A Response to the Final Report of the Telecommunications Policy Review Panel

The Coalition of Canadian Audio-visual Unions

June 2, 2006

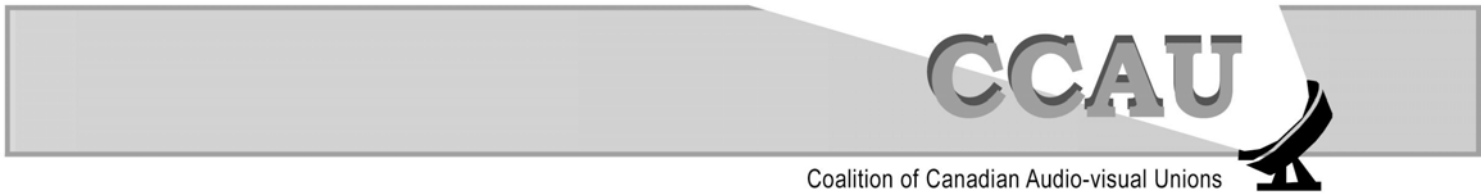

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Table of Contents

1. Introduction and Executive Summary

a) Introduction

This report was prepared by the Coalition of Canadian Audio-visual Unions (CCAU) in response to the March 2006 final report of the Telecommunications Policy Review Panel appointed by the Minister of Industry on April 11, 2005.

The CCAU is a coalition of ten Canadian audio-visual unions representing people in Canada's broadcasting industry. The members of the CCAU include the following organizations that financed the preparation of this report: the Alliance of Canadian Cinema Television and Radio Artists (ACTRA), the Directors Guild of Canada (DGC), the National Association of Broadcast Employees and Technicians Local 700-CEP (NABET), and the Writers Guild of Canada (WGC). The other members of the CCAU are the American Federation of Musicians – Canada (AFM-Canada), Union des artistes (UdA), the Communications, Energy and Paperworkers Union of Canada (CEP), Association des réalisateurs et réalisatrices du Québec (ARRQ), Association Québécoise des techniciens de l'image et du son (AQTIS), and Société des auteurs de radio, télévision et cinéma (SARTeC).

The Telecommunications Policy Review Panel was asked by the Minister of Industry to review Canada's telecommunications framework and report on three areas: regulation, access, and information and communications technologies (ICT) adoption. The panel's mandate did not include either broadcasting or foreign ownership issues.

Given the mandate of the panel, the CCAU did not file a submission in the first round of the panel's public consultation process. Therefore the CCAU was alarmed to learn that a number of parties filed submissions raising issues regarding broadcasting regulation and foreign ownership of broadcasting companies. In response to these submissions, three CCAU members (ACTRA, DGC and WGC) filed a second round submission with the panel. This submission referred to the scope of the panel's mandate and noted that the panel should therefore limit its recommendations to telecommunications and not stray into broadcasting matters, which are governed by the *Broadcasting Act* and have much different imperatives.

Despite the submission of ACTRA, DGC and WGC, the panel's March 2006 final report included an extensive discussion of broadcasting issues, as well as informal recommendations in respect of both broadcasting regulation and foreign ownership of broadcasting undertakings. As a result, the CCAU believes it has no alternative but to respond formally to the panel's report.

The analysis in this document demonstrates the many ways in which the panel's lack of expertise in broadcasting matters led it to inappropriate conclusions. It is also apparent that the panel's focus on technological and economic issues –

suitable for a review of telecommunications and ICT matters – caused the panel to overlook the overriding public policy issues associated with broadcasting, such as artistic vitality and cultural sovereignty, political engagement and national identity, local and regional diversity. While the CCAU can only believe that the panel was well intentioned, there can be no doubt that it would have been preferable if the panel had stayed within its mandate and confined itself to the areas of its expertise – telecommunications and ICTs.

b) Executive Summary

The Telecommunications Policy Review Panel was appointed by the Minister of Industry to review Canada's telecommunications framework and report on three areas: regulation, access and ICT adoption.

The panel members – Gerri Sinclair, Hank Intven and André Tremblay – are experts in telecommunications and ICTs. Gerri Sinclair is a technologist/entrepreneur with management experience at Microsoft. Hank Intven is a telecommunications lawyer. André Tremblay is a businessman with extensive experience in the wireless telecommunications business.

Despite the scope of the panel's mandate and its lack of expertise with respect to broadcasting, the panel nonetheless chose to raise broadcasting issues in numerous places in its report and to include an extensive Afterword making recommendations in respect of broadcasting regulation. The Afterword also includes recommendations with respect to the foreign ownership rules for Canadian telecommunications and broadcasting companies – another issue outside the panel's mandate.

It appears that the panel was convinced to stray beyond its mandate by the combined effect of its own enthusiasm for technology, together with submissions from a handful of parties who argued for virtual elimination of broadcasting regulation and complete elimination of the foreign ownership restrictions. Given the one-sided nature of the input it received on broadcasting issues, the panel developed a perspective on broadcasting which was, at best, confused and often incorrect.

There are three major problems with the panel's analysis.

First, the panel identified that there is an ongoing "convergence" of services (i.e., the offering of many services over a single network) and concluded that this development could not be accommodated under the existing regulatory regime. On this point, the panel was simply wrong. A cable company offering telephony services is regulated under the *Telecommunications Act* with respect to those services. And, a telephone company offering television services is regulated under the *Broadcasting Act* with respect to those services. This is happening today. No regulatory reform is required to deal with this type of convergence.

Second, the panel was confused as to the nature of the current regulatory regime. This is illustrated by the panel's assertion that cable and telephone companies face asymmetric regulation. This is not the case. The *Telecommunications Act* and the *Broadcasting Act* are technology neutral and regulation under these statutes does not depend on the historical character of a network.

In a related vein, the panel appears to have misunderstood the relationship between telecommunications regulation and broadcasting regulation in Canada. In its report, the panel held up the European Union as providing an example for Canada to follow in regulatory matters. The panel focussed on the fact that the EU advocates a technology neutral approach to regulation with an overarching telecommunications regime and a carve out for broadcasting-specific regulation. That is precisely what Canada already has in its *Telecommunications Act* and *Broadcasting Act*.

Third, the panel members' particular experience led the panel to endorse a model of network development that envisions intelligence at the ends of a dumb network (sometimes referred to as the "Microsoft model" since this is the vision promoted by Microsoft). Under this model it is possible to have a complete separation of carriage (i.e., network transmission) from content (i.e., services and applications).

Given its embrace of the Microsoft model, the panel concluded that Canada's existing broadcasting policy and regulatory framework is not sustainable and that reform is required.

Unfortunately, the panel's analysis is simplistic. It is not a given that the Microsoft model will become the dominant network configuration in the future. It seems much more likely that at least some networks will continue to incorporate significant intelligence into the network – intelligence which will be used as an integral part of services provided over the network – thereby eliminating the possibility of a complete separation of carriage and content.

Given the panel's fundamental misunderstanding of the broadcasting regime and its limited perspective on network evolution, the panel's recommendations for reform to Canada's broadcasting policy and regulatory framework are both misguided and unnecessary.

On the question of the foreign ownership restrictions, the panel recommended lifting these restrictions in two phases. In arriving at this recommendation, the panel focused on technological and economic matters and paid no attention to fundamental policy concerns like sovereignty, cultural vitality and national identity, local and regional diversity. The panel did note, but chose not to address, concerns about public safety and national security.

