

**PROVEN ■ INNOVATIVE ■ FOCUSED ■ PROVEN ■ INNOVATIVE ■ FOCUSED ■ PROVEN ■ INNOVATIVE ■ FOCUSED ■ PROVEN ■ INNOVATIVE ■ FOCUSED**

**ABA ANNUAL MEETING 2010**  
**EXAMINING THE GLOBAL NATURE OF THE NET NEUTRALITY DEBATE**  
**– A Canadian Perspective –**

**Authors:**

**George N. Addy**  
**Elisa K. Kearney**

***Davies Ward Phillips & Vineberg LLP***  
**Toronto, Canada**

**ABA ANNUAL MEETING 2010**  
**EXAMINING THE GLOBAL NATURE OF THE NET NEUTRALITY DEBATE**

**– A Canadian Perspective –**

**George N. Addy and Elisa K. Kearney<sup>1</sup>**

**I. INTRODUCTION**

Since its commercialization in the mid 1990s, the Internet has become a vibrant competitive ecosystem linking millions of users with public, private, academic, business, and government networks, spawning new uses and applications and transforming the way individuals interact and conduct business and the way governments deliver social programs. While to a certain extent traditional antitrust issues of access to essential facilities as well as network effects continue to require attention, for counsel and their clients the real game changer is how the Internet has fundamentally altered the demand and supply equation, radically changing the economics of many traditional business models.

Access to the Internet depends on the physical infrastructure over which it operates. Formerly the realm of monopoly telecommunications providers, today the physical infrastructure is owned by fixed line and wireless telecommunications providers, cable companies and satellite telecommunications providers who provide access to the Internet over a mix of digital subscriber lines (DSL), coaxial cable, fibre-optic strands, radio frequencies and satellite. Although increasingly a competitive market, in certain countries or geographic areas the options available

---

<sup>1</sup> George N. Addy is the senior partner leading the Competition and Foreign Investment Review group of Davies Ward Phillips & Vineberg LLP in Toronto, Canada and is also part of the Technology group. Mr. Addy was head of the Canadian Competition Bureau (1993-1996) and its merger review branch (1989-1993). He left public service to become Executive Vice President and Chief General Counsel at TELUS, Canada's second largest telecommunications firm.

Elisa K. Kearney is a partner in the Competition and Foreign Investment Review and Technology group of Davies Ward Phillips & Vineberg LLP in Toronto, Canada.

for Internet access may be limited to one or two facilities based carriers and a number of resellers of telecommunications services. For example, in Canada the "residential broadband market has largely settled into regionalized competition between the incumbent telephone company and local cable provider."<sup>2</sup> But even there technological advances are allowing for a broader range of offerings and competitive bundles.<sup>3</sup>

The concept of net neutrality embodies the principle that access to the Internet be provided in a neutral manner in that Internet service providers ("ISPs") do not block, speed up or slow down particular applications or content, and that ISPs do not use infrastructure ownership to favour their affiliate offerings, content or applications. It is premised on the fear that market competition is insufficient to discipline the conduct of ISPs and that in an unregulated environment, ISPs will interfere with the freedom of the Internet by controlling when and what an individual user sees and does online. The net neutrality concept is intended to preserve the "open Internet" in the face of emerging challenges, such as incidents where ISPs have restricted the applications their customers can use over their Internet connections, a lack of transparency about how consumers' Internet service will function and network congestion.<sup>4</sup>

---

<sup>2</sup> Consultation paper on Canada's Digital Economy Strategy, Industry Canada, May 10, 2010 at p. 16 [hereinafter "Digital Economy Strategy"] available at <http://de-en.gc.ca/en/home/> Broadband access in Canada is primarily split between cable and DSL services; 9% of ISP's are incumbent telecom companies, 18% are cable companies, 54% are secondary ISP's (or resellers) who rely on the facilities-based telecom and cable companies for wholesale service and the remaining 19% are utility, telcos, municipalities, etc. See, CRTC Communications Monitoring Report 2009 at p. 214, available at: <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2009/cmr.htm>.

<sup>3</sup> In 2009, approximately 34% of residential customers in Canada subscribed to service bundles that consisted of local telephone service and one or more of the following services: Internet access, video, and mobile compared with 25% in 2008. See, CRTC Communications Monitoring Report 2010 at p. i and CRTC Communications Monitoring Report 2010 at p. 73.

<sup>4</sup> See, U.S. Federal Communications Commission website <http://www.openinternet.gov/>.

However, the net neutrality debate is really a subset of a larger and to date, at least in Canada, untouched debate as to the choice between "open" or "closed" systems. Which outcome at least directionally will yield the optimal results?

In an article entitled *Preserving the Open Internet in Canada* released earlier this year, Peter Ruby argues that "net neutrality in the United States is being treated as a big-picture policy issue whereas the approach in Canada has been a narrow focus dealing with technical problems".<sup>5</sup> While political rhetoric and high-level policy discussions in the United States may be more robust, as is generally the case, Canada is beginning to address some of the issues necessary to preserve the openness of the Internet. For example, a number of initiatives have been undertaken by the public and private sector to address network congestion, copyright infringement and privacy. While these broader policy concerns are important to the net neutrality debate at its core, in Canada the debate has focused on the Internet traffic management practices ("ITMPs") of ISPs. In this regard, Canada "is the first country to develop and implement a comprehensive regulatory approach" to Internet traffic management practices.<sup>6</sup> The Canadian Radio-television and Telecommunications Commission (the "CRTC") does, however, appear to have recognized that the net neutrality debate is part of a larger debate about the choice between an open or closed system, recognizing that "at the core of the debate over 'net neutrality' is whether innovation will continue to come from the edges of networks, without permission." Will there continue to be

---

<sup>5</sup> Peter Ruby, *Preserving the Open Internet in Canada*, presented at the 15th Biennial National Conference on New Developments in Communications Law and Policy (April 24, 2010), Ottawa Canada at p. 17.

<sup>6</sup> See, Speech by CRTC Chairman Konrad von Finckenstein, Q.C., Keynote address to the Annual Conference of the International Institute of Communications, Montreal, Quebec (October 27, 2009) available at: <http://www.crtc.gc.ca/eng/com200/2009/s091027.htm>.

rapid and uncontrolled innovation in communications? Will citizens have full access to that innovation?<sup>7</sup>

This paper will examine briefly some of the policy concerns that form part of the net neutrality debate before considering *Telecom Regulatory Policy CRTC 2009-657*, the framework and regulatory approach established by the CRTC in October 2009 for determining whether the traffic management practices of Canada's ISPs are acceptable (the "**Net Neutrality Decision**")<sup>8</sup>. The paper will also consider whether sector specific net neutrality regulation is the correct approach.

