakeholders are put on amore level position with respect to the process both from a resources or information standpoint, in the view of the Consumer Groups, there is a greater likelihood that the Commission will ultimately have a better and more complete record of relevant evidence before it when any decision is made.

D. Canada's Connectivity Agenda

D.1 What is the current status of access to broadband and advanced ICTs in Canada?

189. Access involves more than simple **physical availability**. Even where service is available to be purchased, it may be **unaffordable** to large numbers of potential users. It may also be unnecessarily **inaccessible to those with certain physical disabilities**. Finally, significant proportions of the population may be unable to make effective use of it due to **lack of training or awareness** of the vast array of information, services, and opportunities that broadband access offers. Any analysis of the state of access to broadband and advanced ICTs in Canada needs therefore to examine all four aspects of the issue.
190. Moreover, access alone will not be sufficient to achieve the government's ultimate goals. Strategies for the **effective use of ICTs** to support local economic development, local access to education and health services, social justice and political empowerment are also necessary.⁶⁸
191. The National Broadband Task Force recognized this in its 2001 Report *The New National Dream: Networking the Nation for Broadband Access*.⁶⁹ The Task Force focused not only on issues involving physical deployment, but also on "equitable and affordable access", "public access sites", "awareness and use", and "support for development of necessary skills".⁷⁰ The group of leaders from the public and private sectors also emphasized the need to build community capacity as part of an effective strategy to expand access to broadband and advanced ICTs in Canada.
192. The Consumer Groups urge the Telecommunications Policy Review Panel to recognize the importance of all aspects of access rather than narrowly focusing on the issue of physical availability. As repeatedly pointed out by researchers in this

⁶⁸ See Michael Gurstein, "Communities: The Hidden Dimension of ICTs", CRIS Issue Paper No.7 (undated). <http://www.fis.utoronto.ca/research/iprp/cracin/people/profiles/gurstein.htm>

⁶⁹ National Broadband Task Force, *The New National Dream: Networking the Nation for Broadband Access*, 2001, Cat. No. C2-574/2001E. <http://broadband.gc.ca/pub/program/NBTF/broadband.pdf>

⁷⁰ See Recommendations 3 to 6 under "Fostering Innovation and Use".

field, widespread availability of Internet access is only the beginning. A critical next step involves "enabling the use of these technologies to achieve local benefits – economic, social, cultural and political – to provide foundations for local communities".⁷¹

193. The Consumer Groups have been unable to find current data on the state of access to broadband and advanced ICTs in Canada. The following is based on the most current data that we could find.

General access

194. According to Statistics Canada, in 2003, 54% of Canadian households used the Internet regularly from home, and 64% did so from any location (home, work, school, public library, or other location). Of those with home access, 65% had a high-speed link to the Internet in 2003, up from 56% the previous year.⁷² Broadband access grew from 17% of the Internet access market in 1999 to 64% of the market in 2003, based on subscriptions. Of those who had broadband service available to them, approximately 42% actually subscribed to the service in 2003.⁷³

Geographic Access

195. With respect to the issue of unserved and underserved communities (i.e, physical availability), the government's goal of connecting all Canadian communities via broadband by 2004 has clearly not been achieved. As of July 2003, broadband service was available to 95% of households in urban centres and but only 63% of households in rural centres. Although 86% of the Canadian population could be reached by high speed Internet, 72% of communities (largely in rural and remote areas) still did not yet have broadband services available to them.⁷⁴
196. When the Broadband Task Force reviewed the state of access in 2001, it found that of communities without high-speed access, most were located in "weak metropolitan influence zones" (i.e., close to metropolitan areas). However, the more remote the community, the less likely it was to have broadband access.⁷⁵ Another study, published in January 2004, found that residing outside the top 15

⁷¹ Gurstein, CRIS Issue Paper No.7, *op cit.*; www.cracin.ca .

⁷² Statistics Canada, "Household Internet Use Survey", *The Daily*, July 8, 2004. <http://www.statcan.ca/Daily/English/040708/d040708a.htm>

⁷³ CRTC, *Report to the Governor in Council on the Status of Competition in Canadian Telecommunications Markets* (Nov. 2004) Online: <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2004/gic2004.pdf>

⁷⁴ *Ibid.*, and Veenhof, Neogi & van Tol, *High-Speed on the Information Highway: Broadband in Canada*, Statistics Canada, Connectedness Series, Cat. No. 56F0004MIE – No. 10, 2003. <http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE2003010.pdf>

⁷⁵ In 2001, 29% of outlying communities were without high speed access, 21% of far outlying communities were without access, and 32% of remote communities were without access. (National Broadband Task Force: see footnote 69 above).

CMA's (Census Metropolitan Area) in Canada is a statistically significant constraint on household use of the Internet.⁷⁶

Income-related access

197. Equally important to the "digital divide" as geographic disparities is access by low income households to ICTs. (See D.3) Indeed, disparities in access may be even greater as a result of income than as a result of location. Certainly, this was the case in 2000, when 31% of low income households (and 30% of households in rural and small towns) had Internet access, while 67% of high income households (and only 45% of households in census metropolitan areas) had an Internet connection.⁷⁷
198. Current data show that low income households in Canada are only half as likely to have home Internet access as are higher income households. A 2003 survey conducted by Ekos Research indicated that, while 84% of households with incomes of over \$60,000 had access, only 42% of those with incomes of under \$20,000 did so. Statistics Canada has found similar results: in 2003, while 82% of high income households had home access, only 45% of households with incomes between \$24,000 and \$44,000 did so.⁷⁸
199. According to a recent study, "a significant minority of low income Canadians and labourers (those least likely to have access from work) may continue to rely on public access sites".⁷⁹ Citing a 2004 study by Ekos Research Associates,⁸⁰ the authors note that "longitudinal research on Internet and other communication technology usage of Canadians since 1997 demonstrates that the public use of access sites has remained relatively constant at seven per cent of overall Internet users, with about fifteen per cent usage for those with low incomes (<\$20k) and low skills and literacy."⁸¹
200. While public access sites are filling an important gap, they do not substitute for access to the home. More work clearly needs to be done to help lower income

⁷⁶ Singh, *Rural and Small Town Canada Analysis Bulletin: Factors Associated with Household Internet Use*, Statistics Canada, Vol. 5, No. 1, January 2004 – see Table 1.

<http://www.statcan.ca/english/freepub/21-006-XIE/21-006-XIE2003001.pdf>

⁷⁷ For income-related statistics, see Ekos Research Associates Inc., *The Dual Digital Divide IV* (Ottawa: Ekos Research Associates Inc., 2004) [no copy available] and Ekos Research Associates Inc., *Rethinking the Information Highway: Rethinking the Dual Digital Divide*, (March 30, 2001) [no copy available; figures reproduced in <http://ci-journal.net/viewarticle.php?id=39&layout=html>]; for geographic-related statistics, see McLaren, Statistics Canada, *Rural and Small Town Canada Analysis Bulletin: Information and Communication Technologies in Rural Canada*, Vol. 3, No. 5, January 2002.

<http://www.statcan.ca/english/freepub/21-006-XIE/21-006-XIE2001005.pdf>

⁷⁸ Statistics Canada, "Household Internet Use Survey", *The Daily*, July 8, 2004.

<http://www.statcan.ca/Daily/English/040708/d040708a.htm>

⁷⁹ Rideout and Reddick, "Sustaining Community Access to Technology: Who should pay and why", *Journal of Community Informatics*, vol.1, no.2 (2005). <http://ci-journal.net/viewarticle.php?id=39&layout=html>

⁸⁰ *The Dual Digital Divide IV* (Ottawa; Ekos Research Associates Inc.) [no copy available].