The panel's primary motivation for lifting the foreign ownership restrictions appears to be its view that there is a relatively low level of competition in the wireless sector. This weakness in wireless competition can be directly traced to industry consolidation over the past several years when the number of wireless providers dropped from five to three. This consolidation was examined by the Competition Bureau and approved on the grounds that it would not adversely affect competition.

If there is now a problem in the wireless sector, the obvious solution is to take regulatory action and, if necessary, require the divestiture of assets. It is not an appropriate solution to lift the foreign ownership restrictions and permit the sale of Canada's telecommunications and broadcasting companies.

c) Recommendations

The CCAU urges the Government not to accept the panel's recommendations in respect of either the reform of the broadcasting policy and regulatory framework or the elimination of the foreign ownership restrictions.

If the Government believes that broadcasting policy needs to be refined, it can issue a policy directive to the CRTC under the *Broadcasting Act*.

If the Government believes that concentration in the telecommunications industry is adversely affecting competition, it can and should address this problem directly. The Government should not lift the foreign ownership restrictions and thereby relinquish control over key public policy objectives such as public safety, national security, cultural sovereignty and national identity.

2. The Panel and its Mandate

a) The Panel

The panel was selected by the Minister of Industry as a group of eminent Canadians to study Canada's telecommunications policy. [1] At the news conference releasing the panel's Report, Gerri Sinclair, the panel Chair, described the panel in these terms:

> Hank Intven is a partner with McCarthy Tétrault LLP, a leading Canadian law firm. He is an internationally renowned lawyer with a specialized practice in telecommunications law that spans over twenty-five years. He has advised government and industry clients in over twenty countries on telecommunications related matters.

[1] A copy of the panelists' full biographies, as set out on the Telecom Policy Review Panel website (www.telecomreview.ca) is attached as Appendix A.

> André Tremblay is an accomplished business person who has been a leader in the business development of a number of telecom organizations. He was, for a decade, the CEO of Microcell Telecommunications.
>
> As for myself, my career spans the fields of both academic research and business -- from my technology lab at Simon Fraser University, I spun-out an Internet start-up which was acquired by Microsoft four years ago, after which I went on to become the General Manager of MSN Canada.

Thus, the panel consisted of a telecommunications lawyer, a businessman with experience in wireless telephony and a technologist/entrepreneur with management experience at Microsoft. They are talented individuals, but none has any significant experience in broadcasting or broadcasting regulation. No one would choose them for a panel to look into broadcasting issues, and no one did choose them for that purpose.

b) The Panel's Mandate

The panel's mandate was to "to review Canada's telecommunications framework" and "to make recommendations on how to move Canada toward a modern telecommunications framework in a manner that benefits Canadian industry and consumers".[2]

There was no mention of broadcasting in this statement, nor in the further explication of the panel's mandate identified in the statement of the Areas of Interest:

> Creating the right framework for telecommunications involves maintaining an up-to-date regulatory regime, fostering an environment that improves access for all sectors of the economy, and encouraging the adoption of advanced applications and services. The panel is asked to study and report on three areas that must continue to evolve in order to keep pace with rapid changes in technology, consumer demand and market structure: regulation, access, and information and communications technologies (ICT) adoption.[3]

It is hardly surprising that broadcasting was not mentioned anywhere in the panel's mandate as set out by the Minister of Industry, since the Minister of Industry does not have responsibility for broadcasting and other cultural matters. How is it, then, that the panel's report discussed broadcasting in numerous places and made recommendations in relation to broadcasting policy development and regulation? The answer appears to lie in the panel's process.

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[2] A full copy of the Panel's mandate, as set out on their website, is attached as Appendix B.
[3] See Appendix B.

c) The Panel's Process

The panel was established on April 11, 2005, and began gathering information by means of informal consultations with the telecommunications industry and through a more formal public process initiated by a consultation paper released June 6, 2005. The panel also travelled internationally to better understand the global setting for telecommunications and to learn from the experience of other countries.[4]

The panel's June 2005 consultation paper outlined the issues on which the panel sought input from the public. Broadcasting was not one of those issues. Nonetheless, a very small number of the 108 submissions that the panel received on August 15, 2005, in response to its consultation paper, did make arguments about broadcasting and broadcasting regulation. In particular, the Canadian Cable Telecommunications Association (CCTA) and Shaw Communications Inc. (Shaw) made extensive arguments complaining about the current broadcasting regime.

In the September 15, 2005 second round of submissions, a few parties, including ACTRA, DGC and WGC in a joint submission, noted that the panel's mandate did not extend to broadcasting matters and requested that the panel therefore refrain from addressing them.

In the Afterword to its report, the panel acknowledged the limited scope of its mandate:

> The Panel has decided that, for a number of reasons, it would be inappropriate for it to make specific recommendations to change the Canadian broadcasting policy and regulatory framework. ***It was not part of the Panel's mandate to address these issues.*** Broadcasting policy involves a complex interplay of cultural, industrial and trade issues that the Panel has not studied in detail. In addition, parties affected by such issues would feel justifiably concerned if the Panel made specific recommendations on matters that affected their interests, without a full review of the implications of such recommendations — and a full opportunity to make submissions relevant to them. (emphasis added)

Despite this express acknowledgement of the limitations of its mandate and the inadequacy of its consultation process, the panel included numerous comments on broadcasting and broadcasting regulation in the Afterword and in other places throughout the report.

The CCAU finds it difficult to understand why the panel decided to proceed in this manner. In effect, the panel chose to answer a question that it was not asked.

[4] A description of the panel's process, as set out on the panel's website, is attached as Appendix C.

And, because it lacked both the requisite expertise and a complete set of facts and arguments, the panel's comments on broadcasting and broadcasting regulation were not only outside its mandate, they were also misguided and ill-informed.

In the following sections, the CCAU examines the panel's comments on four key areas: convergence, the existing regulatory regime, the panel's proposals for a review of broadcasting regulation and the panel's proposals for liberalization of the foreign ownership rules.

3. Convergence

The panel stated several times in its report that broadcasting and telecommunications are converging and that this phenomenon requires a revised regulatory approach. This view was stated most succinctly in the opening page of the panel's Afterword:

> The continuing convergence of Canada's communications industries, with former "cable TV" companies and "telephone companies" both offering a similar range of voice, data and video services on broadband Internet Protocol (IP) platforms, will significantly increase competition between the telecommunications and broadcasting industries. The entry of wireless companies into the video distribution business will intensify this competition.
>
> This convergence of telecommunications and broadcasting markets brings into question the continued viability of maintaining two separate policy and regulatory frameworks, one for telecommunications common carriers like the incumbent telephone companies and one for their competitors in most of the same markets, the cable telecommunications companies.[5]

This statement contains four key elements, each of which requires careful scrutiny.

First, the panel's statement suggests that there is a convergence of industry sectors. However, it is unclear why this type of convergence should have any regulatory implications.

Second, the panel's statement is based on one perspective as to how networks are evolving. There are other views.

Third, the panel's statement makes claims about the current regulatory regime which, at best, can be viewed as confused.

[5] TRPR Report at page 11-3.

Fourth, the panel's statement suggests that changes are required to the current regulatory framework. Given the problems with the panel's views on the preceding three points, this final conclusion is unjustified.

Each of these four points is discussed in greater detail below. The first two are discussed in the remainder of this section. The third point is discussed in Section 4, and the fourth point is discussed in Section 5.

a) Industry Convergence

The panel attributed considerable significance to industry convergence – that is, the fact that network operators are offering a wider range of services than before. However, it is unclear why the panel believed the broadening of service offerings by a cable or telephone company should have any implications for regulation.