## **II. Canada's Broader Policy Agenda**

The "open Internet" has created unmatched innovation, investment and societal benefits and transformed economies, contributing billions of dollars to GDP in many countries around the world. As technology advances, the importance of the Internet will only grow, and so will the need of governments to thoroughly analyse a wide range of policy issues and put forth a policy agenda that encompasses these issues. However, this policy agenda must be rooted in the physical manifestation of the Internet, a wired and wireless telecommunications network that spans the globe.

Despite the technological advancements of the Internet, the fundamental economics of the telecommunications industry have not changed. "Telecommunications service provision is still subject to strong economies of scope and scale and the large up-front sunk costs can act as

---

<sup>7</sup> *Telecom Regulatory Policy CRTC 2009-657*, October 21, 2009, Review of the Internet traffic management practices of Internet service providers at para. 4 available at: <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>.

<sup>8</sup> *Id.*

barriers to entry. The costs of upgrading equipment, digging trenches, and erecting poles can be immense, especially in a country as geographically challenging as Canada."<sup>9</sup>

Recognition of the need for cost recovery fuels the existing fear that the telecom and cable carriers who make the infrastructure investments to provide access to the Internet will have the incentive, in addition to the ability, to "create a special fast lane for big companies that can afford to pay steep tolls, while everyone else is left in a digital dirt road".<sup>10</sup> The cost of infrastructure, together with calls by the United Nations and the move by countries such as France and Finland to make Internet access a fundamental human right just like roads, waste and water, provide the rationale for arguments that governments should subsidize network build-outs to address network congestion<sup>11</sup> as well as unserved or underserved communities.

An ISP's rationale for traffic management stems from capacity constraints and network congestion. The abundant use of "peer-to-peer" (P2P) file sharing applications, such as Bit Torrent, as well as other technological advancements such as high-definition video, is pushing network capacity to its limits. Arguably, an ISP may have a legitimate need to block certain applications or use bandwidth throttling to help limit network congestion. In this regard, a tool used by ISPs to identify the users of large amounts of bandwidth capacity is "deep packet inspection" (DPI), a technology that has raised privacy and security concerns as it involves looking at the content of communications and monitoring all but encrypted communications. The increased use of peer-to-peer file sharing has also resulted in greater opportunity for and

---

<sup>9</sup> Digital Economy Strategy *supra* note 1 p. 16.

<sup>10</sup> See, [www.openInternetcoalition.com](http://www.openInternetcoalition.com).

<sup>11</sup> See for example, <http://news.bbc.co.uk/2/hi/technology/8548190.stm>.

incidences of copyright infringement on the Internet, resulting in the need for greater legal protections for copyright owners in the digital era.

All of these issues form part of the broader net neutrality debate. Until recently, these related policy issues have been considered in an unsystematic fashion by various departments and agencies of the Government of Canada. The branch of the Government of Canada with primary responsibility over the issues raised by the net neutrality debate is Industry Canada, which administers the *Telecommunications Act*<sup>12</sup> and *Radiocommunications Act*<sup>13</sup>, as well as the *Competition Act*<sup>14</sup> and *Copyright Act*<sup>15</sup>, among others. The Competition Bureau, an independent agency that enforces the *Competition Act*, and the Copyright Board report to Parliament through the Minister of Industry. The CRTC, an independent government agency that has the authority to regulate and supervise broadcasting and telecommunications in Canada, reports to Parliament through the Minister of Canadian Heritage and Official Languages.<sup>16</sup> Spectrum is also managed by Industry Canada and the CTRC takes direction on spectrum issues and telecommunications policy from that department. Finally, the Office of the Privacy Commissioner of Canada oversees compliance with both the *Privacy Act*<sup>17</sup>, which covers the personal information-handling practices of federal government departments and agencies, and the *Personal Information Protection and Electronic Documents Act*<sup>18</sup> ("PIPEDA"), Canada's federal private sector privacy law. The Privacy Commissioner of Canada is an Officer of Parliament who

---

<sup>12</sup> R.S. 1985, c. C-38.

<sup>13</sup> R.S. 1908, c. 17, s.1.

<sup>14</sup> R.S. 1985, c. C-34.

<sup>15</sup> R.S. 1985, c. C-42.

<sup>16</sup> *The Broadcasting Act*, 1991, c.11 is administered through the Department of Canadian Heritage.

<sup>17</sup> R.S. 1985, c. P-21.

<sup>18</sup> S.C. 2000, c. 5.



reports directly to the House of Commons and the Senate. These various departments and agencies create a patchwork quilt of policy and sector regulatory responsibilities and influence.

More recently, however, the Government of Canada committed to "launch a digital economy strategy to drive the adoption of new technology across the economy. To encourage new ideas and protect the rights of Canadians whose research, development and artistic creativity contribute to Canada's prosperity, [...and] strengthen laws governing intellectual property and copyright."<sup>19</sup> In that regard, on May 10, 2010, the Government launched a national consultation aimed at developing a digital economy strategy for Canada, including building a world class digital infrastructure, and on June 2, 2010, the Minister of Industry and the Minister of Canadian Heritage and Official Languages announced the introduction of Bill C-32, the *Copyright Modernization Act*.<sup>20</sup>

### *Infrastructure*

To date, "[c]onvergence and competition between duelling network platforms has driven continued investment in network infrastructure. In 2008, the private sector devoted over \$12 billion to capital expenditures, and the capital intensity of Canadian service providers is in line with global peers."<sup>21</sup> Over the past two years, consumers in Canada have seen significant investment and upgrades in both high speed wireless networks, such as the HSPA wireless network recently installed by Telus<sup>22</sup> and Bell<sup>23</sup> offering speeds of up to 21mbps, and cable

---

<sup>19</sup> Government of Canada, *Speech from the Throne*, March 3, 2010 available at <http://www.discours.gc.ca/eng/index.asp>.

<sup>20</sup> Bill C-32 was at first reading when the House of Commons was adjourned until Monday, September 20, 2010.

<sup>21</sup> Digital Economy Strategy, *supra* note 1 at p. 16.