⁸¹ Rideout and Reddick, *op cit*.

Canadians reap the advantages of broadband and ICTs through home access, as well as through free community access sites.

Disability-related access

201. We do not have data on rates of Internet access among Canadians with disabilities. This is an area in which further research should be conducted.

Awareness and use

202. As noted above, physical access is not, in and of itself, sufficient to ensure that individuals and businesses take advantage of the Internet and ICTs. Researchers have found that a majority of non-Internet users see little benefit from going online, or lack the knowledge and/or confidence to do so.⁸² Those citing lack of need as their primary reason for not accessing the Internet tend to find it difficult or inconvenient to use, and see few or no benefits from such use.⁸³ And even those that have access do not always have the knowledge or skills to take full advantage of it. Simply providing access will therefore not achieve our overall social and economic goals. Effective use of ICTs should become a key focus of government strategy, in order to make the most of access. As Michael Gurstein states,

"...simple access to the Internet and other ICTs is insufficient to significantly improve the life-chances of populations increasingly at risk from rapidly advancing technology change.... While considerable development resources have been spent on creating ICT infrastructure and access points (local telecentres), few of these initiatives, have been directed towards expanding local capacity for developing, managing and maintaining ICT capabilities."⁸⁴

203. In order to take advantage of access, communities, businesses and individuals all need to learn how to leverage it to their advantage. In particular, less educated and privileged users (and non-users) need assistance in understanding and acting upon opportunities created by ICTs. And communities – including local and voluntary organizations, local government operations, businesses, and citizens - need support in developing and implementing strategies to take advantage of ICTs and to develop useful applications.⁸⁵
204. It is difficult to measure the current status of community use of broadband and ICTs. What is clear, however, is that we as a society are a long way from achieving the potential that these technologies offer.⁸⁶

⁸² CRACIN Executive Position Statement, prepared for the conference "Paving the Road to Tunis WSIS II" (Winnipeg, May 13-15, 2005). www.cracin.ca. Online: http://808.pariso.com/archives/2005/05/cracin_executiv.html

⁸³ Rideout and Reddick, *op cit*.

⁸⁴ Gurstein, "Communities: The Hidden Dimension of ICTs", Communication Rights in Information Society Issue Paper No.7, (2000). Online: http://files.crisinfo.org/cris/issue_7_en.rtf

⁸⁵ NBTf Report, Recommendation 5.3. *op cit*.

⁸⁶ Gurstein, "Effective Use and the Community Informatics Sector: Some thoughts on Canada's approach to community technology/community access" (2004), in *Seeking Convergence in Policy and Practice: Communications in the Public Interest*, Vol. 2. M. Moll and L.R. Shade (Eds.) Ottawa: Canadian Centre for

Recommendation:

- **Government policy should focus not only on physical access to broadband and ICTs, but also on affordability, special needs access, awareness and training, and effective use by local communities. The status of all of these aspects of access should be measured and tracked on an ongoing basis.**

D.2 Is government or regulatory intervention required to expand Canada's telecommunications network connectivity – or should this be left to the market? Given the level of competition in the broadband access market, as well as the fact that new access and IP technologies are reducing costs for consumers and improving the business case for service providers, is government or regulatory intervention still required?

205. Yes – clearly, government or regulatory intervention continues to be required in order to expand Canada's connectivity.
206. The market has proven successful in providing physical access where there are profits to be made from doing so, but it cannot be expected to deliver access to locations or population segments where there is no reasonable business case for doing so. Moreover, the market does not account for important social and economic benefits that accompany broadband access – benefits that accrue to society and the economy generally, but not to individual service or facilities providers. It thus fails to deliver services to locations and in circumstances even where the overall benefits of doing so outweigh the costs. Technological and market developments may reduce the need for government/regulatory intervention in some areas, but will not eliminate – and may in fact augment - that need in other areas. See B.1 for more on this issue generally.
207. While technological developments are changing the economics of service delivery, it remains the case that the profit potential for businesses is insufficient to justify private investment in connectivity to certain locations, at affordable prices. Similarly, investments in special accessibility devices for those with disabilities (e.g., cell phones with capability to operate with special devices for those with disabilities) are not being made, presumably because there is insufficient demand to warrant the necessary investment. As long as service delivery remains unprofitable in certain locations or to certain groups, other methods must be used to make such delivery happen.
208. In the context of ongoing technological development and change, however, it is essential that subsidy programs be continually reassessed so as to ensure that they are providing service where truly needed, that they are not overly costly, and that their design minimizes market distortions and avoids perverse effects.

Policy Alternatives. [No copy available]. See other research being conducted by the "Canadian Research Alliance for Community Innovation and Networking": www.cracin.ca.

Recommendations:

- **Expanding connectivity to geographic, special needs, and low-income communities requires government or regulatory intervention, despite technological innovations that are lowering the cost of service provision.**
- **Subsidy programs be continually reassessed so as to ensure that they are providing service where truly needed and that they are cost-effective.**

D.3 If government or regulatory intervention is warranted, why, and in what types of markets is it required? (e.g. what specific types of remote, rural, lower income, aboriginal communities or communities within some proximity to urban centers that are currently still unserved). What types of social and economic benefits justify such methods?

209. The justification for government/regulatory intervention in order to deliver broadband to unserved communities and to support the development of community capacity to take advantage of the opportunities offered by broadband is set out in the National Broadband Task Force report of 2001. After reviewing the significant social, economic, and cultural benefits of nationwide broadband, the Task Force crafted a set of principles to guide its work. One of these principles is the "Role of Governments", expressed as follows:

"Access to broadband networks is widely expected to make a significant contribution to economic and social development in all parts of Canada. Moreover, there is some urgency associated with the development of broadband infrastructure because the achievement of some economic development objectives could be affected by international competition. Accordingly, we believe that the federal government, in partnership with other levels of government, public institutions, community organizations and the private sector, should continue to play a key role in the development of broadband networks and services.

Accordingly, the Task Force concluded that:

Working with other stakeholders, governments should, in their respective jurisdictions:

- *foster effective competition in facilities, services and content provision, as well as a climate conducive to private innovation and investment;*
- *develop an enabling and effective regulatory environment within which elements of the private sector operate;*
- *assist communities in exploiting opportunities for broadband deployment;*
- *ensure the effective utilization of broadband networks in such public sector activities as e-government, e-health, e-learning and e-research;*

- *stimulate the development, availability and use of Canadian content, including through Canada's public institutions; and*
- *promote awareness of Canadian achievements in the development of broadband infrastructure and use of broadband services.*⁸⁷

210. The Task Force concluded, under its eighth principle "Broadband Infrastructure Development Programs", that:

*Government broadband infrastructure development programs in service of the specific ends described above as well as the general public interest, should focus on those communities where, without government involvement the private sector is unlikely to deliver such services, and should be guided by such considerations as sustainability, technological neutrality, timeliness and affordability, and the value of an open and competitive market.*⁸⁸

211. The Consumer Groups endorse these principles and recommendations, and submit that they apply as much today as they did in 2001.

212. The Task Force identified and explained at some length the significant benefits that broadband access offers in the areas of e-government, e-business, e-learning, and e-content. We will not repeat that analysis here; it also continues to apply as much in 2005 as it did in 2001.