When Rogers offers a telephony service, it competes as a telecommunications company in the telephony business. And, when MTS Allstream offers television services, it competes as a broadcasting company in the broadcasting distribution business. In neither case is there a "convergence" of services. The two types of services remain distinct. Consequently, Rogers can be – and is – regulated under the *Telecommunications Act* in respect of its telephony services. And, MTS Allstream can be – and is – regulated under the *Broadcasting Act* in respect of its television services. No regulatory adjustments are required.

The CCAU would like to emphasize that it recognizes the new challenges facing the CRTC as a result of technological developments. The regulator must examine and address new forms of broadcasting. Satellite radio, mobile TV, Internet broadcasting - each of these represents a significant regulatory challenge. But none of these developments require the type of dramatic revision to broadcasting policy and regulation that the panel suggested is necessary.

b) Technological Convergence

The panel's report made numerous comments on the evolution of telecommunications networks. From the CCAU's perspective, the most important of these statements is the assertion that networks are developing along the lines of the model promoted by Microsoft. This model envisions the network as being relatively "dumb" – it simply moves information back and forth but does not process that information in any significant manner. Instead, the provision and processing of information, including programming content, takes place at the ends of the network (e.g., at a service provider's server or broadcasting facility and at a user's home). The panel put forward this perspective several times:

> By separating the provision of services and applications from the provision of infrastructure and access and by putting more intelligence at the edges of the telecommunication networks, the open network architectures

> associated with IP will give consumers much greater opportunities to define their product and service needs, to choose a mix of suppliers, and even to create their own applications. In the future, the telecommunications marketplace will increasingly shift from one where applications are "pushed" to consumers by network providers, to one where there are greater opportunities for consumers to "pull" the applications, services and content of their choice.[6]
>
> The servers that provide applications at the edge of IP-based networks can be located anywhere in the world. The distance insensitivity of these networks will expand competition on a global basis and bring new competitors into the telecommunications industry.[7]
>
> However, changes in data, video and audio distribution technologies and markets raise increasing concerns about whether the current broadcasting policy approaches will be the best way, or even a viable way, to pursue such leadership in the future. ***In the Panel's view, these changes call for a major reassessment of the Canadian broadcasting policy and regulatory framework.***[8] (emphasis added)

The final statement cited above makes it clear why the panel's view of networks is so important. The panel believes that if networks are evolving to have the intelligence at the ends and basic transmission capacity in between, along the Microsoft model, then existing broadcasting policies and laws will no longer work.

The CCAU is not convinced that the panel was correct on this last point. Even if the Microsoft model were to become the dominant network model, it does not follow that the result would be a chaotic, borderless communications environment that could not be regulated. Among other things, recent developments indicate that the Internet is not as "borderless" as originally thought. In order to preserve their own markets, broadcasters and online service providers are limiting their reach geographically and setting up technology-based and business-based protections. They are warranting to content producers that the content will only be accessible within certain territorites

For example, in the United States, iTunes Video requires users to provide a credit card with a US address and, at the same time, blocks users with foreign IP addresses. Similarly, ABC has begun streaming some of its most popular programming over the Internet – but only within the United States. ABC is confident that it can put up geographic "fences" on the Internet to protect its intellectual property in these programs.

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[6] TPRP Report at page 1-29.
[7] TPRP Report at page 1-30.
[8] TPRP Report at page 11-6.

These developments illustrate that the panel jumped to unwarranted conclusions on the basis of its assumption that "borderless" networks are a necessary aspect of the Microsoft model. The problem with the panel's conclusions is also illustrated by mobile TV services as they are currently offered by Canadian wireless carriers.

While mobile TV is described as being delivered over the Internet, a mobile user only has access to mobile TV programming if the user subscribes to the wireless carrier's service. In this regard, mobile TV is directly analogous to cable television service. Moreover, the user only gets access to the programming services which the wireless carrier has chosen to make available to its subscribers; again, just like cable television. Based on these facts, it is clear that regulation of a wireless carrier's mobile TV services is no more difficult than regulation of current cable television services. The panel's suggestion of a loss of regulatory control does not withstand scrutiny.

It is evident from the preceding discussion that even if the Microsoft model does turn out to be the way of the future, it does not imply the loss of control suggested by the panel or the necessary demise of current broadcasting policies and regulatory mechanisms. That being said, in the CCAU's view, it is also important to recognize that the panel's assumption about network evolution may not be correct.

In a recent interview in CED Magazine, Alexander Brock, Vice President, Technology and Architecture Development at Rogers Communications discussed the implementation of IP Multimedia Subsystem (IMS) technology by Rogers Cable.[9] Mr. Brock pointed out that IMS allows a cable operator to implement such features as quality of service, authentication, encryption and presence services. These kinds of features permit the network operator to tailor and enhance the services provided over its network and necessarily imply that the network is not merely a transport mechanism, but rather is an integral part of the overall service provided to customers. Consequently, in Mr. Brock's view, this IP technology makes the cable network a much more valuable asset and ensures that it is never "dumb".

In other words, Rogers has an IP-based cable network that does not fit the Microsoft model. The CRTC is currently regulating the broadcasting and telecommunications services Rogers offers using its IP-based network under the *Broadcasting Act* and the *Telecommunications Act*, as appropriate. There is no reason to believe it could not continue to do so in the future.

In the CCAU's view, it is far too early to state with any degree of confidence that all networks will move to the Microsoft model. It seems just as likely that different types of networks will continue to exist. Indeed, it is reasonable to expect that networks will operate differently depending on the services and applications

[9] www.cedmagazine.com/article/CA6294434.html?industryid=43677

being provided. The simplistic separation of applications and transmission described by the panel seems unlikely to occur. Consequently, it is also inappropriate to conclude that the existing regulatory regime will be unable to cope with the evolving environment.

4. The Current Regime

The panel's comments on the current regulatory regime are problematic in at least two ways.

First, the panel mistakenly believes there is an asymmetry in the way cable and telephone companies are regulated.

Second, the panel appears to be confused about the relationship between telecommunications and broadcasting regulation in Canada.

Each of these areas is discussed below.

a) The Myth of Asymmetry

The panel appears to have been convinced that there is "asymmetric" regulation of cable and telephone companies under the *Telecommunications Act* and the *Broadcasting Act* (i.e., it appears the panel believes the statutes are technology specific and provide for distinct regimes for "cable" technology and "telephone" technology). For example, in its Afterword the panel made the following comments:

> This convergence of telecommunications and broadcasting markets brings into question the continued viability of maintaining two separate policy and regulatory frameworks, one for telecommunications common carriers like the incumbent telephone companies and one for their competitors in most of the same markets, the cable telecommunications companies.[10]
>
> These changes in the technological and market environment threaten to undermine the current system of parallel regulation, particularly as it applies to the former "telephone" and "cable TV" companies that are major players in the new converged telecommunications industry.[11]

These statements indicate a fundamental lack of understanding of the current regulatory regime. The type of parallel regulation alluded to by the panel does not exist. Services are regulated under the *Telecommunications Act* or the *Broadcasting Act*, according to their characteristics and market conditions,

[10] TPRP Report at page 11-3.
[11] TPRP Report at page 11-5.

without regard to whether they are offered by a “telephone” or a “cable TV” company.

The depth of the panel’s misunderstanding is further highlighted by the following comments that suggest Canada should revise its regime to follow the example of the European Union.