<sup>22</sup> See, [http://about.telus.com/cgi-bin/news\\_viewer\\_ir.cgi?news\\_id=1207&mode=2&news\\_year=2010](http://about.telus.com/cgi-bin/news_viewer_ir.cgi?news_id=1207&mode=2&news_year=2010).

networks, with both Shaw<sup>24</sup> and Rogers<sup>25</sup> installing fibre to the home in urban areas across Canada. However, this expansion activity requires extremely high levels of capital expenditure, which in Canada has been funded, in part, by profit margins which have been the highest in the world among other wireless carriers.<sup>26</sup>

However, these high margins are threatened by new competition in the wireless industry in Canada<sup>27</sup> initiated by Industry Canada's November 2007 Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services, which set aside 40 MHz of AWS spectrum for new entrants in an effort to bring more wireless competition to Canada. At that time, the three integrated national network operators, Bell Canada, Rogers Communications Inc. and TELUS Communications Company, accounted for 94% of the national wireless market. The Auction was held in May 2008. In the past year, three new wireless carriers, Wind, Public Mobile and Mobilicity have begun services and the national operators have begun to respond with discount brands of their own.<sup>28</sup> As satellite and wireless telecommunications carriers compete for a larger share of the ISP market, there may be growing resistance on the part of traditional telecom and cable ISPs to build out their networks. They are profit making corporations concerned with cost recovery and shareholder returns. The Government of Canada has acknowledged that "[t]he twin issues of facilitating both investment and competition are foundational challenges in telecommunications policy. Policy-makers and regulators must ensure that there is a sufficient

---

<sup>23</sup> See, <http://www.bce.ca/en/news/releases/bm/2009/11/04/75264.html>.

<sup>24</sup> See, <http://www.shaw.ca/NR/rdonlyres/C31FEBC1-DE35-445C-BA43-2C98178DCD34/0/ShawGigabitFeb17.pdf>.

<sup>25</sup> Rogers Communications Inc., 2009 Annual Report, at p. 32.

<sup>26</sup> See, <http://www.cbc.ca/technology/story/2008/09/04/tech-profit.html>.

<sup>27</sup> See, <http://www.reuters.com/article/idUSN1125509820091211>.

<sup>28</sup> See for example, chatr released by Rogers Communications Inc. on June 30, 2010 [http://www.chatrwireless.com/web/chatr.portal?\\_nfpb=true&\\_pageLabel=HomeLanding](http://www.chatrwireless.com/web/chatr.portal?_nfpb=true&_pageLabel=HomeLanding).

level of competition and consumer choice amongst a variety of services, while at the same time facilitating an environment that is conducive to continued network investment."<sup>29</sup>

To facilitate network investment, \$225 million was provided to Industry Canada over three years as part of Canada's Economic Action Plan (the Government of Canada's economic stimulus package, introduced in January 2009) to develop and implement a strategy to extend broadband<sup>30</sup> coverage to as many unserved and underserved households as possible. The biggest component of this strategy is the Broadband Canada: Connecting Rural Canadians program which was created to help bring broadband Internet access to rural Canadians. Up to 50% of the costs of private sector partners selected to deploy broadband infrastructure and services in designated rural areas are to be funded by the Government.<sup>31</sup> These financial commitments to broadband network infrastructure investments are very small in comparison the amounts allocated for traditional infrastructure investment like roads and sewers and tiny relative to the financial commitments made by the United States<sup>32</sup> and some of Canada's other trading partners.

### *Copyright Reform*

---

<sup>29</sup> Digital Economy Strategy, *supra* note 1 at p. 16.

<sup>30</sup> Broadband is a high data rate Internet access having download data transfer rates equal to or faster than 256 kilobits per second and is typically contrasted with dial-up access. See OECD Broadband Statistics 2010 available at: [http://www.oecd.org/document/54/0,3343,en\\_2649\\_34225\\_38690102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html).

<sup>31</sup> See Industry Canada News Release, Minister Clement Announces First Projects to Receive Broadband Canada Funding (May 9, 2010), available at: <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/05530.html>. As at May 2010, 52 projects across Canada had been conditionally approved for funding under the Broadband Canada program. These projects, which collectively will receive a federal contribution of approximately \$76.7 million, will bring broadband access to an estimated 169,000 households currently unserved or underserved by high-speed Internet.

<sup>32</sup> *The American Reinvestment and Recovery Act* appropriated \$7.2 billion for the Department of Agriculture's Rural Utilities Service and the Department of Commerce's National Telecommunications Information Administration to expand broadband access and adoption in communities across the United States.

Bill C-32: the *Copyright Modernization Act*, proposed in June of this year, is intended to, amongst other things, (i) implement the rights and protections of the World Intellectual Property Organization Internet Treaties, bringing Canada in line with international standards; (ii) provide legal protection for businesses that choose to use technological protection measures or "digital locks" to protect their intellectual property; (iii) give copyright owners the tools they need to combat piracy; (iv) clarify the roles and responsibilities of ISPs and search engines; and (v) give consumers the ability to record their favourite TV shows to watch at a convenient time using the technology of their choice and copy music from a CD on their MP3 player.

With regard to the intermediary responsibility of ISPs, the *Copyright Modernization Act* clarifies that ISPs and search engines are exempt from liability when they act strictly as intermediaries in communication, caching and hosting activities. ISPs will be required to forward any notice they receive from a copyright owner to a subscriber who is alleged to be engaging in infringing activities. ISPs will be required to retain a record of this notification, including the identity of the alleged infringer, for use if court proceedings were to follow. Civil damages attach if ISPs do not retain such records or fail to forward infringing notices. The draft legislation does not go so far as to exempt ISPs from liability like the defamation liability exemption in the United States contained in section 230 of the *Communications Decency Act*.

The approach proposed by Bill C-32 to discourage copyright infringing uses of the Internet is a "notice and notice" regime which is different than the "notice and take down" approach that exists in the United States. A "notice and notice" regime is current industry practice in Canada and, in the view of the Government of Canada, better addresses peer-to-peer file sharing. A "notice and takedown" regime, typically requires an ISP to block access to material upon

receiving a notice from a rights holder and is not well suited to files shared on peer-to-peer networks, since the files are actually located on the computers of the persons engaged in sharing.

Bill C-32, if passed, will introduce a new civil remedy for copyright owners against those who knowingly enable infringement of copyright, supplementing existing criminal powers to deal with pirate sites. However, search engines and ISPs will be unaffected by this provision to the extent that they act as true, neutral intermediaries.

