Nation-Building, Oligopoly, and Wireless Prices in Canada: The Big 3 and Their Stranglehold on Canadian Consumers

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ABSTRACT

In Canada, as in much of the world, wireless telephone technology has become indispensable as a communications medium, and its adoption has become near-ubiquitous across all demographics. As usage has risen over the last three decades – and in particular, since 2007, with the popularization of smartphones – control of the retail wireless market has become consolidated in the hands of three main players: Rogers Communications, Telus Corporation, and BCE (Bell) Inc., otherwise known as the "Big 3." The Big 3 consistently leverage their advantageous market position to inflate the costs of wireless telephone subscriptions such that Canada consistently ranks among the most expensive countries in the world in which to own and use the technology. The oligopoly in the retail wireless arena enjoyed by these companies is reinforced by Canadian ownership requirements enshrined in the *Telecommunications Act*, the inheritor of the nationalistic telecommunications policies contained in its precursor, the *Railway Act*. Keenly aware of the nationalistic bent of the *Telecommunications Act*, the Big 3 cynically maintain their power in the retail wireless market by colluding, tacitly and explicitly, to shut out competition from within and outside Canada and fix prices to the detriment of Canadian consumers. These monopolistic tendencies are nothing new: since the dawn of telecommunications in Canada, large telecom providers (especially, Bell) have sought to maintain their stranglehold on the industry under the guise of needing to control the telecommunications industry in the "national interest." Recently, however, the "hands-off" approach taken by regulators – justified by their desire to see national telecommunications networks expanded – has begun to be supplanted by a "consumer-first" perspective. How this shift will play out remains to be seen, but there is a glimmer of hope that, by forcing the large telecom companies to allow access to their networks by smaller emerging players, true competition may arrive in the Canadian telecommunications landscape, resulting in more affordable wireless telephone options for Canadian consumers.

INTRODUCTION

Proliferation of wireless telephone services in Canada has risen exponentially since cellular technology entered the consumer market in the mid-1980s.[1] As of December 2018, there were over 32.8 million wireless subscriptions in Canada.[2] By a significant margin, more Canadians have mobile phones (90.18% adoption) than landlines (41.25%), and approximately one in three households are exclusively wireless.[3] Hand-in-hand with significant increases in smartphone use, mobile data consumption has experienced continued growth. It is projected that by 2023, "the average smartphone in North America will generate approximately 50GB of traffic per month," taking into account both wireless network and WiFi usage.[4]

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[1] Peter Henderson, "Cellphones mark 30 years in Canada" (29 Jun 2015), CBC News (online), online: <https://www.cbc.ca/news/technology/cellphones-mark-30-years-in-canada-1.3132058>. [Henderson]

[2] Canadian Wireless Telecommunications Association, "Facts&Figures|Statistiques – CWTA" (website), online: <https://www.cwta.ca/facts-figures/>. [CWTA]

[3] *Ibid*.

[4] *Ibid*, citing Ericsson Mobility Report, 2018.

Convergence of Information and Communications Technologies

Communications technologies "include the techniques, tools and methods used to facilitate communication," while information technologies "include those used to create, record, modify and display the content being communicated.[5]" In the 1970s, the first mobile communications handsets were developed alongside the "basic technology foundation for the Internet and World Wide Web," which, in the previous four decades have come together "to the point where mobile access to the Internet … is the dominant and fastest growing form of communication.[6]"

In Canada, this is no exception. Canadians have embraced mobile and Internet-based technology *en masse*, in many ways making obsolete the "wireline" telephony systems that preceded the ascent of wireless. Curiously, however, the legacy of the development of the telegraph, and later, telephone systems remains in Canada – albeit in a new form. Where the development of the telegraph and telephone systems was inextricably bound to the "nation-building" aims that accompanied the establishment of railroads in Canada's early days, contemporary wireless telecommunications continue to fall under purview of protectionist, nationalistic policies.

RAILROADS, TELEPHONES & NATION-BUILDING

The Railway Act and Its Relation to Telecommunications

At Confederation, the railway "was seen as physically binding disparate regions of the country together with ribbons of steel.[7]" Alongside the development of the railway came the development of communications technologies and networks, which "have been envisioned as the means to promote economic development and dialogue," that enable "common understandings and perspectives among Canadians.[8]" The evolution of the telephone system in-step with that of the railway networks made telecommunications in Canada a "symbol of national integration.[9]"

Just as the federal government was instrumental in the development of the railway system in Canada, "so too [was it] central to the development and implementation of communications technologies and the creation of communication networks.[10]" As such, the telephone system represented more than simply a means of communication – it became a mechanism by which other aspects of the nation-state were exercised, "such as the police, military outposts, mines, and nascent business opportunities," by complementing federal efforts to "limit United States military forces to the official border,... control the territory... against native peoples and Metis, and... accommodate a vast flood of European migrants.[11]"

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[5] William H. Melody, "Information and Communications Technology" (published 7 Feb 2006, updated 19 Aug 2015), The Canadian Encyclopedia (online), online: <https://www.thecanadianencyclopedia.ca/en/article/information-and-communications-technology>. [Melody]
[6] Melody.
[7] Melody.
[8] Melody.
[9] Dwayne Winseck, "A Social History of Canadian Telecommunications" (1995), 20:2 Canadian Journal of Communication (online), online: <https://www.cjc-online.ca/index.php/journal/article/viewArticle/863/769>. [Winseck 1]
[10] Melody *supra* note 5.
[11] Winseck 1.