> European telecommunications and spectrum laws increasingly provide the basis for regulating all telecommunications networks — or "electronic communications networks," as they are now called. Under European Commission policy, no distinction is made between the regulation of telecommunications networks that originated as telephone networks and those that originated as cable TV networks. Separate rules govern production and distribution of broadcasting content, but these are applied equally to all telecommunications networks.
>
> This form of more symmetrical or "technology neutral" regulation should allow network operators the freedom to invest in and develop the IP network infrastructure in the most efficient and effective way possible in response to market demand. At the same time, it should enable policies dedicated to the promotion of video content to focus on the measures best suited to the new network environment.[12]

In brief, the panel recommended that Canada create a regulatory regime that is technology neutral. However, that is precisely what Canada already has.

Both the *Broadcasting Act* and the *Telecommunications Act* are technology neutral, but service-specific. As noted in Section 3, if Rogers offers telephony services those services are regulated under the *Telecommunications Act*. And, if MTS Allstream offers television services, those services are regulated under the *Broadcasting Act*. It makes no difference that Rogers started off as a cable company and MTS Allstream as a telephone company. Both statutes are technology neutral. They focus only on the services provided, not the historical background of the networks used to provide the services.

Contrary to the panel’s statements, asymmetric regulation of cable and telephone companies does not exist. It is a myth put forward by parties who want to see broadcasting regulation eliminated altogether.[13]

[12] TPRP Report at page 11-9.

[13] The notion of asymmetric regulation and the need for a “converged” regulatory environment can be traced directly to the August 15, 2005 submissions of Shaw and CCTA in the panel’s public consultation process. Presumably, these parties had the opportunity to reinforce these ideas in the course of the panel’s informal consultations with members of the telecommunications industry.

b) The Relationship Between Broadcasting and Telecommunications

The panel appears to have been equally confused about the relationship between the telecommunications and broadcasting regimes in Canada. Once again, the panel cited the European Union as an example for Canada to follow:

> The EU's 2002 Framework Directive for electronic communications networks does not differentiate among types of networks or technologies, except that networks making use of radiocommunications remain subject to spectrum licensing requirements. Because of its technological neutrality, and the use of the broadly defined terms "electronic communications networks" and "electronic communications services," the new framework is consistent with technological and market convergence, particularly between conventional public telecommunications networks and cable television distribution networks.
>
> The EU's 2002 Framework Directive deals with "carriage" issues. A separate EU directive deals with "content." Broadcasting or audiovisual programming policy for the EU is the subject of the "Television Without Frontiers Directive."[14]

In other words, the European Union is pursuing an approach that sees telecommunications regulation as the overarching regime, with broadcasting regulation as a “carve out”. This approach is made clear in the EU 2002 Framework Directive, which states:

> This framework ... is without prejudice to measures taken at Community or national level in respect of such [broadcasting] services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. ... ***The separation between the regulation of transmission and regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.***[15] (emphasis added)

The final sentence in this quotation is particularly important. The European Union recognizes that in order to properly regulate broadcasting services it is necessary to recognize the “links” between the regulation of transmission and the regulation of content. That is, the carve out under the EU Framework Directive for the regulation of broadcasting services necessarily entails a carve out of the regulation of transmission where there is a link between content and transmission.

[14] TPRP Report at page 11-10.
[15] EU Directive 2002/21 Recital (5).

If the panel's mandate had included investigating the regulatory relationship between the *Telecommunications Act* and the *Broadcasting Act*, it would have discovered that Canada already has a regulatory regime that takes the same general approach identified in the European Union Directive.

Canada's regulatory regime recognizes that broadcasting is a form of telecommunications, but provides an express "carve out" of broadcasting in the *Telecommunications Act*.[16] In other words, the *Telecommunications Act* regulates all forms of telecommunications in a technologically neutral fashion, but also includes a carve out to ensure that broadcasting is regulated in accordance with the broadcasting policy objectives determined by Parliament and set out in section 3 of the *Broadcasting Act*.

In effect, the carve out under the *Telecommunications Act* recognizes the "links" which exist between the regulation of transmission and the regulation of content in the case of broadcasting. It thereby permits broadcasting to be regulated in a manner that accords with the European Union approach (i.e., that will "guarantee media pluralism, cultural diversity and consumer protection", among other things.). Thus, the panel's recommendations on this point are unnecessary because they address an issue that does not exist.

5. The Panel's Proposals

In its Afterword, the panel set out proposals for change in two areas that fell outside its mandate: broadcasting and foreign ownership.

> In this Afterword, the Panel deals with ***two related issues that were not specifically made part of its mandate***, but that significantly affect the future of the Canadian telecommunications industry:
>
> - the implications of the technology and market trends that are transforming the telecommunications industry for Canada's broadcasting policy and regulatory framework
> - the current policies that restrict foreign ownership and control of telecommunications common carriers and broadcast distribution undertakings. [17]
>
> ***Although the Panel was not specifically asked to provide recommendations on either of these issues***, there are clear linkages between them and the objectives of the telecommunications policy review.

[16] Telecommunications is defined in a technologically neutral manner under the *Telecommunications Act* and, on its face, includes all forms of broadcasting. However, section 4 of the *Telecommunications Act* states: "This Act does not apply in respect of broadcasting by a broadcasting undertaking."
[17] TPRP Report at page 11-3.

> These linkages have led the Panel to use this Afterword to suggest possible future approaches that the government might use to resolve the long-standing policy debates over the issues.[18]
>
> (emphasis added)

The CCAU does not agree with the panel's views on either broadcasting or foreign ownership. However, before discussing the panel's proposals in detail, it is important to recall the objectives of the telecommunications policy review as set out in the panel's mandate:

> The government's objective is to ensure that Canada has a strong, internationally competitive telecommunications industry, which delivers world-class affordable services and products for the economic and social benefit of all Canadians in all regions of Canada.

There is no reference in this statement to culture, national identity or sovereignty. And yet, these are key policy objectives established by Parliament in respect of broadcasting. Section 3 of the *Broadcasting Act* sets out the broadcasting policy for Canada and states, in part:

> (b) the Canadian broadcasting system ... provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
>
> (d) the Canadian broadcasting system should (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

The panel's mandate did not include a consideration of these broader issues. Nor did the panel seek input on such issues, but instead solicited and received comments relating to technological and economic issues, as well as social issues directly related to telecommunications (e.g., accessibility and privacy).

The panel's proposals in respect of broadcasting and foreign ownership reflected the one-sided nature of the panel's expertise, interests and input. Consequently, the panel's analysis and proposals are of limited value in assessing issues relating to either broadcasting or foreign ownership.

a) Broadcasting

The panel framed its proposals for broadcasting in terms of issues that it believed should be investigated as part of a review of broadcasting by an independent group of experts:

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[18] TPRP Report at page 11-4.

> Since the Panel was not asked to review Canada's broadcasting policy, it would be inappropriate for it to make specific recommendations for changes to broadcasting or regulation.
>
> ...
>
> However, the Panel's work over the past ten months has persuaded it of the need for a comprehensive review of Canada's broadcasting policy and regulatory framework by an independent group of experts.[19]

The panel then went on to identify three areas where it believed change should be considered: the legislative framework, the policy-making framework and the regulatory framework. Each of these areas is discussed below.

The Legislative Framework

The panel's proposals for legislative change involved two main elements.