Canada is only beginning to address some over the various policy concerns raised by the Internet and has not yet engaged the public in a larger discussion on the ubiquitous influence of the Internet on economic, social, cultural and economic policy. The launch of the consultation paper on the Digital Economy Strategy this past June is a step in the right direction as the Government recognizes that "to prosper in the global digital economy, Canada must build on its many strengths and foundations to seize new opportunities and regain its digital leadership".<sup>33</sup> In the meantime, the various departments and agencies march forward in an uncoordinated manner with the CRTC primarily at the front lines.

### **III. Regulatory Approach and Framework for Internet Traffic Management Practices**

The *Telecommunications Act* gives the CRTC the authority to regulate Canadian carriers. A Canadian carrier is defined as a person, including a corporation or unincorporated organization, "who owns or operates a transmission facility to provide telecommunications services to the public for compensation." Accordingly, the CRTC's regulatory authority does not apply directly to non-facilities-based ISPs who use tariffed wholesale services from a primary ISP to provide its own retail Internet service (i.e., secondary ISPs or resellers).

---

<sup>33</sup> Digital Economy Strategy *supra* note 2 at p. 34.

Under the *Telecommunications Act*, the CRTC is required to forbear from regulation where a telecom service "is or will be subject to competition sufficient to protect the interests of users".<sup>34</sup> Today, almost all telecommunications markets in Canada have been opened up to competition such that the CRTC has forborne from economic regulation of most telecommunications services, including terminal equipment,<sup>35</sup> toll,<sup>36</sup> mobile wireless,<sup>37</sup> interexchange private lines,<sup>38</sup> international services,<sup>39</sup> wide area networking,<sup>40</sup> local exchange services<sup>41</sup> in most urban areas, and certain other data services.<sup>42</sup>

Due to the extent of competition in the market for the provision of Internet services, the CRTC has also forborne from regulating rates, quality of service issues or business practices of ISP's as they relate to retail customers.<sup>43</sup> However, in order to ensure that Canadians have access to a range of ISPs, the CRTC mandates access for secondary ISPs (or resellers) to tariffed wholesale services under fair and reasonable terms and conditions and regulates rates and quality of service

---

<sup>34</sup> *Telecommunications Act*, *supra* note 12 at subsection 34(2).

<sup>35</sup> Telecom Decision CRTC 94-14, 4 August, 1994 (Forbearance – Sale of Terminal Equipment by Canadian Carriers).

<sup>36</sup> Telecom Decision CRTC 97-19, 18 December, 1997 (Forbearance – Regulation of Toll Services Provided by Incumbent Telephone Companies).

<sup>37</sup> Telecom Decision CRTC 94-15, 12 August, 1994 (Regulation of Wireless Services) as modified by Telecom Decision CRTC 96-14, 23 December, 1996 (Regulation of Mobile Wireless Telecommunications Services).

<sup>38</sup> Telecom Decision CRTC 97-20, 18 December, 1997 (Stentor Resource Centre Inc. – Forbearance from Regulation of Interexchange Private Line Service and Telecom Decision CRTC 2006-18, 13 April, 2006 (Forbearance from Regulating Interexchange Private Line Services on Additional Routes).

<sup>39</sup> Telecom Decision CRTC 99-14, 28 September, 1999 (Teleglobe Canada Inc. – Forbearance for GlobeaccessTel and Related Matters).

<sup>40</sup> Telecom Order CRTC 2000-553, 16 June, 2000 (Forbearance granted for telcos' wide area network services).

<sup>41</sup> Telecom Decisions CRTC 2006-15, 6 April, 2006 (Forbearance from the regulation of retail local exchange services).

<sup>42</sup> *See* for example, Telecom Order CRTC 96-130, 19 February, 1996 and Telecom Order CRTC 97-572, 29 April, 1997,

<sup>43</sup> Telecom Order CRTC 99-592, 25 June, 1999 (Forbearance from Retail Internet Services).

issues for those wholesale services. This is an important distinction to the situation in the United States, where a mandated wholesale market does not exist.

A decision of the CRTC, issued in November 2008<sup>44</sup> before the CRTC's regulatory approach and framework for analyzing Internet traffic management practices of ISPs was introduced, assumed that the *Telecommunications Act*, together with the Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives (the "**Policy Direction**")<sup>45</sup>, provide "a complete code that can satisfactorily address net neutrality issues in Canada."<sup>46</sup>

A Policy Direction is a tool available to the Government through the *Telecommunications Act* to provide policy guidance to the CRTC on how it should exercise its regulatory mandate. The Policy Direction stemmed from a recommendation of the Telecommunications Policy Review Panel (the "**Panel**"), established by the Minister of Industry on April 11, 2005, to conduct a review of Canada's telecommunications policy and regulatory framework. A fundamental finding of the Panel in its March 22, 2006 report was that competition in telecommunications markets has evolved to the point where market forces can be relied upon to achieve many of the telecommunications policy objectives, and the need for regulation should no longer be presumed. The Panel also recommended that any new regulation should be subject to a form of cost/benefit

---

<sup>44</sup> Telecom Decision CRTC 2008-108, November 20, 2008, The Canadian Association of Internet Providers' application regarding Bell Canada's traffic shaping of its wholesale Gateway Access Service. The Canadian Association of Internet Providers ("**CAIP**"), an association of secondary ISPs complained with respect to Bell Canada's slowing down of traffic generation by peer-to-peer file sharing applications. However, on the particular facts of the case, the CRTC dismissed the application and ruled that the primary ISPs practices did not violate the *Telecommunications Act* as the traffic shaping was not unjustly discriminatory, since the traffic shaping applied equally to the primary ISP's own retail customers as well as the customers of the secondary ISPs and because there was no traffic blocking and any delay experienced by customers did not amount to editorial control or influencing the meaning of their communications.

<sup>45</sup> Order issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives [hereinafter "**Policy Direction**"] dated December 14, 2006, made under section 8 of the *Telecommunications Act*.

<sup>46</sup> Alexander J. Adeyinka, Avoiding "dog in the manger" regulation - a nuanced approach to net neutrality in Canada, *Ottawa Law Review* (December 22, 2008), at p. 56.

analysis to ensure optimal broad economic benefit rather than private interest agendas. The subsequent Policy Direction to the CRTC was one element of the Government's broader telecommunications policy agenda to decrease the regulatory burden and make regulation more efficient and effective through increased reliance on market forces.