213. Other studies have borne out the tremendous benefits of broadband access for rural and remote communities in particular, noting that it mitigates the costs of isolation and distance by providing online alternatives in such areas as education and health, as well as business and government services.⁸⁹ Increased broadband access also enables community development by allowing the isolated, disabled, and otherwise marginalized an opportunity to have the same resources as everyone else. This enablement in turn has an important democratizing effect, and serves to "safeguard, enrich and strengthen the social and economic fabric of Canada and its regions", the first telecommunications policy objective articulated in s.7 of the *Telecommunications Act*.

214. More recent research and analysis tends to focus on the need for appropriate programs and policies to ensure effective use of ICTs by local communities - programs such as Industry Canada's Community Access Program, and policies

⁸⁷ pp.57-58. <http://broadband.gc.ca/pub/program/NBTF/broadband.pdf>

⁸⁸ p.59. <http://broadband.gc.ca/pub/program/NBTF/broadband.pdf>

⁸⁹ Canadian Rural Partnership: "Rural Communities as the Cornerstone" Roundtable discussions, 2003 http://www.rural.gc.ca/dialogue/report/quarter1_e.phtml#6 ; Canadian Research Alliance for Community Information and Networking, "A proposal submitted to the Initiative on the New Economy (INE) Research Alliances program of the Social Science and Humanities Research Council (SSHRC)", 2003, <http://www.fis.utoronto.ca/research/jprp/cracin/CRACIN.pdf> ;Gurstein, *op cit.* and "Putting our work in context", editorial to *Journal of Community Informatics* vol.1, no.3 (2005). <http://ci-journal.net/viewarticle.php?id=106&layout=html>

supporting community-based broadband and wireless infrastructure, as well as the use and development of open source software tools and open access models for content production and dissemination.⁹⁰

215. Government support of local initiatives to extend broadband access to low income, unemployed, disabled, elderly, and other disadvantaged communities, and to assist those communities in making effective use of such access, is clearly warranted.
216. For the reasons stated under D.2, government or regulatory intervention should be focused on those communities and sectors most in need – i.e., communities with the most number of people and businesses likely to benefit from year-round access, individuals who can least afford home access, those with the least ability and power to take advantage of ICTs, and those whose needs are not being met by market forces. Subsidy programs should focus on permanent rather than seasonal residents, on lower income rather than wealthy households, and on local initiatives rather than large national enterprises.
217. Regulation is also needed in order to ensure fair and open access to broadband facilities by retail competitors, thereby maximizing the potential for retail competition in the delivery of broadband and related services. This is particularly so where the prospects for facilities-based competition are limited (due, for example, to the capital cost of facilities construction). The Broadband Task Force recognized the importance of third-party open access, both explicitly as a prerequisite for government-supported infrastructure,⁹¹ and implicitly, under its fourth principle "Equitable and Affordable Access to Broadband":

All communities, institutions, businesses and individuals in Canada should have equitable and affordable access to broadband services and to the widest possible range of content and service providers.

218. In summary, the Consumer Groups submit that government or regulatory intervention is warranted in order to deliver broadband services to communities where such delivery is uneconomic, to ensure third-party open access to broadband facilities, and to support the development of community capacity to take advantage of the opportunities offered by broadband and ICTs.

Recommendations:

- **Government/regulatory intervention should focus on those communities and sectors most in need, and likely to benefit most from such access and empowerment. More resources should be devoted to supporting local community initiatives designed to extend broadband access to low income, unemployed, disabled, elderly, and other disadvantaged communities, and to assist those communities in making effective use of such access.**

⁹⁰ CRACIN Executive Position Statement (May 2005), *op cit.*

⁹¹ See s.4.4 of the report, p.72. <http://broadband.gc.ca/pub/program/NBTF/broadband.pdf>

- **Government/regulator should also intervene so as to ensure third-party access to broadband facilities on fair terms.**

D.4 How effective have Federal Government initiatives been to date in improving access to broadband for communities, businesses, citizens, and public institutions?

219. Industry Canada has undertaken a number of projects designed to expand access to broadband across the country, both prior to and in the wake of the National Broadband Task Force report. Such projects include the Broadband for Rural and Northern Development Pilot Program, the National Satellite Initiative, Smart Communities, the Community Access Program (CAP), SchoolNet, LibraryNet and VolNet (some have which been discontinued). Human Resources Development Canada (HRDC) has also provided support for community use of ICTs through its Community Learning Networks program, administered by the Office of Learning Technology.
220. While an evaluation of each of these projects is beyond of the scope of this submission, it appears that geographic access has improved significantly as a result of these initiatives, and that that some programs (notably, CAP) have played an important role in bridging the persistent income-based digital divide.
221. The CRTC noted in its Nov.2004 "State of Competition" report that:

According to the Broadband Pilot Program National Selection Committee, which recently issued a status report on the program,⁸⁰ investments made through the Pilot program are expected to extend broadband access to approximately 880 rural, northern and First Nation communities by year-end 2005. Moreover, the Committee also estimates that complementary investments made through the NSI and CSIF as well as provincial and territorial broadband initiatives, including private sector participation, should extend broadband access to an additional 700 previously unserved communities by year-end 2005. In total, therefore, roughly 1,500 otherwise unserved communities will have broadband access by the end of 2005 as a result of these various initiatives.

Without these government broadband initiatives, the National Selection Committee estimates that some 3,250 of Canada's 5,500 total communities would have remained without broadband access as of year-end 2005, representing roughly 60% of all Canadian communities or 3 million Canadians (i.e., 10% of the population). However, as a result of the Broadband Pilot Program and other federal, provincial and territorial government broadband deployment initiatives, it is estimated that some 1,700 communities will remain unserved as of year-end 2005. Consequently, the existing government broadband programs have proved

successful in significantly reducing the number of communities in Canada without broadband access to the Internet.⁹²

222. On the other hand, **the income-related digital divide, as measured by home Internet access, has in fact widened significantly over the past several years.**

223. In its 2001 report, the Broadband Task Force found that 79% of Canadian communities (or 4781 communities) did not have access to high speed Internet. By 2003, that figure had fallen to 72%, indicating some improvement. While we do not have current figures, Industry Canada's broadband programs appear to be gradually expanding the coverage of high speed Internet to unserved communities in rural and remote Canada.

224. However, statistics on home Internet access suggests that the income-related digital divide has in fact grown over time. Broadband access clearly remains unaffordable for many Canadian households, and the "connectedness" gap between higher and lower income households is in fact widening.

Home Internet Access among Income Brackets (Ekos)⁹³

Year	Income/Year	< \$20 K	\$21 K- \$39 K	\$40 K - \$59 K	> \$60 K
1997		16 %	27 %	27 %	46 %
1999		23 %	30 %	46 %	65 %
2000		31 %	39 %	54 %	67 %
2001		35 %	46 %	60 %	72 %
2003		42 %	55 %	70 %	84 %

225. Not only has Internet access by low-income households consistently lagged that of higher income households over the years, it has increased by a significantly smaller amount (26% vs. 38% from 1997 to 2003; 11% vs. 17% from 2000 to 2003, and 7% vs. 12% from 2001 to 2003).⁹⁴ The income-related digital divide in Canada has thus increased, from 30% in 1997, to 36% in 2000, to 42% in 2003.

⁹² CRTC, *Report to the Governor in Council on the Status of Competition in Canadian Telecommunications Markets* (Nov. 2004), s.5.6. Online:

<http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2004/gic2004.pdf>

⁹³ Ekos Research Associates Inc., *The Information Highway and the Canadian Communication Household* (2000); *Rethinking the Information Highway: Rethinking the Dual Digital Divide* (2001); *Tracking the Dual Digital Divide* (2002); *The Dual Digital Divide IV* (2004).