First, the panel cited the United States' *Communications Act 1934* and suggested that Canada should also have a single piece of "unified" legislation to govern all forms of telecommunications.[20]

This is an odd suggestion, given that the *Communications Act 1934* is a hodgepodge of provisions which is not technology neutral and which consistently raises difficulties of interpretation and application which simply do not exist under Canada's technology neutral *Telecommunications Act* and *Broadcasting Act*.

That being said, it would certainly be possible to integrate Canada's three key communications statutes – the *Telecommunications Act*, the *Radiocommunication Act* and the *Broadcasting Act* - into a single statute. The CCAU accepts that combining the first two of these statutes may make sense given some of the panel's recommendations for telecommunications regulation. However, it is not clear what would be achieved by including the *Broadcasting Act* as the third part in a larger statute, given the significantly different policy objectives involved in broadcasting regulation.

Another aspect of the panel's proposal for legislative unification is the notion that such unified legislation would be technology neutral. As discussed in Section 4, the *Telecommunications Act* and *Broadcasting Act* are already technology neutral. Consequently, no legislative change is necessary to achieve this goal.

The panel's second proposal regarding legislative change is to establish separate, updated "content rules" to "deal with promotion of Canadian content services over all forms of electronic 'carriage' networks".[21]

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[19] TPRP Report at page 11-9.
[20] TPRP Report at page 11-10.
[21] TPRP Report at page 11-11.

It is not clear to the CCAU what the panel meant by this proposal. The CRTC has already established content rules under the *Broadcasting Act*. The CRTC's powers to establish and modify such rules are already sufficiently flexible to reflect changes in broadcasting policy or technology. If the panel was suggesting that "content rules" be given more detailed statutory form, beyond what is already present in the *Broadcasting Act*, then the CCAU would be concerned that such rules could quickly become outdated as a result of technological change.

In the CCAU's view, the *Broadcasting Act* provides an appropriate mechanism for maintaining Canada's national identity and cultural sovereignty. While it has not always agreed with the decisions made by the CRTC under the *Broadcasting Act*, the CCAU does not believe that legislative change is required.

The Policy-making Framework

The panel was of the view that policy-making should be separate from regulation, with policy-making taking place at the government level (i.e., Industry Canada, rather than at the CRTC).[22] Furthermore, in keeping with its view that broadcasting is disappearing as a distinct activity[23], the panel recommended that all policy-making in respect of all types of telecommunications, including broadcasting, should be undertaken by a single government department, which the panel suggested could be named the "Department of Information and Communications Technologies":

> Given the importance of ICTs to the future of Canadian prosperity and culture, consideration should be given to assigning this converged policy-making role to a separate new "Department of Information and Communications Technologies." Such a department could become the unified centre, within the Government of Canada, for all major policy making and programs related to building and maintaining Canada's leadership in ICTs.[24]

The name proposed by the panel for the new department aptly captures the panel's focus. The Department of ICTs would clearly be a technology-oriented department with little or no emphasis on culture, national identity or related broadcasting policy matters. This orientation accords with the panel's own expertise and mandate.

The panel's proposal for a Department of ICTs also accords with the panel's proposal, in Chapter 2 of its report, regarding the policy objectives the panel believed should guide the regulation of telecommunications. The panel's

[22] TPRP Report, Chapter 9.
[23] For example, the panel states at page 11-7 of its report: "Technology and markets are clearly eroding the distinction between the broadcasting and telecommunications industries...".
[24] TPRP Report at page 11-12.

proposed policy objectives, which presumably would also govern the regulation of broadcasting given the perceived convergence of broadcasting and telecommunications, were set out in Recommendation 2-2:

> **Recommendation 2-2**
>
> Section 7 of the *Telecommunications Act* should be removed and replaced with the following:
>
> *"Canadian Telecommunications Policy and Government and Regulatory Guidelines"*
>
> "7. It is hereby affirmed that telecommunications performs an essential role in enabling the economic and social welfare of Canada and that Canadian telecommunications policy is based on the following objectives:
>
> (a) to promote affordable access to advanced telecommunications services in all regions of Canada, including urban, rural and remote areas;
>
> (b) to enhance the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy; and
>
> (c) to enhance the social well-being of Canadians and the inclusiveness of Canadian society by:
>
> (i) facilitating access to telecommunications by persons with disabilities;
> (ii) maintaining public safety and security;
> (iii) contributing to the protection of personal privacy; and
> (iv) limiting public nuisance through telecommunications."

It is extremely important to note that culture, national identity and sovereignty are conspicuous by their absence from this statement of policy objectives.

The CCAU does not agree with the panel's proposed list of policy objectives, nor with its proposal for a unified Department of ICTs. There is often a tension between policy objectives such as enhancing cultural sovereignty, on the one hand, and promoting economic efficiency or increased reliance on market forces, on the other. While the panel occasionally noted the existence of cultural issues in its report, it is implicit in the panel's proposed approach that it believes this tension should be resolved by simply eliminating cultural sovereignty as a policy objective.

This is clearly not acceptable. There can be no doubt that technological and economic efficiency are important policy objectives. But they cannot take priority over, let alone completely supplant objectives like the promotion of cultural

sovereignty and national identity. A country that sells out its culture to get faster broadband networks will soon become a country in name alone.

The Regulatory Framework

In regard to the regulatory framework, the panel acknowledged the recent internal restructuring at the CRTC, but suggested more should be done:

> Accordingly, the proposed review of Canadian broadcasting policy should examine the following issues:
>
> - further reorganization of the CRTC to develop an increased capacity to deal with both the broadcasting, telecommunications and broader ICT industry implications of decisions related to its "broadcasting" and "telecommunications" mandates
>
> - better coordination of the copyright-related functions of government with its ICT policies and regulations, including a consideration of possible consolidation of the regulatory functions carried out by the Copyright Board with the communications regulatory functions of the CRTC.[25]

The CCAU agrees that it is important for the CRTC to operate in a manner that permits it to properly recognize and analyze all aspects of the issues that come before it. However, in the CCAU's view, this is an internal operational matter best left to the CRTC to manage. If the CRTC is properly funded and appropriate people are appointed as commissioners, there should be no need for Government to attempt to micro-manage the CRTC's structure or operations.

On the question of copyright, this is another matter that was clearly outside the panel's mandate and expertise. It is also an issue that was not canvassed by the panel in its public consultation. In any event, the CCAU does not agree with the panel's suggestion that the CRTC take over the Copyright Board's "regulatory functions".

In the CCAU's view, it is appropriate to maintain the separation between the Copyright Board's copyright tariff approval function – which is purely economic – and the CRTC's broader regulatory mandate under the *Broadcasting Act*. Ensuring that rights holders are properly compensated for the use of their copyright should not be mixed with - and possibly confused with - the implementation of the cultural objectives underlying the *Broadcasting Act*. It is also important to note that many matters which come before the Copyright Board have nothing to do with either telecommunications or broadcasting (e.g., other music use, publishing, print photography).