The Panel put forth 127 recommendations, including the recommendation that "market forces shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives".<sup>47</sup> This led to the pronouncement of the Policy Direction mandating that the CRTC "rely on market forces to the maximum extent feasible and regulate, where there is still a need to do so, in a manner that interferes with market forces to the minimum extent necessary."<sup>48</sup> It should be noted that the Panel also recommended that "[c]ontrol of anti-competitive conduct in telecommunications service markets should be guided by competition law principles, suitably modified to take into account the specific features of the telecommunications service industry".<sup>49</sup> Given the complexity and fast moving nature of developments in the digital space the Panel also recommended the establishment of a new regulatory body drawing on both the CRTC and the Competition Bureau to resolve market structure and conduct issues. As discussed further below, to date that recommendation has not been pursued by the Government.

---

<sup>47</sup> Telecommunications Policy Review Panel, Final Report, March 2006, Recommendation 3-1 available at: <http://www.telecomreview.ca> [hereinafter "Panel Report"].

<sup>48</sup> Policy Direction *supra* note 44.

<sup>49</sup> Panel Report *supra* note 46 at Recommendation 3-14.



The CRTC's authority to regulate the Internet traffic management practices of Canadian carriers, and the template for the CRTC's Net Neutrality Decision, is found in sections 27 and 36 of the *Telecommunications Act*.<sup>50</sup>

The relevant provisions are as follows:

Subsection 27(1) - *Every rate charged by Canadian carrier for a telecommunications services shall be just and reasonable.*

Subsection 27(2) - *No Canadian carrier shall, in relation to the provision of a telecommunications service of the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.*<sup>51</sup>

Section 36 - *Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of a telecommunications carried by it for the public.*

In this regard, Canada's telecom legislation already codifies the fifth principle for the open Internet proposed by the U.S. Federal Communications Commission (the "FCC") which provides that "subject to reasonable network management, a provider of broadband Internet service must treat lawful content, applications, and services in a non-discriminatory manner."<sup>52</sup>

---

<sup>50</sup> Members of Parliament have tried to usher in legislative changes to address net neutrality concerns. Two private member's bills, C-552 and C-555, were tabled in Parliament on May 28, 2008 and June 8, 2008 but both bills died on the Order Paper when Parliament was dissolved in September 2008.

<sup>51</sup> Pursuant to subsection 27(4) of the *Telecommunications Act*, if a complaint is brought, the onus is on the Canadian carrier to establish that any discrimination or preference is not unjust, undue or unreasonable.

<sup>52</sup> See, <http://www.openinternet.gov/about-the-nprm.html>.

In November 2008, the CRTC initiated a comprehensive review of the ITMPs of ISPs with the intention of developing a transparent regulatory policy that could be applied as cases come before it. The CRTC's primary objective was "to find the proper balance between the users' interests to explore the net to the fullest, to experiment and to innovate and the legitimate interests of ISPs to protect their networks from congestion."<sup>53</sup>

Cognizant of arguments advanced that throttling "threatens to reduce incentives to invest in infrastructure capacity" and "encourages carriers to build their business model around managing scarcity, rather than developing more abundant capacity,"<sup>54</sup> the CRTC articulated that the best solution to the network congestion problem is continued investment in network infrastructure. Nevertheless, the CRTC recognized a need for certain ITMPs, favouring economic ITMPs given their transparency to technical ITMPs.<sup>55</sup>

Given the fast pace of Internet innovation and technological development, the CRTC did not lay down any hard and fast rules or even a bright line test of what would constitute reasonable Internet traffic management practices but instead, to provide clarity to the industry, developed a framework that should be applied by ISPs to determine whether specific ITMPs are in compliance with subsection 27(2) of the *Telecommunications Act*. This framework will also be applied by the CRTC when analyzing complaints brought before it alleging a violation of subsection 27(2).

---

<sup>53</sup> von Finckenstein, *supra*, note 6 at p. 2.

<sup>54</sup> Comments submitted by Google regarding Part VII Application by Canadian Association of Internet Providers Requesting Certain Orders Directing Bell Canada to Cease and Desist from "Throttling" its Wholesale ADSL Access Services (3 July 2008) at para. 17, available at: <[http://www.crtc.gc.ca/public/partvii/2008/8622/c51\\_200805153\\_1/923481.pdf](http://www.crtc.gc.ca/public/partvii/2008/8622/c51_200805153_1/923481.pdf)>

<sup>55</sup> An economic ITMP is one that manages traffic through monetary costs and incentives, for example, charging higher rates for greater bandwidth usage, or offering discounts during off-peak hours. A technical ITMP manages traffic through technological means, for example, throttling triggered by deep-packet inspection or prioritizing traffic from a specific service or application.

In assessing a particular ITMP or responding to a complaint regarding an ITMP it has implemented, an ISP shall:

1. Describe the ITMP being employed, as well as the need for it and its purpose and effect, and identify whether or not the ITMP results in discrimination or preference.

In the case of an ITMP that results in any degree of discrimination or preference:

1. demonstrate that the ITMP is designed to address the need and achieve the purpose and effect in question, and nothing else;
2. establish that the ITMP results in discrimination or preference as little as reasonably possible;
3. demonstrate that any harm to a secondary ISP, end-user, or any other person is as little as reasonably possible; and
4. explain why, in the case of a technical ITMP, network investment or economic approaches alone would not reasonably address the need and effectively achieve the same purpose as the ITMP.

This framework does not apply to ITMPs that block time-sensitive Internet traffic or result in the noticeable degradation of such traffic which, as will be described below, all require the prior approval of the CRTC under section 36 of the *Telecommunications Act*.

The CRTC's Net Neutrality Decision addresses the fact that the CRTC does not have the authority to regulate secondary ISPs by directing all primary ISPs, as a condition of providing

wholesale services, to include in their service contracts and other arrangements with secondary ISPs, the obligation that the latter abide by the non-discrimination/no undue preference provision with regard to any ITMPs employed. Similarly, as the CRTC has forborne from regulating wireless data services to date<sup>56</sup>, the CRTC noted that the Net Neutrality proceeding was not an appropriate vehicle for re-examining forbearance regarding mobile wireless data services. It went on to state that "considering the increasingly important role of such services to telecommunications in Canada, and for the purposes of technologically neutral regulation related to ITMPs, the Commission intends to review, at a future date, the appropriateness of reapplying section 24 and subsection 27(2) of the Act to mobile wireless data services. In the interim, the Commission expects ISPs using mobile wireless data services to offer Internet access services in accordance with the determinations of this decision."<sup>57</sup>

As information is vital to allow consumers make informed decisions, the CRTC has also mandated disclosure requirements of ITMPs. ISPs are expected to continue the practice of disclosing pricing information related to economic ITMPs and are required to clearly and prominently disclose on their websites information related to technical ITMPs, including a full explanation describing the practice, why it has been introduced and how it will affect the user. ISPs must give retail customers 30 days notice before implementing ITMPs. Wholesale customers are entitled to 60 days notice, because such measures may require the secondary ISPs to change their own systems and inform their own retail customers. These requirements are consistent with the sixth principle for the open Internet proposed by the FCC.<sup>58</sup>

---

<sup>56</sup> *Supra* note 36.