<http://ci-journal.net/viewarticle.php?id=39&layout=html> (figure 1)

⁹⁴ "% " = percentage point difference, not percentage rate of increase.

Home Internet Access among Income Quartiles (StatsCan)⁹⁵

Year	Income	Lowest Quartile	2 nd Quartile	3 rd Quartile	Highest Quartile
1997		5.5 %	8.8 %	17.1 %	32.5 %
1998		7.1 %	13.6 %	24.4 %	45.1 %
1999		10.9 %	18.0 %	32.4 %	53.5 %
2000		16.5 %	31.2 %	47.4 %	65.4 %
2001		22.6 %	40.0 %	56.4 %	75.8 %
2002		25.1 %	39.9 %	62.3 %	78.4 %
2003		26.7 %	44.6 %	64.7 %	81.9 %

226. Statistics Canada data confirm this trend: in 1999, only 11% of the lowest income quartile had home Internet access, while 53.5% of the highest income quartile did. As of 2003, these figures were 27% and 82%, respectively – indicating an increase of 28 percentage points for higher income households, but only 16 percentage points for lower income households.

Internet Access from any location, by income quartile (StatsCan)⁹⁶

Year	Income	Lowest Quartile	2 nd Quartile	3 rd Quartile	Highest Quartile
1997		12.4 %	18.4 %	32.8 %	53.7 %
1998		13.2 %	23.6 %	41.5 %	65.1 %
1999		18.8 %	29.2 %	48.1 %	71.2 %
2000		23.9 %	42.8 %	60.6 %	77.9 %
2001		31.6 %	51.8 %	70.1 %	87.3 %
2002		33.0%	50.9 %	74.7 %	87.9 %
2003		35.0 %	56.3%	75.3 %	90.3 %

227. The statistics showing rates of Internet access from any location (including home, work, school, public libraries, and other locations) also confirm a persistent digital divide based on income in Canada. In 1999, 19% of the lowest income quartile accessed the Internet from some location, in contrast to 71% of the high income quartile. By 2003, those figures were 35% and 90%, respectively, indicating increased Internet access of 16 percentage points for the low income category, compared to 19 percentage points for the highest income category over this period.

⁹⁵ Dickinson & Ellison, *Plugging In: The Increase of Household Internet Use Continues into 1999*, Statistics Canada, Connectedness Series, Nov. 2000, <http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE2000001.pdf>, Statistics Canada, CANSIM, tables (for fee) [358-0003](#), [358-0004](#), [358-0005](#) and [358-0017](#); Statistics Canada, *Household Internet Use Survey*, <http://www40.statcan.ca/101/cst01/comm10b.htm>.

⁹⁶ Statistics Canada, CANSIM, tables (for fee) [358-0003](#), [358-0004](#), [358-0005](#) and [358-0017](#); <http://www40.statcan.ca/101/cst01/comm10a.htm>

228. Industry Canada's **Community Access Program (CAP)** has been instrumental in bridging this growing gap by offering free public Internet access sites in rural and urban communities across the country. Several thousand sites (estimates vary) now offer free Internet access to millions of Canadians who cannot afford home access. CAP representatives state that "CAP has a strong track record in leveraging resources", and note that "at least 50% of the costs of operating a CAP site are found and leveraged from the community".⁹⁷ They point out that CAP is a "collaboration platform" that has each year spawned over 2,000 additional projects across the country, engaged over 20,000 community partners in those projects, and touched over 5 million Canadians (over and above site visits).⁹⁸
229. A 2004 evaluation of the program concluded that "CAP is a unique program that continues to be needed and relevant because there is still a digital divide in Canada and CAP has been having success at bridging this gap in public Internet access and capability."⁹⁹ The study noted that:

"CAP is perceived to have had considerable success at contributing to its objectives, providing a range of benefits for users and communities, and reducing the digital divide (though there is still more to do in this regard). For example, major perceived benefits include increased knowledge about, comfort with and use of the Internet and ICT; exchange of information and ideas among citizens; social/cultural development and better integration of users into the community (e.g., through opportunities to meet or communicate); and even some improvement in the economic situation of users (e.g., development of job skills, assistance with job search, selling locally produced goods over the Internet)."

Moreover,

"CAP is widely viewed as a cost-effective program, providing numerous benefits for a small investment in sites (an average of approximately \$4,412 per site)."

230. However, the study also notes that one-third of sites would likely cease to exist if CAP funding ends, and one-half would need to offer fewer services. As leading researchers and practitioners in this area point out, *"Recent gains in closing the digital divide are fragile. The community initiatives and organizations on the front lines of public Internet access provision are extremely vulnerable and highly dependent on government funding."*¹⁰⁰

⁹⁷ "The Future of CAP: Proposed Recommendations to Industry Canada for feedback from the CAP Community"; <http://cap.vcn.bc.ca/uploads/1336/CAP3.pdf>.

⁹⁸ Ibid.

⁹⁹ "Evaluation Study of the Community Access Program", Audit and Evaluation Branch, Industry Canada (January 16, 2004).
<http://www.ic.gc.ca/cmb/welcomeic.nsf/558d636590992942852564880052155b/ffd2e3755d7f251585256e9800510b66!OpenDocument>

¹⁰⁰ CRACIN Executive Position, *op cit*.

231. Yet, funding for the CAP Program was significantly reduced in recent years, and is scheduled to end on March 31, 2006. In the words of the CRACIN experts, *"flagging government commitment to completing the job of connecting Canadians in a meaningful way threatens to halt, and even undo, the progress made in the past decade"*.
232. Listing a number of significant achievements in connecting Canadians over the past decade, these experts warn:
- "As impressive as these achievements appear, we must however be wary of the glorification of "technical connectedness" when it comes to assessing the results of Canada's national ICT strategy. Indeed, the work of CRACIN and other researchers has shown that Canada's national ICT strategy has fallen short of its own modest goals, and has been undermined by, among other things: short term funding and program horizons; narrowly-defined and "access" oriented program goals; misaligned departmental boundaries and programs; lack of adequate public consultation; and a halfhearted commitment to public interest concerns regarding the ICT agenda."¹⁰¹*
233. The Consumer Groups agree with this analysis. The CAP program has been remarkably effective in improving access to broadband for marginalized communities and citizens. Yet much more remains to be done in this area, and recent government decisions to scale back funding threaten to undermine progress made to date.

D.5 What specific policies and/or fiscal and/or regulatory measures are needed to provide affordable broadband access to all communities? Given the political challenges of obtaining government budget allocations for expansion of telecommunications network connectivity, what other government or regulatory funding initiatives should be considered? For example, should there be a tax subsidy mechanism? An auctions based mechanism? Should services be subsidized through the CRTC's contribution regime? If so, what would be the extent to which the mechanisms are applied and/or the appropriate level and conditions of subsidy?

Community Access Program

234. The federal government's Community Access Program should be expanded and continued on a long-term basis. The notion that free, non-commercial community Internet access sites and networks can be self-sustaining is clearly fanciful. User fees and/or commercial sponsorship would undermine the whole purpose of the sites, and thus their effectiveness. The value of publicly funded community-based initiatives to expand and capitalize on broadband access has been clearly demonstrated, and justifies renewed governmental support.

¹⁰¹ Ibid.

Other community and NGO initiatives to expand access

235. The Community Access Program is a flagship program for the expansion of affordable broadband access to communities. However, other local and NGO initiatives designed to leverage community access, especially for disadvantaged individuals and communities, also deserve continued – indeed expanded – government support. Like the CAP, such initiatives tend to deliver high value (in terms of bridging the digital divide) at low cost.