[25] TPRP Report at page 11-12.

b) Foreign Ownership

In its Afterword, the panel proposed a two phase liberalization of the foreign ownership restrictions under the *Telecommunications Act* and *Broadcasting Act*.[26] The panel's proposal reflects its overall preference eliminating regulation and relying on market forces to determine outcomes. This was stated very clearly by the panel in its Afterword:

> The Panel's approach to considering the ownership and control rules in the telecommunications sector is based on the same principles that have guided it in approaching other telecommunications regulatory issues within its mandate. The Panel believes, at this stage in the evolution of the telecommunications sector, Canada should rely primarily on market forces to achieve its telecommunications policy objectives.[27]

In keeping with this view, the panel focused on economic issues when assessing the costs and benefits of possible liberalization of the foreign ownership regime. The sole exception to this focus was its brief mention of public safety and national security.[28] On these latter two points, the panel acknowledged that concerns are warranted and that other major OECD countries have retained controls on foreign investment:

> … in the heightened security environment of the early 21st century, it is likely that the foreign acquisition of the major telecommunications carriers of OECD countries such as the U.S., U.K., France, Germany and Japan could nevertheless raise concerns about national security, depending in part on the nationality and motivation of the acquirer. These countries maintain explicit or implicit controls on foreign investment in their telecommunications carriers.[29]

The panel also acknowledged that the economic arguments in favour of liberalization are not conclusive and raise concerns about loss of head office operations, loss of knowledge workers and loss of research and development

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[26] The panel's proposal is spelled out on pages 11-25 and 11-26 of its report:

"In the first phase, the *Telecommunications Act* should be amended to give the federal Cabinet authority to waive the foreign ownership and control restrictions on Canadian telecommunications common carriers when it deems a foreign investment or class of investments to be in the public interest.

…

The second phase of liberalization should be undertaken after completion of the review of broadcasting policy proposed by the Panel. At that time, there should be a broader liberalization of the foreign investment rules in a manner that treats all telecommunications common carriers including the cable telecommunications industry in a fair and competitively neutral manner."

[27] TPRP Report at page 11-13.
[28] TPRP Report at pages 11-21 and 11-23.
[29] TPRP Report at page 11-23.

activity.[30] The panel was very clear that analogies with other countries were of limited value:

> The Panel regards this and other international studies as providing only circumstantial support in favour of foreign investment liberalization in Canada's telecommunications sector. Very different and often unique circumstances affect the performance of telecommunications markets in different countries, including the state of development of the telecommunications supply sector, regulatory regimes and general economic circumstances. For this reason, the approach to foreign investment rules should take full account of the Canadian regulatory framework for telecommunications service providers, including their regulation under the broadcasting law, as well as the broader Canadian public interest in relation to the future development of the telecommunications system.[31]

Despite the clear reservations in this statement, and the public safety, national security and economic concerns it identified, the panel went on to conclude that liberalization of the foreign ownership rules would be appropriate.

The Wireless Conundrum

The panel's conclusion that the foreign ownership rules should be lifted, despite numerous concerns, appears to be based primarily on the lower level of competition in wireless services in Canada as compared to some other countries.[32]

> Accordingly, the Panel believes the case for liberalization of Canada's foreign investment restrictions is strongest in the newer, emerging markets, where Canadian performance lags that of other countries – such as those in the mobile and fixed wireless markets.[33]

The CCAU finds it ironic that an expert panel, established by the Minister of Industry, recommended that the foreign ownership rules be lifted to enhance competition in the wireless sector. The sector has indeed undergone significant consolidation in recent years through the acquisition of Clearnet Communications by TELUS Communications and the acquisition of Microcell Telecommunications by Rogers Communications. However, both of these acquisitions were examined by the Competition Bureau, a branch of Industry Canada, and were approved on the grounds that they would not adversely affect competition in the wireless sector.

[30] TPRP Report at page 11-21.
[31] TPRP Report at page 11-18.
[32] TPRP Report at pages 11-19 to 11-21.
[33] TPRP Report at page 11-21.

If there is a problem with competition in the wireless sector, then the obvious solution is to address concentration in that sector through regulatory measures and, if necessary, by divestiture. The answer is not to sell off Canada's telecommunications industry to the highest foreign bidder[34] despite concerns about public safety, national security, loss of head offices, loss of knowledge workers, and loss of research and development activity.

The panel's foreign ownership proposal is especially troubling given that the panel did not limit its recommendation to the wireless sector but went further and argued that the rules should be loosened for both telecommunications carriers under the *Telecommunications Act* and for BDUs[35] under the *Broadcasting Act*. In other words, the panel took a dubious argument in favour of liberalization in the wireless sector and used it as the basis for liberalization in respect of both telecommunications and broadcasting. And, the panel took this step without even considering the implications of its proposal for such issues as Canada's sovereignty, culture and national identity.

Sovereignty, Culture and National Identity

While the panel did acknowledge that foreign ownership would raise issues of public safety and national security, the panel did not consider the more general issues of sovereignty, culture and national identity. This is a serious omission.

If the foreign ownership restrictions were eliminated, it is likely that one or more of the major communications conglomerates in Canada would be acquired by non-Canadians. At a minimum, this would place control over these entities in the hands of foreign nationals who would have different views as to what level of priority to give to Canadian interests, especially Canadian culture. However, the implications would not be limited to effects attributable to the personal preferences of executives. There could also be serious implications for Canada's ability to exercise full sovereignty in the area of telecommunications and broadcasting.

For example, if a Canadian company were acquired by U.S. interests, then that company – and its executives - would be subject to restrictions on their activities under a number of U.S. laws, including the *Trading with the Enemy Act*, the *International Security and Development Cooperation Act* and similar statutes. These laws have a very real effect. For example, ESPN, the U.S. sports

[34] The panel expressly stated that one of the reasons for the proposed changes to the foreign ownership rules would be to ensure that shareholders could maximize their gains: "Thus, even if the *Telecommunications Act* were amended to permit greater foreign ownership or control of Canadian telecommunications common carriers, these companies would remain subject to the foreign ownership and control provisions of the *Broadcasting Act*. This could potentially disadvantage their shareholders, in terms of the benefits that might result from a transfer of ownership…" TPRP Report at page 11-15.

[35] A "BDU" is a broadcasting distribution undertaking – that is, a cable, DTH or telephone company that distributes programming services to the public.

channel, was fined because its Argentine subsidiary, ESPN Sur, had a contract with Cuba relating to participation of the Cuban volleyball team at a sports event in Argentina. There is no reason to believe a Canadian subsidiary of a U.S. company would be treated differently. In fact, Wal-Mart was fined because some of the pajamas sold to its Canadian operations might have originated in Cuba.

The prospect of corporate fines is a minor inconvenience compared to the fate that could face executives. James Sabzali, a Canadian citizen, was convicted in 2002 of selling chemicals used for purifying water to Cuban hospitals while he was working in Canada for a U.S. corporation. Mr. Sabzali made the mistake of accepting a promotion, moving from the Canadian subsidiary of a U.S. company to a position with the U.S. parent company, and subsequently moving to the United States where he was arrested, charged, tried and convicted of breaching the U.S restrictions on dealings with Cuba. In 2003, Mr. Sabzali's conviction was overturned on the grounds of prosecutorial misconduct, unrelated to the jurisdictional question. In 2005, Mr. Sabzali pleaded guilty to a lesser offence and was given one year probation and a $10,000 fine. Under the original charges, Sabzali faced possible life imprisonment and a fine of up to $19 million.[36]

It is highly unlikely that Canadian telecommunications or broadcasting executives would want to expose themselves to the possibility of a prosecution in the United States for failing to comply with U.S. laws while they were working for the Canadian subsidiary of a U.S. corporation. Consequently, if the foreign ownership restrictions were lifted, the spillover effect of the U.S. trade restrictions would almost certainly be significant. And, there could be similar (or worse) consequences if a Canadian company were owned by nationals of a foreign country other than the United States.

The potential chilling effects on Canadian telecommunications and broadcasting companies could be significant. The end result would be that international investments, joint ventures and possibly even reporting and other broadcasting activities would be constrained, not by Canadian laws, but the laws of the country where ownership ultimately resides.