<sup>57</sup> *Supra* note 7 at paras. 115 and 116.

<sup>58</sup> *See*, <http://www.openinternet.gov/about-the-nprm.html>.

The CRTC's Net Neutrality Decision also set out the CRTC's approach to the regulation of ITMPs. With the exception of ITMPs that affect content, the CRTC will only get involved in analyzing an ISP's traffic management practices in the retail market on an *ex post* basis if and when the use of an ITMP (whether economic or technical) triggers an unjust discrimination or undue preference complaint pursuant to section 27 of the *Telecommunications Act*.

The *ex-post* regulatory approach taken by the CRTC to ITMPs in the retail market is consistent with regulatory forbearance in this sector.

The situation in the wholesale market is more complicated. Consistent with ongoing regulation in the wholesale market, a primarily *ex ante* regulatory approach, which generally aims to address concerns with market structure, has been adopted with respect to ITMPs in the wholesale market. Since economic ITMPs in the wholesale market are based on CRTC approved wholesale rates, prior rate approval for economic ITMPs imposed at the wholesale level will be evaluated using ordinary principles for rate approvals.

Technical ITMPs, so long as they do not block or degrade content, can be imposed by a primary ISP without prior approval from the CRTC provided there is no undue preference or unjust discrimination; any complaints as to undue preference or unjust discrimination will be dealt with on an *ex post* basis. However, technical ITMPs that are more restrictive to secondary ISPs than to a primary ISP's own retail customers clearly raise concerns of unjust discrimination and therefore will be subject to *ex ante* scrutiny. The CRTC will only grant its approval if the terms of the framework described above are met and there is no other workable and reasonable solution.

An ISP will always need the CRTC's prior approval for any ITMP in either the retail or wholesale market that affects content. Section 36 of the *Telecommunications Act* prohibits a Canadian carrier from controlling content except where the CRTC approves otherwise. Accordingly, *ex ante* approval from the CRTC is required before an ISP can implement a practice that would (i) block the delivery of content to an end-user or (ii) slow down time-sensitive traffic (e.g. videoconferencing or VOIP) to the extent that the content is degraded.<sup>59</sup> According to the CRTC Chairman, "it is hard to imagine a case where [the CRTC] will approve such actions; truly, it would be a most exceptional case".<sup>60</sup>

In conducting its review of ITMPs, the CRTC had sought views on whether sector specific rules were required, beyond the requirements of PIPEDA, to address privacy concerns raised by the use of ITMPs. The CRTC determined that, as a result of paragraph 7(i) of the *Telecommunications Act*, which provides that Canadian telecommunications policy has as one of its objectives to contribute to the protection of the privacy of persons, its role with respect to the protection of privacy in the telecommunications industry is complementary to that of the Office of the Privacy Commissioner of Canada.

The CRTC determined that certain ITMPs raise privacy concerns in regard to the collection and use of personal information and concluded that in order to provide a higher degree of privacy protection for customers of telecommunications services, it would be appropriate to impose a higher standard than that available under PIPEDA. As a condition of providing retail Internet services, the CRTC directed primary ISPs not to use personal information collected for the

---

<sup>59</sup> For example, an ISP that delays traffic by implementing deep packet inspection will be considered to have blocked access to content if time-sensitive audio or video traffic is degraded noticeably.

<sup>60</sup> Speaking Notes, CRTC Chairman, Konrad von Finckenstein, Q.C., Federal Communications Commission Workshop on Consumers, Transparency and the Open Internet, Washington, D.C. (January 19, 2009) available at: <http://www.crtc.gc.ca/eng/com200/2010/s100119.htm>.

purposes of traffic management for any other purpose and not to disclose such information. Primary ISPs are also directed, as a condition of providing wholesale services to secondary ISPs, to include in their service contracts or other arrangements with secondary ISPs, the requirement that the latter not use for other purposes personal information collected for the purposes of traffic management and not disclose such information.

The CRTC's approach to privacy in its Net Neutrality Decision is contrary to the assertion made by Bell Canada during the CRTC hearing of the Canadian Association of Internet Providers' complaint concerning Bell Canada's traffic shaping of its wholesale Gateway Access Service that "paragraph 7(i) of the Act is a legislative objective that can help clarify the purpose of the legislation and is relevant to decision making, but is not a power-conferring provision"<sup>61</sup>.

#### **IV. RESPONSE AND ANALYSIS**

The CRTC's Net Neutrality Decision was met with criticism from some net neutrality advocates, who argue that the Internet needs to be protected from interference by ISPs. For example, the federal New Democratic Party criticized the framework, arguing "the CRTC has left the wolves in charge of the henhouse. ISPs have been given the green light to shape the traffic on the Internet toward their corporate interest. This decision is a huge blow to the future competitiveness of the Internet."<sup>62</sup> Tim Wu, a Canadian professor at Columbia University in New York who is often credited with originating the concept of net neutrality, said he was disappointed by the ruling.<sup>63</sup>

---

<sup>61</sup> *Supra* note 43 at para. 62.

<sup>62</sup> *See*, CRTC issues net neutrality rules, Peter Novak, CBC News (October 21, 2009) available at: <http://www.cbc.ca/technology/story/2009/10/20/crtc-net-neutrality-ruling.htm>.

<sup>63</sup> *Id.*

There has, however, been some qualified acceptance that the CRTC has tried to balance conflicting interests. Jacob Glick, Policy Counsel for Google Inc. in Canada stated "We're pleased that the CRTC has adopted a principle-based approach designed to protect the open Internet for Canadians and preserve flexibility for ISPs."<sup>64</sup> Google's primary concern appears to have been that reasonable "[n]etwork management does not include Canadian carriers' blocking or degrading lawful applications that consumers wish to use". "From consumer, competition and innovation perspectives, throttling applications that consumers choose is inconsistent with a content and application-neutral Internet".<sup>65</sup>

While the jurisdiction of the CRTC to regulate traffic management in the wholesale market is appropriate, it is interesting, although perhaps academic, to consider whether sector specific *ex post* regulation, which typically addresses concerns of market conduct and aims to redress proven misconduct in a market, of the traffic management practices of ISPs in the retail market is necessary or the desirable approach in Canada.