Recommendation:

- **The federal government should commit to stable, long term funding to community networking and public access programs and organizations, including the Community Access Program.**

Subsidizing broadband access to unserved communities

236. Competitively and technologically neutral subsidy mechanisms should be devised so that broadband service is delivered to the remaining unserved Canadian communities in the most cost-effective manner, using the most appropriate technology for that location. The Broadband Task Force outlined two deployment models in its 2001 report: the supply-oriented "infrastructure support model" and the demand-oriented "community aggregator model", noting that "hybrid approaches may well provide the best long-run solutions to meeting the differing needs of different parts of the country".¹⁰² Under the infrastructure support model, proposals would be solicited via a competitive bidding process, based on established eligibility criteria. Both private sector and public sector (including local government) builders would be eligible. Under the "community aggregator model", assistance would be provided to Community Champions or Demand Aggregators, who would pool demand within the community, create partnerships, identify matching funding, and make the business case for proceeding with deployment of broadband infrastructure. Once this stage is complete, the Demand Aggregator would issue an RPF and apply for funding (if necessary) from the program administrator. Such funding could be ongoing in the case of some communities.

237. See also B13. Tax-based government funding programs for broadband deployment should be coordinated with the CRTC's contribution-based funding for the extension and upgrading of basic service to high cost areas, so that Canadians are not paying twice for essentially the same end-result. Tax-based subsidies are preferable to service/subscriber-based subsidies insofar as they are more progressive (i.e., less burdensome on low income households).

Recommendations:

- **Broadband deployment to unserved communities should be facilitated, where necessary, through tax-based subsidies rather than service/subscriber-based subsidies.**

¹⁰² pp.72-74, and Appendix G.

- **Tax-based government funding programs for broadband deployment should be coordinated with the CRTC's contribution-based funding for the extension and upgrading of basic service to high cost areas, so that Canadians are not paying twice for essentially the same end-result.**
- **Facilities providers under either subsidy scheme (CRTC-administered or federal government-administered) should be selected via a technology-neutral competitive process based on eligibility criteria drawn up by, or in close consultation with, the local community.**
- **The National Broadband Task Force's two recommended deployment models should be used as the basis for a new approach.**

D.6 Should consideration be given to expanding the definition of universal service for regulatory purposes, to include specific broadband connectivity? If so, should other services be added to the definition of regulated universal services? What is "an appropriate level of access to modern telecommunications services" for all Canadians?

238. Yes. To the extent that policies are based on a definition of "basic telecommunications service", it is important that this definition keeps pace with technological and market developments. Over the past few years, the standard for Internet service has shifted from dial-up to high speed service (based on DSL or cable modems). Even two years ago, the vast majority of Internet users in Canada relied upon high speed connections. In 2003 (the most recent data published by Statistics Canada), 55% of Canadian households reported having home Internet access, and of these households, 66% had a high-speed connection.¹⁰³ These figures have no doubt increased since 2003.
239. Forty-two percent (42%) of respondents to the July 2005 Decima Consumer Study commissioned by Bell Canada and Telus said that high-speed Internet service should be considered basic service for regulatory purposes. While this is a minority, it is important to note that 35% did not think that even dial-up Internet access should be considered "basic" – yet, the CRTC and most parties to the high cost area proceeding in 1997/98 took the position that it was.
240. Low-speed dial-up connections no longer suffice for many of the applications that users wish to make of the Internet. Complex graphics, multi-media applications, and other content that uses high bandwidth are increasingly common on websites and in online communications. As the majority of high speed users grows, so does the expectation that all users have high-speed connections, and hence the need for users to be so equipped.
241. Moreover, as the telecommunications infrastructure moves to IP-based platforms, only those consumers with broadband access will benefit from the increased array of options and features offered by this new technology.

¹⁰³ Statistics Canada, *The Daily* (July 8, 2004). Online: <http://www.statcan.ca/Daily/English/040708/d040708.pdf>

242. Therefore, in 2005, "an appropriate level of access to modern telecommunications services" includes a high-speed connection to the Internet.
243. Nevertheless, in designing a subsidy program to deliver or upgrade telecommunications access, it is important to prioritize needs, to weigh costs and benefits of different approaches to universal service in specific locations, and to allow for flexibility in the implementation of universal service policies in different local communities. One size does not necessarily fit all. In some communities, provision of basic voice communications may be the priority, while in others, high speed Internet access may be more important. Certain technologies may be appropriate in some communities, but not in others. A policy of subsidizing broadband service to all Canadian communities should allow for exceptions where the cost of doing so exceeds a reasonable threshold per subscribed household, where local communities have objected, or where prudence in the light of technological developments dictates waiting a short period for a more promising technology to mature.

Recommendations:

- **Government and regulatory approaches to connectivity should recognize that an appropriate level of access to modern telecommunications services now includes a high-speed connection to the Internet. However, subsidy programs should be sufficiently flexible to respond to the differing needs of different communities.**

D.8 What should be the roles of the various stakeholders – the private sector, CRTC, federal and provincial governments, non-profit organizations, and communities themselves – in bridging Canada's broadband divide?

244. The Consumer Groups support the recommendations of the National Broadband Task Force regarding the role of communities and governments:

Working with other stakeholders, communities should be engaged in identifying local needs and network options, in developing capacity at the local level to use and gain value from broadband networks, and in ensuring that economic development plans and initiatives incorporate broadband services and content.¹⁰⁴

Working with other stakeholders, governments should, in their respective jurisdictions:

- *foster effective competition in facilities, services and content provision, as well as a climate conducive to private innovation and investment;*
- *develop an enabling and effective regulatory environment within which elements of the private sector operate;*

¹⁰⁴ Fifth Principle: Role of Communities, p.58. <http://broadband.gc.ca/pub/program/NBTF/broadband.pdf>

- *assist communities in exploiting opportunities for broadband deployment;*
- *ensure the effective utilization of broadband networks in such public sector activities as e-government, e-health, e-learning and e-research;*
- *stimulate the development, availability and use of Canadian content, including through Canada's public institutions; and*
- *promote awareness of Canadian achievements in the development of broadband infrastructure and use of broadband services.*¹⁰⁵

245. The private sector will obviously play a key role in bridging Canada's broadband divide, but for the reasons set out above under B.1 and D.2, it cannot be expected to take a "leadership role" as suggested by the Task Force, especially regarding community empowerment initiatives or the delivery of broadband service to locations or households that offer no profit potential.
246. Non-profit organizations are proving to be key players in the provision of Internet access to those without the means to afford home access and without the privilege of work access. They should be supported via government grants and contributions programs.

Recommendations:

- **See National Broadband Task Force recommendations re: the roles of communities and governments.**
- **The CRTC should create and/or maintain national subsidy schemes designed to fill in access gaps (geographic, special needs-related, and income-related) that the federal and provincial governments have left open.**
- **The private sector cannot be relied upon to bridge Canada's digital divide. Nor should it be expected to play a key role in the delivery of broadband services to needy communities. Community networks and public access sites should remain non-commercial in nature.**
- **Governments should provide greater support to non-profit organizations engaged in efforts to bridge Canada's digital divide, through expanded grants and contributions programs.**

D.10 To what extent will the provision of an advanced telecommunications infrastructure drive the adoption of advanced information and communications services by Canadian consumers and businesses? Is there a role for government to play in the adoption of these services and technologies?