In the CCAU's view, it is incomprehensible why Canada – or any other country – would want to turn over control of such critical sectors as telecommunications and broadcasting to foreigners. The failure of the panel to consider the full implications of its foreign ownership proposal is a fundamental flaw that undermines its analysis. That analysis is further undermined when the next element in the panel's argument is considered – the so-called asymmetry problem.

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[36] Assistant U.S. attorney Joseph Poluka told Canadian Press: "You need to educate your audience." According to Mr. Poluka, Mr. Sabzali's case demonstrates that "you're not allowed to violate the laws of this country just because you live outside it". A more complete history of Mr. Sabzali's legal ordeal can be found at www.canadiannetworkoncuba.ca.

The Myth of Asymmetry Revisited

The notion of asymmetric treatment of telecommunications carriers and cable BDUs was put forward by the panel as a reason for extending the liberalization of the foreign ownership rules beyond wireless and wireline telecommunications, to include broadcasting undertakings as well:

> Cable TV companies were originally authorized to construct facilities for the purpose of distributing broadcasting services. In recent years, they have upgraded these facilities so that they can also provide telecommunications services, such as high-speed Internet access and telephone service. However, because these telecommunications services are provided by companies that are licensed as BDUs, the ownership and control of their facilities is subject to the provisions of the *Broadcasting Act*, not the *Telecommunications Act*. BDUs could therefore potentially be disadvantaged if ownership rules were relaxed or abolished under the latter Act, but not under the former.
>
> Because the facilities they own are now used to carry broadcasting services as well as telecommunications services, some of Canada's largest telecommunications common carriers, such as Bell Canada and TELUS Communications Inc. are now licensed as BDUs. Thus, even if the *Telecommunications Act* were amended to permit greater foreign ownership or control of Canadian telecommunications common carriers, these companies would remain subject to the foreign ownership and control provisions of the *Broadcasting Act*. This could potentially disadvantage their shareholders, in terms of the benefits that might result from a transfer of ownership, and weaken their competitive position in the Canadian telecommunications marketplace.
>
> In summary, asymmetrical liberalization of Canada's foreign investment rules — that is, liberalizing foreign investment rules for telecommunications carriers but not BDUs — could leave cable companies and some telecommunications companies in an unfair competitive disadvantage.[37]

This argument is both incorrect and inconsistent with the panel's overarching view of developments in the telecommunications and broadcasting industry.

A cable BDU that provides telecommunications in addition to its television distribution services is subject to the ownership and control restrictions under both the *Telecommunications Act* and the *Broadcasting Act*. It is, therefore, incorrect to state: "the ownership and control of their [cable BDU] facilities is

[37] TPRP Report at page 11-15.

subject to the provisions of the *Broadcasting Act*, not the *Telecommunications Act*."

The argument is inconsistent with the panel's overall vision of the convergence of telecommunications and broadcasting since, if that vision is correct, then all companies will provide both telecommunications and broadcasting services and, hence, will be subject to the ownership restrictions under both the *Telecommunications Act* and the *Broadcasting Act*. No company will be disadvantaged because it is subject to a more restrictive regime. There will be no asymmetry in the future, just as there is no asymmetry now.

Betting on the Microsoft Model

Another major problem with the panel's foreign ownership proposal is that it assumes the total separation of carriage and content envisioned by the Microsoft model will be possible.

> Earlier in this Afterword, the Panel suggests that the proposed broadcasting policy review should resolve issues related to the separation of Canadian broadcasting "content" policy from policies for the "carriage" of telecommunications. Such a separation would permit creation of symmetrical foreign investment rules for traditional telecommunications carriers as well as the cable and satellite undertakings that now operate in the same telecommunications markets.[38]

As discussed earlier, it is not clear whether the Microsoft model of intelligence at the ends and a dumb network in between will actually become a pervasive reality. If it does not, then the separation of carriage and content may be much more difficult than envisioned. It may be impossible.

Even if the separation of carriage and content were technically possible, it is important to recognize that fully implementing such a separation would require a radical restructuring of the operations of BDUs of all types (i.e., cable, DTH, telco). BDUs could not have any involvement in programming. That would mean no more cable-owned community channels or cable-owned exempt programming services. It would also mean that BDUs could not be involved in the programming of interactive television. Their sole involvement in interactivity would be to provide telecommunications services and facilities to programmers on a non-discriminatory basis. All aspects of all programming would have to be developed, produced and owned by someone other than the BDU.

And, that would not be the end of it. In 2003, when the Standing Committee on Industry, Science and Technology released its report on foreign ownership, *Opening Canadian Communications to the World*, the Committee recognized that

[38] TPRP Report at page 11-25.

"BDUs influence programming in that they make decisions about which services to market, package and promote, about channel positioning, and about retail rates".[39] Consequently, in order for the separation of carriage and content to be complete, BDUs could no longer be involved in any packaging, marketing or pricing decisions. BDUs would have to truly become carriage-only entities.

It is doubtful whether BDUs would consider such a carriage-only role attractive from a business perspective. It is also questionable whether such an approach would be the best thing for Canada, since it could undermine the incentive for investment in new facilities and technologies. However, the panel's proposed total separation of carriage and content and liberalization of the foreign ownership rules necessarily implies that this radical restructuring of BDUs would be required.

The Bottom Line

The final problem with the panel's foreign ownership proposal has already been alluded to. It appears that a major motivation for the panel's expanded proposal for removing the foreign ownership limits is to ensure that shareholders of all types are able to maximize their gains by selling their shares to the highest international bidder:

> …these companies would remain subject to the foreign ownership and control provisions of the *Broadcasting Act*. This could potentially disadvantage their shareholders, in terms of the benefits that might result from a transfer of ownership…[40]

The CCAU is surprised that the panel would consider it acceptable for Canada to relinquish control of its telecommunications and broadcasting so that a handful of prominent Canadian families and other shareholders could maximize their wealth. The CCAU does not consider it acceptable to take such a dramatic, damaging and unnecessary step for this reason. And, there can be little doubt that the vast majority of Canadians would not find it acceptable either.

6. Recommendations

The CCAU recognizes that telecommunications and broadcasting have been undergoing significant changes over the past decade and that these changes will continue into the foreseeable future. It serves no one's interests to deny or attempt to ignore these developments.

[39] *Opening Canadian Communications to the World* Report of the Standing Committee on Industry, Science and Technology April 2003 at page 49.
[40] TPRP Report at page 11-15.

At the same time, it is important to recognize that Canada has been and remains a leader in the area of telecommunications and broadcasting. Any problems which may exist – such as possibly in the area of wireless services - can be attributed to industry consolidation and the resultant lessening in competition. If this is considered a problem, it should be addressed directly through regulatory measures and, if necessary, limited divestiture. It does not require a revamping of the broadcasting regulatory regime or the lifting of existing foreign ownership restrictions.

In the CCAU's view, the existing broadcasting regulatory regime provides the Government and the CRTC with appropriate tools to address change as it occurs. In particular, the Government has a number of statutory powers it can use to ensure that the CRTC addresses issues in a timely manner and in accordance with Government policy (e.g., the Government can issue policy directives to the CRTC under section 7 of the *Broadcasting Act* if it considers it appropriate).

In sum, the CCAU does not see the need for legislative reform in the area of broadcasting, and the CCAU opposes any changes to the foreign ownership rules in either telecommunications or broadcasting. The CCAU therefore recommends the Government decline to pursue the recommendations of the Telecommunications Policy Review Panel on these matters.