Opponents of net neutrality regulation argue that the competitive market will guard against market misconduct. In colloquial terms, customers will vote with their feet. For example, Alexander Adeyinka argues that from a competition law perspective the ability for consumers of content and applications to switch from one ISP to the other "provides certainty that neither is likely to behave downstream in a manner that impedes competition in the upstream content and applications market".<sup>66</sup> Notwithstanding such arguments, some net neutrality advocates believe that "[n]otwithstanding the existence of competition in the high speed Internet access market, net

---

<sup>64</sup> *Id.*

<sup>65</sup> *Supra* note 52 at para. 3.

<sup>66</sup> Adeyinka *supra* note 45 at p. 29.



neutrality regulation is required as a guarantee that ISPs will not behave in the access market in manners that can impede competition, innovation and investment in the Internet content and applications market."<sup>67</sup>

It has also been argued that despite competition, "consumers may in fact be incapable of voting with their feet due to information failure."<sup>68</sup> If consumers are not aware that blocking or degradation is the result of behaviour of the access provider rather than the content provider, they will be inclined to blame the content provider. "In short, inaccurate information could impede consumers' ability to rationally exercise their choice even where there is competition."<sup>69</sup> The CRTC has attempted to address this information asymmetry in its Net Neutrality Decision by requiring ISPs to give notice and provide a full explanation and description of the effect of any ITMP implemented.

Opponents of net neutrality regulation also argue that antitrust laws of general application can be relied upon to keep the market in check. In a 2007 Report on Broadband Connectivity Competition, policy staff at the U.S. Federal Trade Commission ("FTC") concluded that they were sceptical about the need for rules given the ability of antitrust enforcement to ensure competition in broadband Internet markets.<sup>70</sup> However, more recently, before the FCC in its workshop on Consumer Transparency and the Open Internet, FTC Chairman Leibowitz

---

<sup>67</sup> Adeyinka *supra* note 45 at p. 4.

<sup>68</sup> Barbara Van Schewick in Adeyinka *supra* note 45 at p. 31.

<sup>69</sup> Adeyinka *supra* note 45 at p. 31.

<sup>70</sup> Broadband Connectivity Competition Policy, FTC Staff Report, June 2007 available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

remarked that he believed that staff were overly confident about the ability of antitrust law to deal with net neutrality-based concerns.<sup>71</sup>

There is no specific exemption from the *Competition Act*, framework legislation of general application enforced by the Competition Bureau, that applies to telecommunications carriers regulated by the CRTC under the *Telecommunications Act*. Thus, there is jurisdictional overlap between the Competition Bureau and CRTC with respect to reviewing anticompetitive conduct in the Canadian telecommunications sector. The appropriate role for competition law in regulated or quasi-regulated industries is frequently a matter of strong debate. As noted earlier, the Telecommunications Policy Review Panel report had hinted at this issue when it recommended a new agency drawing on resources from both the CTRC and Competition Bureau.

The authority of the CRTC under the *Telecommunications Act* and *Broadcasting Act* and that of the Competition Bureau under the *Competition Act* is described in a document entitled the CRTC/Competition Bureau Interface agreement (the "**Interface**"), issued in May 2007. So far this is the only formalized recognition of the overlap and attempt to provide jurisdictional clarity. It provides that where the CRTC has forborne from regulation in whole or in part, the *Competition Act* would apply to the activities exempted from regulation (e.g. the provision of retail Internet access) until such time as the CRTC exercises its authority to review, rescind or vary its exemption or forbearance orders and decisions. The approach to questions of jurisdiction described in the Interface is consistent with the common law doctrine known as the

---

<sup>71</sup> Remarks by Jon Leibowitz, Chairman Federal Trade Commission, FCC Workshop: Consumer, Transparency and the Open Internet, Washington, D.C., January 19, 2010 at p. 4.

"regulated conduct defence"<sup>72</sup> and the Competition Bureau's Technical Bulletin on Regulated Conduct, which provides that the Competition Bureau may not seek a remedy in respect of conduct that is regulated pursuant to a federal law, provided the regulator has exercised its regulatory authority in respect of the conduct in question.<sup>73</sup> Predictably, this jurisdictional overlap has produced an uneasy relationship between the Competition Bureau and CRTC in matters arising in the telecommunications sector.

Although the CRTC has forborne from regulating retail Internet access, in issuing its Net Neutrality Decision the CRTC has signalled that it is not prepared to simply cede jurisdiction over the conduct engaged in by ISPs to the Competition Bureau. Even if it had been, it is not clear that the Competition Bureau has the enforcement tools necessary to address net neutrality concerns. Similarly, the Competition Bureau is not prepared to cede authority on these issues to the CRTC. That being said, the two agencies do talk to each other around factual issues but do not, at least from the outside, appear to be keen on deferring to the other.

The Competition Bureau has authority under the *Competition Act* to address market misconduct by ISPs including cases of abuse of dominance brought under section 79 of the *Competition Act*

---

<sup>72</sup> Summarized briefly, the courts have held that the regulated conduct defence will apply to immunize "regulated" conduct from scrutiny under the *Competition Act* when four main criteria are satisfied: (1) there is validly enacted legislation regulating the conduct at issue; (2) the conduct is directed or authorized by that legislation (although it is still unsettled as to the degree of authorization that must exist); (3) the authority to regulate has been exercised; and (4) the regulatory scheme has not been hindered or frustrated by the conduct.

<sup>73</sup> Competition Bureau, Technical Bulletin on "Regulated" Conduct, (Ottawa, Industry Canada, 2006) available at: [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca). The regulated conduct defence is analogous to the "state action doctrine" developed by the United States Supreme Court to permit state governments and certain private actors to demonstrate that antitrust liability is barred by the operation of a state regulatory scheme. See *Parker v. Brown*, 317 U.S. 341 (1943) and *California Liquor Dealers Association v. Midcal Aluminium, Inc.*, 445 U.S. 97 (1980). That doctrine operates to immunize certain regulated conduct from federal antitrust review where such conduct is engaged in pursuant to "clearly articulated" state policy and is "actively supervised" by the state.

before the Competition Tribunal for determination.<sup>74</sup> However, to succeed in an abuse of dominance complaint under section 79 of the *Competition Act*, three essential elements must be found to exist by the Competition Tribunal:

1. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
2. that person or these persons have engaged or are engaging in a practice of anti-competitive acts; and
3. the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

The jurisprudence under section 79 has held that for market behaviour to be considered anti-competitive, it must be intended to have a negative effect on a competitor that is exclusionary, disciplinary, or predatory.<sup>75</sup> Accordingly, while the abuse of dominance provisions of the *Competition Act* may successfully be invoked where the traffic management practices of an ISP have a negative effect on a competing ISP, there is no authority in the legislation for the abuse of dominance provisions to be invoked where the traffic management practices of an ISP have a negative effect on an applications provider (unless the ISP is vertically integrated and is favouring its affiliated applications).