247. The provision of advanced telecommunications infrastructure is just one factor – albeit an important one – in the adoption of advanced information and communications services by Canadian consumers. As noted above under D.1, access (and by implication, adoption of related services) involves much more than mere physical availability.

¹⁰⁵ Seventh Principle: Role of Governments, pp.58-59.
<http://broadband.gc.ca/pub/program/NBTF/broadband.pdf>

- Consumers must also be able to afford the service that is being made available to them. If it is beyond their means, or perceived as not worth the expense, it will not be adopted.
 - Consumers must also be able to use the services – if the services are not accessible to people with visual or hearing disabilities, for example, they will not reach those important segments of the population.
 - Consumers must be able to take advantage of the services: they must have the necessary awareness, training, and other tools with which to make effective use of the services – not just as e-commerce consumers, but also as citizens and active members of civil society.
248. Government has an important role to play in the ensuring that these often neglected aspects of access – affordability, special needs access, awareness/training, and effective use – are addressed. Support of local community initiatives to make effective use of ICTs will be a key role of government in the coming years.
249. Affordability of Internet service is influenced, in part, by the price of such services, as well as the equipment necessary for them. Government also has an important role to play in ensuring that prices, quality of service, and other important aspects of telecommunications services are regulated if and where competition proves to be insufficient or unable to protect the interests of users. See B1 for more on this issue.
250. Adoption of advanced information and communications services by Canadian consumers will also be inhibited by the perception that it entails undesirable risk. The Internet has proven to be fertile ground for fraudsters, thieves, and unethical business practices. Consumer concerns about privacy, security, and fraud are affecting consumer willingness to engage in electronic commerce,¹⁰⁶ and if not adequately addressed, will likely limit the adoption of services that are perceived to entail unacceptable risk. Governments must address these issues if consumers are to adopt ICTs in larger numbers. See E.15 for more on this issue.

Recommendations:

- **The federal government should renew and expand its support for local community initiatives to make effective use of ICTs.**
- **The CRTC should be prepared to regulate Internet service prices and other aspects of service if and when it is clear that competition is insufficient to protect the interests of users.**

¹⁰⁶ For example, see "Study: Security Fears daunt online shoppers", CNet News.com, Kawamoto (Feb.14, 2005). http://news.com.com/Study+Security+fears+daunt+online+shoppers/2100-1029_3-5575569.html

- **The federal government should continue to work with stakeholders to develop industry guidelines, legislation and other measures designed to limit the risks that face consumers when they go online.**

E. ICT in the Home

E.15 How can consumer concerns about privacy, network dependability, security and fraud be addressed to facilitate the adoption of ICT?

E.16 What measures, if any, should the Federal Government take to increase the usage of the Internet and adoption of ICT by consumers?

251. Consumer concerns about privacy, security, fraud, and network dependability are seriously impeding the adoption of ICTs in Canada, as elsewhere. For example, 30% of respondents to a nationwide survey conducted by Ipsos-Reid in January 2005 claimed to have stopped banking or shopping online in order to protect themselves against identity theft.¹⁰⁷ Statistics Canada data indicates significant, and in some cases, growing consumer concern about privacy and security on the Internet: in 2003, 42% of Internet users expressed strong concern about privacy, and 46% expressed strong concern about security, compared to 39% and 45% in 2001. A consistently higher proportion of Internet "window shoppers" expressed strong concern about privacy (46% in 2003) and security (50% in 2003), suggesting that many users were refraining from engaging in e-commerce because of these fears.¹⁰⁸
252. These concerns are likely to increase with the incidence of, and harm caused by, ever-changing forms of Internet-based fraud, scams, spam, spyware, and privacy invasions.¹⁰⁹ The latest threats to Internet users, coined "pharming" and "crimeware", are expected to rapidly outpace "phishing" in the damage they inflict.¹¹⁰ "Phishing" alone – a form of e-mail fraud – has caused widespread loss of confidence in online communications. Indeed, a recent US survey finds that phishing and online attacks are likely to inhibit growth in electronic commerce by 1-3% over the next three years, in the absence of effective counter-action.¹¹¹ The same survey found that over 42% of US online shoppers and 28% of online banking customers were cutting back on their activities because of "phishing" and other online dangers.

¹⁰⁷ "Concern about Identity Theft Growing in Canada", released Feb. 28, 2005; <http://www.ipsos-na.com/news/pressrelease.cfm?id=2582>

¹⁰⁸ Table 358-0023: "Concern about privacy and security on the Internet by type of Internet shoppers accessing from any location"; online; <http://www40.statcan.ca/101/cst01/comm11c.htm>

¹⁰⁹ Susannah Fox, "Spyware: The threat of unwanted software programs is changing the way people use the internet" (July 2005) Pew Internet and American Life Project: http://www.pewinternet.org/PPF/r/160/report_display.asp.

¹¹⁰ Dawn Kawamoto, "Antiphishing group casts line a new threats", *CNet News.com* (Aug.3, 2005); http://news.com.com/2100-7349_3-5816919.html.

¹¹¹ Avivah Litan, "Increased Phishing and Online Attacks cause dip in consumer confidence"; (Gartner Group; June 22, 2005): http://gartner11.gartnerweb.com/DisplayDocument?doc_cd=129146.

253. In addition to these more obvious threats, unfair and deceptive business practices, overly zealous intellectual property protection regimes, and lack of effective consumer redress in the online environment are also exacting a toll in terms of consumer confidence online. The Consumer Groups submit that these "softer" targets are also in need of attention if the potential for ICT adoption is to be fully achieved.
254. To its credit, Industry Canada has recognized the central role of consumer trust and confidence in its efforts over the past decade to make Canada a world leader in electronic commerce. With the support of Industry Canada and in particular its Office of Consumer Affairs, members of the Consumer Groups have been involved in a number of important multi-stakeholder initiatives to create the foundation for consumer trust and confidence in ICTs, including:
- the development of the "Canadian Code of Practice for Consumer Protection in Electronic Commerce", endorsed by federal, provincial and territorial Ministers responsible for Consumer Affairs in January 2004 ;
 - the development of the "Canadian Code of Practice for Consumer Debit Card Services"¹¹²;
 - the development of "Principles for Electronic Authentication: A Canadian Framework" (Industry Canada; May 2004);
 - the national Task Force on Spam, which reported to Industry Canada in May 2004;
 - the CI/GBDe Agreement on ADR Guidelines (see <http://www.gbde.org/consumerconfidence.html>);
 - the CSA Technical Committee on Privacy (*Model Code for the Protection of Personal Information*, CAN/CSA-Q830-96); and
 - the development of private sector data protection legislation in Canada.
255. In all areas - privacy, security, and consumer protection – the challenges faced by Canadian governments and regulators are not merely local. Because the Internet knows no borders, consumer fraud, privacy abuses, spam, spyware, viruses and other problems cannot be solved at the domestic level alone. Effective approaches to all of these problems must involve international cooperation. The Consumer Groups endorse the recommendations made by US and EU consumer organizations regarding protection of consumers from fraud and serious deception across borders.¹¹³
256. Effective approaches must also focus on underlying problems, rather than on promoting consumer trust and confidence *per se*. In other words, it is not enough to reassure consumers that they are safe online; risks must be actually reduced. Consumers also need effective redress measures when things go wrong. They

¹¹² <http://www.fcac-acfc.gc.ca/eng/compliance/documents.asp>.