Appendix A – The Panel's Biographies

(as described on the panel's website)

Who Are We?

The Telecommunications Policy Review Panel was established by the Minister of Industry on April 11, 2005, to conduct a review of Canada's telecommunications framework. The Minister appointed Dr. Gerri Sinclair, Hank Intven and André Tremblay as the members of the Panel. The Panel's reviewed Canada's telecommunications policy and regulatory framework and made recommendations on how to make it a model of 21st century regulation.

Dr. Gerri Sinclair

Dr. Gerri Sinclair is an Internet technology consultant to industry and government. The former General Manager of Microsoft Network Canada, she is a director of the Canada Foundation for Innovation, sits on the board of directors of the Communications Research Centre and was recently appointed to the new British Columbia Competition Council. She has broad public and private sector experience, having served with the Information Highway Advisory Council and CANARIE Inc., and on the boards of TELUS and BC Telecom. She is the recipient of the 1999 Canadian Women in Communications' Woman of the Year Award, the 1999 Canadian Women in New Media Pioneer Award, the 2000 Influential Woman in Business Award, as well as the 2003 Sarah Kirke award for the most outstanding Canadian woman in high tech.

Hank Intven

Hank Intven is a partner in the Toronto office of McCarthy Tétrault LLP, a leading Canadian law firm. He has over 25 years of experience in issues related to the telecommunications industry in Canada and in more than 20 other countries. Over this time he has worked with telecom, cable, satellite and other wireless service providers, investors, governments, regulators and consumers. He has been involved in many of the major legal, regulatory and business developments that have affected the Canadian and international telecommunications industries. He has also served as counsel for the Consumers' Association of Canada and was Executive Director of Telecommunications at the Canadian Radio–television and Telecommunications Commission from 1981–85.

André Tremblay

André Tremblay has more than 20 years experience in the telecommunications industry, where he has been actively involved in the conception, financing and management of several companies. For almost 10 years, Mr. Tremblay served as President and Chief Executive Officer of Microcell Telecommunications Inc., which he led from its formation on through the different phases of its evolution.

He has also provided early–stage financing, along with strategic advice and direction, for start–up technology firms. Mr. Tremblay regularly lectures in the areas of corporate finance and management, and sits on the boards of directors of a number of corporations and non–profit organizations.

Appendix B – The Panel's Mandate

(as described on the panel's website)

Mandate

Appointment of Members to the Telecommunications Policy Review Panel

The government recognizes the critical importance of the telecommunications sector to Canada's future well-being and the need for a modern policy framework. To ensure that the telecommunications industry continues to support Canada's long-term competitiveness, the government is appointing a panel of eminent Canadians to review Canada's telecommunications framework. The panel is asked to make recommendations on how to move Canada toward a modern telecommunications framework in a manner that benefits Canadian industry and consumers.
— Budget 2005

Objective

The government's objective is to ensure that Canada has a strong, internationally competitive telecommunications industry, which delivers world-class affordable services and products for the economic and social benefit of all Canadians in all regions of Canada.

The panel is asked to make recommendations that will help achieve this objective.

Structure

A panel of three Canadians has been named by the Minister of Industry. It is expected that the panel will:

- receive submissions from interested parties as its primary means of gathering information;
- hold public consultation with the aim of gathering additional information or clarifying submissions; and
- commission a limited number of contextual reports (e.g. an international benchmarking of policy and regulatory frameworks, or an analysis of the applicability of alternative dispute resolution mechanisms).

Timing

The panel is asked to make recommendations to the Minister of Industry before the end of 2005.

Areas of Interest

Creating the right framework for telecommunications involves maintaining an up-to-date regulatory regime, fostering an environment that improves access for all sectors of the economy, and encouraging the adoption of advanced applications and services. The panel is asked to study and report on three areas that must continue to evolve in order to keep pace with rapid changes in technology, consumer demand and market structure: regulation, access, and information and communications technologies (ICT) adoption.

Regulation

The existing regulatory regime was designed to facilitate the introduction of competition into an industry previously structured around monopolies. The development and deployment of advanced technology, such as Internet Protocol-based services, high-speed Internet access and wireless broadband communications, combined with maturing consumer demand, have had a profound effect on the telecommunication industry and have started to change the shape and structure of the industry. Governments face the challenge of regulating the industry as it exists today and protecting the interests of its users, while at the same time not standing in the way of progress or restricting the benefits and adoption of advanced telecommunications networks and services.

The panel is asked to make recommendations on how to implement an efficient, fair, functional and forward-looking regulatory framework that serves Canadian consumers and businesses, and that can adapt to a changing technological landscape.

Access

A key objective of Canada’s telecommunication policy is the provision of reliable and affordable telecommunications for Canadians in all parts of the country, and in all sectors of the economy. Great success has been achieved in providing basic telephone service thanks in large part to internally generated cross subsidies. However, the increasingly competitive nature of the industry substantially limits the ability to cross subsidize. At the same time, consumer expectations have grown. Access beyond traditional voice services to advanced telecommunications connectivity and high-speed networks is now expected. Challenges remain, not only in closing the existing service and accessibility gaps, but also in ensuring that Canada keeps pace with ever-changing technology and consumer demand.

The panel is asked to recommend mechanisms that will ensure that all Canadians continue to have an appropriate level of access to modern telecommunications services.

ICT Adoption

A primary principle of Canadian telecommunications policy is that the telecommunications system should safeguard, enrich, and strengthen the social and economic fabric of Canada. Not only is telecommunications an important sector in its own right, it is also a powerful enabler within the economy and society as a whole; a new platform for the delivery of traditional services, such as health care and education, as well as for innovative new services. Research and development efforts continue to produce innovative ICT. Given the impact ICT has on productivity, Canada must ensure that its levels of technology adoption remain competitive with the world's other leading economies.

The panel is asked to make recommendations on measures to promote the development, adoption and expanded use of advanced telecommunications services across the economy. In this context, the panel is also asked to report on the appropriateness of Canada's current levels of ICT investment.

In addition to these specific areas of interest, the panel is encouraged to study and report on any other issues that, in its opinion, are essential to creating a modern telecommunications framework.

Appendix C – The Panel's Process

(as described on the panel's website)

The Consultation Process

- The three-member Telecommunications Policy Review Panel was established in April 11, 2005.
- In order to meet its mandate, the Panel solicited input from the public and the telecommunications sector in Canada and internationally.
- On June 6, the Panel issued a discussion document that posed 106 questions structured around three main themes: regulation; access and ICT adoption.
- The Panel requested submissions from all interested parties. Over 200 interested parties registered on the website to participate in the consultations.
- The first round of the consultation ended August 15 with 108 submissions received. These submissions were posted on the Panel's website.
- There was then a 30-day period for parties to reply to the posted submissions of other parties, ending September 15. An additional 90 second round submissions were received.
- The Panel also held two consultation forums:
    - In September, a live online interactive forum attended by 50 interested parties on-site and 150 on-line was held in Whitehorse Yukon on Broadband Access.
    - In October, a forum attended by 160 interested parties was held in Gatineau, Quebec on the Telecommunications Policy Framework. This forum was broadcast in real-time on the web, and also rebroadcast on CPAC.
- So as to better understand the global setting for telecommunications, and to learn from the experience of other countries, Panel members also met with regulators and industry leaders in Japan, Korea, Dublin, London, Brussels, and Washington.