---

<sup>74</sup> The Competition Tribunal is a specialised administrative body established pursuant to the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd supp). Broadly speaking, its mandate is to adjudicate applications brought under the Act's civil 'reviewable practices' provisions. These include matters such as abuse of dominance, mergers, certain types of distribution practices (e.g., exclusive dealing and tied selling) and, as of March 12, 2010, agreements among competitors that do not involve a *per se* criminal offence but that substantially prevent or lessen competition.

<sup>75</sup> Competition Bureau, Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Ottawa, Industry Canada, January 2009) available at: [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

In contrast, although section 27 of the *Telecommunications Act* has typically been relied on to date by competing telecommunications carriers, there is nothing in the provision limiting who can bring a complaint to the CRTC alleging that it has been subject to an undue preference or undue disadvantage.

Moreover, for conduct to amount to an abuse of dominance in antitrust terms, the practice must also be having or be likely to have the effect of preventing or lessening competition substantially in a market. Given the competitiveness and market structure of the Internet, it may be difficult to assert that the throttling of a certain application is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Accordingly, the only circumstances where the abuse of dominance provision could be invoked to address the implementation of anti-competitive ITMPs is in the wholesale market, which is squarely within the jurisdiction of the CRTC, or where an ISP is vertically integrated and is using ITMPs to favour its affiliated applications. In the latter circumstances, it is possible that the Competition Bureau may commence an investigation into the traffic management practices of an ISP despite the CRTC's Net Neutrality Decision. If this were to occur, the interface between the CRTC and the Competition Bureau would likely become even more strained. The counterweight issue to the tension is perhaps a recognition by both agencies that if the matter is forced to the courts for determination one of them will lose definitively.

From the viewpoint of deterrence, a benefit of having ITMPs reviewed concurrently by the Competition Bureau and the CRTC is that the Competition Bureau, unlike the CRTC, has the ability to assess administrative monetary penalties ("AMPs") for conduct violating the abuse of dominance provisions. While one might assume that regulatory agency incentives being what

they are, in an overlap case a likely scenario is for one of them to blink rather than risk an adverse judicial ruling, recent statements by Leonard Katz, Vice-Chairman of the CRTC suggest that for the CRTC the issue needs to be resolved. He suggests that concurrent jurisdiction is not the regulatory approach envisioned by the telecommunications regulator. Katz, invoking a recommendation of the Telecommunications Policy Review Panel to grant the CRTC authority to assess AMPs, argued that as "[t]he Commission is moving away from the old *ex ante* regulatory approach where players had to seek our approval before taking action in the marketplace..... More and more..... we get involved only if someone fails to comply with the rules we've put in place. However, we have few options if someone breaks the rules. With AMPs authority, we would have a meaningful and targeted tool that would increase compliance with regulatory conditions and serve as a real deterrent against anti-competitive behaviour."<sup>76</sup>

Perhaps as part of its Digital Agenda it is time for the Government of Canada to adopt one of the other recommendations of the Telecommunications Policy Review Panel which would, if adopted, fundamentally impact the jurisdiction of the CRTC and Competition Bureau with respect to telecom matters. The Panel found the Competition Tribunal to be ill-suited to review competitive issues in the telecommunications industry because it lacks investigative powers and sectoral expertise, and its court-like process is too lengthy. Accordingly, the Panel recommended that a new Telecommunications Competition Tribunal should be established operating as a type of "joint panel" of the CRTC and the Competition Bureau to address competition issues in the telecommunications sector including, amongst other things, complaints

---

<sup>76</sup> Speech by Leonard Katz, Vice-Chairman, Telecommunications Canadian Radio-television and Telecommunications Commission to the Canadian Telecom Summit panel on "Building Digital Canada" (Toronto, Ontario), June 8, 2010 available at: <http://www.crtc.gc.ca/eng/com200/2010/s100608.htm>.

of anti-competitive conduct in all telecommunications markets, other than the terminal equipment market.

Whether the relationship between the CRTC and the Office of the Privacy Commissioner will also be characterized by a degree of tension going forward given the CRTC's interpretation of its jurisdiction under section 7(i) of the *Telecommunications Act* also remains to be seen.

## V. CONCLUSION

The net neutrality debate in Canada has to date unfortunately been largely limited to network congestion and traffic management issues. Even with the proposed reform to the *Copyright Modernization Act*, Canada is still focussing on irritants arising at the periphery of the digital space.

We have yet to have a dialogue among policy makers and stakeholders on the more fundamental broader question: is it better from a national interests perspective to favour an "open" or "closed" approach to the Internet ecosystem. Which will yield the greatest economic benefit? Which is better at stimulating innovation? Which will make Canada more globally competitive?

The question is not do we need regulation or not. Every potential regulatory intervention needs to be rigorously analysed to assess its pros and cons. What we have not had in Canada is the general public debate and more importantly at the regulatory and policy-making levels, including the political level, a commitment to which end of the spectrum from no regulation to full regulatory oversight Canada should be striving for.<sup>77</sup> There are clearly difficult political issues

---

<sup>77</sup> For example, in a recent decision of the Federal Court of Appeal ("FCA") issued on July 7, 2010, the FCA determined that ISPs do not come within the definition of "broadcasting undertaking" subject to the *Broadcasting Act* when they provide access through the Internet to "broadcasting" services. However, the

that would be triggered by the debate itself but optimizing the digital economy returns to Canada requires that some of these issues be dealt with.

Only following that type of discussion will we be able to design a global approach, a truly national framework within which to assess and resolve on-going issues, whether they're intellectual property rights issues, anticompetitive behaviour issues, industry structure issues or the host of other socio-economic issues like cultural policy, education, training, market access and standard setting.

---

FCA's conclusion was "based on the content-neutral role of ISPs" and the FCA explicitly stated that its conclusion "would have to be reassessed if this role should change"; [2010] F.C.J. No.849, 2010 FCA 178.