¹¹³ Trans Atlantic Consumer Dialogue, *Resolution on Protecting Consumers from Fraud and Serious Deception across Borders*, Doc No. Internet-28-02 (Nov., 2002); online: <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=179>

should not be held liable for losses due to security breaches or online frauds that they could not reasonably have prevented. Aggressive marketing of online banking and other such services may indeed backfire, if large numbers of consumers fall victim to online theft and fraud, and are not adequately compensated by the service provider that promoted the online service.

Recommendations:

- **Consumer concerns about online dangers should be addressed by reducing the risks that face consumers when they go online, not by promoting the adoption of ICTs nor by simply assuring consumers that they are safe online.**
- **The federal government should continue its efforts to obtain international agreements and cooperative arrangements aimed at problems of online fraud, spam, spyware, privacy abuses, cross-border redress mechanisms, and other risks that consumers face when going online.**

Privacy

257. Consumer concerns about privacy should be addressed through stronger domestic legislative/regulatory regimes (in particular, more effective enforcement mechanisms) as well as the development of international minimum standards of data protection and internationally coordinated enforcement activities.
258. Canadians are concerned about both private sector and public sector invasions of their privacy in the online context. In both cases, any incentive for the organization to protect the privacy of its citizens or consumers is outweighed by counter-incentives; self-regulation is clearly not an answer to this problem. That is why we have data protection legislation applicable to both the public and private sectors. In both cases, the existing federal legislation needs to be updated and strengthened in order to provide citizens and consumers with more effective privacy rights.
259. The *Canadian Charter of Rights and Freedoms* does not contain a specific right to privacy. Almost a quarter century after the adoption of the Charter, it has become clear that the lack of a right to privacy in the constitution or similar document is a serious omission. In addition to updating and improving its data protection legislation, the federal government should consider the adoption of a Privacy Rights Charter, such as that proposed by Senator Sheila Finestone in 2000.¹¹⁴ Privacy is a human right, and should be treated as such. Unfortunately, relying on data protection legislation that attempts to balance commercial interests with individual privacy rights results in the commodification of privacy and thus fails to offer the kind of protection that citizens and consumers need in order to trust new

¹¹⁴ Bill S-27: An Act to Guarantee the Human Right to Privacy;
http://www.parl.gc.ca/36/2/parlbus/chambus/senate/bills/public/S-27/S-27_1/S-27_cover-E.htm

technologies and be confident that their privacy will be respected when they engage in online activities.

(a) Private Sector

260. While some organizations appreciate the value of customer privacy and do not engage in unnecessary or inappropriate data collection, use and sharing, many others consider data sharing for secondary marketing purposes to be an integral part of their operations, or a source of revenue that is too attractive to ignore. The business advantages of privacy-intrusive activities seem to outweigh the business advantages of privacy-respectful activities, as long as consumers are not fully aware of how their personal information is being used and with whom it is being shared.
261. Private sector data protection legislation in Canada, together with telecom-specific privacy regulations, has filled in an important gap, but appears to be largely ineffective in proscribing widespread privacy-invasive practices, even within Canada.¹¹⁵ Commercial entities located outside Canada seem to be thumbing their noses at our laws, offering such online services as telephone records searches for a fee, in flagrant violation of Canadian law.¹¹⁶ Clearly, more needs to be done at both the national and international levels to address this growing problem.
262. The Consumer Groups are hopeful that the upcoming Parliamentary review of the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), due in 2006, will offer a meaningful opportunity to assess and amend this important legislation, with a view to improving its effectiveness and thus giving consumers more reason to have confidence in the electronic marketplace and ICTs more generally. In the meantime, the federal government should identify key metrics for the assessment of PIPEDA, and should take measures to ensure that rigorous independent studies on the effectiveness of PIPEDA are conducted in advance of the review, so that the Parliamentary committee has evidence other than the views of stakeholders on which to base its assessment.¹¹⁷

(b) Public Sector

263. Many Canadians are also concerned about overbroad data collection, use and disclosure by governments, law enforcement agencies, and other public sector bodies. These concerns are heightened in the context of increasing governmental use of ICTs, given the vastly greater opportunities for data collection, retention, use and disclosure that such ICTs offer. Much of the data collected by public bodies for

¹¹⁵ Philippa Lawson, "The PIPEDA five-year review: An opportunity to be grasped", *Canadian Privacy Law Review* vol.2, no.10 (July 2005), online: http://www.cippic.ca/en/news/documents/pl_article_for_cplr_july_2005.pdf; John Lawford, "Consumer Privacy under PIPEDA: How are we doing?" (PIAC, Nov. 2004), online: <http://www.piac.ca/PIPEDAReviewFinal.pdf>; Christopher Berzins, "Three Years under the PIPEDA: A Disappointing Beginning" (Nov. 2004) 3:3 *Canadian Journal of Law and Technology* 113.

¹¹⁶ See, for example, <http://www.locatecell.com/> or <http://www.abika.com/> .

¹¹⁷ For more detail on this issue, see Philippa Lawson, *op cit*.

legitimate purposes (such as social assistance, tax, health care, census statistics and the investigation of crime) is highly sensitive and therefore needs to be subject to very strict controls.

264. The federal *Privacy Act* governs federal public sector collection, use and disclosure of its citizens' personal information. It has not been reviewed or amended since taking effect in 1983, despite significant new privacy challenges posed by technological developments and increasing government use of ICTs. Clearly, a review of this legislation is long overdue.
265. Many Canadians are also concerned about inappropriate access by law enforcement officials to their private online communications.¹¹⁸ The federal government is expected to introduce legislation early in the fall of 2005 to update and expand rules regarding "lawful access" in order to give law enforcement agencies more effective tools to investigate crimes in the digital age. ("Lawful Access" refers to the lawful interception of communications as well as search and seizure of information by law enforcement agencies.) Civil society concerns focus on the potential for widespread surveillance of Canadians by overzealous security agencies via such means as warrantless access to subscriber data, mandatory retention of communications data by ISPs, easily obtained "production orders", and centralized depositories of digital communications data.
266. If Canadians perceive that their communications are subject to government surveillance, they will likely limit their use of ICTs. Thus, even aside from the overriding civil liberties concerns that these proposals raise, they may well have a serious chilling effect on the adoption and use of ICTs by Canadians.

(c) Electronic Authentication

267. One of the greatest challenges to address regarding consumer trust and confidence in ICTs is that of authentication. Electronic commerce, private communications, government online, electronic voting, etc. all require some degree of confidence on the part of users regarding the identity of the persons they are communicating with as well as the integrity of their communications. As well, problems such as spam – now a serious inhibitor to ICT adoption – take advantage of the unrestricted and free flow of information on the Internet. Much effort is therefore going into the development of authentication mechanisms as answers to problems of spam, fraud, identity theft, and insecure communications.
268. Electronic authentication itself, however, can raise privacy concerns depending on how it is designed and implemented. It is important, in order not to undermine the goal of consumer trust and confidence in ICTs, that electronic authentication mechanisms are designed and implemented so as to minimize, if not avoid, the collection, retention, use and disclosure of personal information. Organizations

¹¹⁸ See CIPPIC's website on "Lawful Access": <http://www.cippic.ca/en/projects-cases/lawful-access/>. See also the International Campaign Against Mass Surveillance: <http://www.i-cams.org/>.

should only get the information they need and only at the time that they need it to carry out the authentication function.

Recommendations:

- **The federal *Personal Information Protection and Electronic Documents Act* should undergo a thorough and meaningful review, as scheduled, in 2006.**
- **The federal *Privacy Act* should undergo a thorough and meaningful public review in 2006.**
- **The federal government should propose and champion a *Privacy Rights Charter* similar to that proposed by Senator Finestone in 2000.**
- **Federal legislative proposals to expand "lawful access" should be subjected to a full and fair public debate before being adopted.**
- **The federal government should take additional steps to ensure that electronic authentication mechanisms developed and/or used in Canada are designed and implemented so as to minimize if not avoid the collection, use, retention and disclosure of personal information.**

Security, Network Dependability, Online Fraud

269. As with privacy, consumer concerns about the security of their online transactions have also proven to be well-founded, as ever-mutating forms of fraud, spyware, spam, and computer viruses bombard Internet users daily and successfully steal from and cheat innocent consumers. If these threats are not adequately contained, risk-averse consumers will simply stop using the Internet and the promise of ICTs will never be reached.
270. Given the strong common interest among legitimate businesses, governments, and public interest organizations in making the Internet a safe and friendly place for citizens and consumers, there are a number of initiatives underway to address problems such as spam, spyware, online fraud and other crimes at both domestic and international levels. On these issues, multistakeholder initiatives hold particular promise and should be recognized as key elements of any effective strategy to address consumer concerns. For example, the North American Anti-Spyware Coalition (in which CIPPIC is active) is making progress in defining the problem, developing best practices for the industry (including guidelines for anti-spyware service providers to deal with complaints by alleged spyware vendors), and providing tips for computer users to avoid spyware.¹¹⁹ It is critical, however, that such initiatives include input from all affected stakeholder groups – in particular, consumer groups.

¹¹⁹ <http://www.antispywarecoalition.org/>

271. On other issues, however, such as unfair business practices and consumer remedies, there is no similar confluence of interest between businesses and consumers. Multi-stakeholder efforts to develop codes of practice or legislation will therefore always be limited and the public interest may never be fully achieved. Governments play a critical role with respect to these "softer" issues affecting consumer trust and confidence, precisely because the private sector cannot be expected to agree to give up practices which, although unfair or harmful to consumers or the public interest, have proven to be profitable. Examples of such practices include mandatory arbitration clauses in consumer contracts, holding consumers to unfair terms hidden in "clickwrap" or "shrinkwrap" contracts, and making unilateral changes to consumer contracts for online services without proper notice to the consumer. In these cases, strong consumer protection laws, and enforcement thereof, are needed.
272. Consumer concerns about these threats and issues can and should be addressed through a variety of approaches including:
273. In the marketplace:
- Websites and offline materials that provide consumers with accurate, up-to-date, and neutral information about online risks;
 - Trustmark programs that are based on meaningful and rigorously enforced codes of practice meeting or exceeding the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*;
 - Effective consumer redress mechanisms especially in the cross-border context, including online dispute resolution mechanisms for consumers that meet the standards set out in the *CI/GBDe Agreement on ADR Guidelines*;¹²⁰
274. At the policy level (using working groups with balanced stakeholder representation):
- International guidelines for countries to adopt via legislation (e.g., the *OECD Guidelines for Consumer Protection in the context of electronic commerce*¹²¹);
 - International and national standards for private sector actors to adopt in their policies and practices (e.g., the *CSA Model Privacy Code*);
 - National Guidelines, Principles, Codes, and statute templates (e.g., the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*; the Consumer Measures Committee *Internet Sales Contract Template*)
275. Legislation:
- Data protection legislation (e.g., PIPED Act and similar provincial statutes);

¹²⁰ <http://www.gbde.org/consumerconfidence.html>

¹²¹ http://www.oecd.org/document/51/0,2340,en_2649_201185_1824435_1_1_1_1,00.html

- Consumer Protection statutes that provide consumers with the effective protection against online fraud, deception, and unfair business practices, as well as with effective redress mechanisms;
- Criminal laws that prohibit the most serious forms of online fraud and deception;
- Where necessary, specific legislation targeted at online threats (e.g., national Task Force on Spam report calling for federal legislative action on spam and spyware)

276. Effective enforcement of laws:

- domestically, through a combination of rigorous state enforcement as well as private actions by aggrieved consumers;
- internationally, through bilateral and multilateral mutual recognition and enforcement agreements.

Recommendations:

- **The federal government should continue its efforts to develop effective legislative and regulatory responses to online threats, both federally and across provinces and territories, where self-regulatory approaches have proven insufficient or where market forces are clearly insufficient to address the problem. In particular:**
 - **provinces and territories should be encouraged to adopt consumer protection legislation that proscribes unfair business practices such as mandatory arbitration clauses, and overbroad liability limitation clauses, and that requires effective forms of notice in the online context.**
 - **enforcement of existing laws as they apply to new online threats such as spyware should be improved.**
 - **where existing laws are clearly inadequate to address new online threats such as spam and spyware, legislation targeted at those threats should be developed.**
 - **legislative and regulatory approaches to these problems should not rely upon individual consumers or other private actors to enforce the law; instead, governments should take responsibility for a significant share of the enforcement burden themselves.**
- **The federal government should continue to facilitate and encourage multi-stakeholder initiatives to develop codes and guidelines for business best practices in the online context, and should ensure that consumer/public interests are well represented on such bodies. In particular,**
 - **the Canadian Code of Practice for Debit Card Services should be used as the basis for a new or expanded Code of Practice focusing on online banking.**

- **The federal government should continue to work with other governments to address the international aspects of online fraud, security, network dependability and consumer protection, though the OECD and other international bodies.**

Other Issues

F.1 What other issues should the Panel take into account in making its recommendations? Please provide specific facts, analysis and suggestions that you think are relevant to the Panel's recommendations?

277. If the Commission continues to set just and reasonable rates for services that are provided by a dominant carrier, it must, at a minimum require the reporting of costs and revenues associated with the services. In Decision 2002-34, the Commission abolished reporting requirements on utility segment services on a going forward basis at the same time as it fashioned the second-generation price cap. This essentially has meant that the Commission disabled itself from ascertaining whether the rates set under the price cap were reasonable or unreasonable based on the historic judicially articulated test for setting just and reasonable rates.¹²² There is also little point in prescribing PBR exercises such as price caps if the efficiencies gleaned from the operation of the price cap are not applied to the benefit of ratepayers at the end of the price cap period. The Commission has made this task extremely difficult by its order in Decision 2002-34.
278. While there is no evidence on the ILECs' experience under the second price cap period, it is fair to assume that the over-earning trends from the first period have continued. As a result, returns from regulated services during the second period may well be even higher than during the first period. This suggests that the prices charged by the incumbents for regulated services are too high, and perhaps much too high, resulting in potentially billions of dollars of overcharges to consumers. Whatever the reality, this is something that the Commission and all stakeholders should know.
279. In tandem with our comments associated with the retention of the "just and reasonable" standard for rates, we recommend that the Commission ensure that adequate reporting of financial results take place with a view to ensuring that, at a minimum, a sanity check on reasonableness of the rates exists. The required reporting is unlikely to be an onerous requirement for the regulated company as it likely corresponds or is closely related to reasonable standards of management accounting that must be in place.

G.6 Given the wide range of possible changes that could be made in Canadian telecommunications policy and regulation, what should be the priorities for the Panel's areas of study and recommendation?

¹²² *Edmonton v. Northwestern Utilities Ltd.* [1929] 2 S.C.R. 186 at pp 192-3.

G.7 Assuming the Panel recommends a phased approach to the implementation of any proposed changes, which areas should be addressed first and what sort of timeline would be appropriate?

280. The Consumer Groups submit that all of the policy changes that may be suggested during this process necessarily must be built upon consumer trust. That trust can only be assured by prioritizing the consumer protection measures suggested in this submission.

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