From 1906 to 1993, the *Railway Act* was the guiding legislation for the telecommunications industry; supplanted later by the *Telecommunications Act*, SC 1993, c 38. Both statutes stressed that "telecoms are point-to-point communications systems that carry all forms of content.[12]" This view of telephone systems "…evolved piecemeal through interpretations of the *Railway Act*, amendments to [that] *Act*, and changes to the laws governing telecoms providers in Canada.[13]" The common-carrier principle contains three elements: (1) that control of content should be separated from control over the networks; (2) that access to networks should be non-discriminatory; and, (3) that rates should be just and reasonable. These features of the common-carrier principle "have been implemented by policies that prevented carriers from influencing the messages flowing through their networks and required them to offer non-discriminatory access to their system on the basis of 'just and reasonable' rates.[14]" The legislative aim of encouraging universal service across Canada has "historically been pursued through provisions in the *Railway Act* that required all telephone rates to be 'just and reasonable' and 'not unjustly discriminatory or unduly preferential'.[15]" Similar clauses to those are enshrined in the *Telecommunications Act* in section 27, as well as the methodology for determining what is "just and reasonable," notably, "any method or technique that [the CRTC] considers appropriate.[16]"

The 'Bell Charter'

The federal government secured a "stable legal context for the extension of a national telephone system when … [they] … asserted legislative control over the telephone system" and granted Bell Canada (an off-shoot of the American Bell Telephone Company) a Charter with extensive rights.[17] The "Bell Charter" was introduced into Parliament on 23 February 1880, and received Royal Assent less than a month later.[18] Scant attention was paid towards the detrimental effects the Charter would have on competition in the telephone industry, and indeed, the only substantive debate was whether the Charter "usurped too much power from the provinces and municipalities, as it stripped them of any power to control the company's operations." The Bell Charter had an immense scope, giving Bell the right to:

> *"…manufacture telephone and telegraph equipment; construct, acquire, maintain, and operate telephone systems in Canada and elsewhere; connect with other telephone and telegraph companies in Canada and elsewhere; construct lines along any and all public rights-of-way...; and amalgamate with or become a shareholder in companies owning telephone or telegraph lines or possessing power to use communication by means of the telephone.[19]"*

Bell's plans, taken together with the immense power granted to it via the Bell Charter, "complemented the conclusion of negotiations to begin the [construction of] the cross-Canada railway.[20]" The reciprocal relationship between the federal government and Bell furthered the monopolistic aims of the latter. Bell

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[12] Dwayne Winseck, "Canadian Telecommunications: A History and Political Economy of Media Reconvergence" (1997), 22:2 Canadian Journal of Communication, online: <https://www.cjc-online.ca/index.php/journal/article/viewArticle/995/901>. [Winseck 2]
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.
[16] *Telecommunications Act*, SC 1993, c 38 at s 27 (5). [*Telecommunications Act*]
[17] Winseck 1.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid*.

Canada agreed to "furnish to the Railway Company at all points in the Dominion of Canada[,] … connection between the offices and stations of the Railway Company, [and] long distance passes free of charge.[21]" In exchange for furnishing the Railway Company with connections and equipment, Bell was given the exclusive right "…of placing telephone[s]… in the stations, offices and premises of the Railway Company throughout the Dominion of Canada.[22]" Bell Canada and the Railway Company maintained a reciprocal understanding, whereby each would furnish to the other "facilities for carrying its wires and lines.[23]" Interestingly, the Railway Company obligated itself to "not grant similar facilities to any other telephone company,[24]" in effect creating Canada's first telecommunications monopoly – something Bell Canada has strived to maintain ever since.

Railway stations were, in the late nineteenth and early twentieth centuries, major centres of commercial activity in Canada. The agreements between Bell Canada and the Railway Company "excluded competitive telephone companies from railway premises … and allowed Bell and the railways, who operated an extensive telegraph system, to share one anothers' facilities … at the expense of denying competitors' access to their emerging information grid.[25]" What underpinned the separation of different communication sectors was not "anything inherent in the technologies available at the time, but rather … 'corporate collusion'.[26]"

THE WIRELESS TELEPHONE MARKET IN CANADA

It ought to not come as a surprise that, today, "Canadian households depend on mobile wireless services for important aspects of daily life, from basic communication needs related to work and safety, to more advanced needs related to convenience and entertainment.[27]" A significant proportion of household income is dedicated to bills for wireless services in Canada; a reality that is especially true for low-income households, who spend a disproportionately high percentage of income on these services.[28] Despite the significant expenditures undertaken by Canadians to stay connected, Canada "languishes down at the bottom of the OECD rankings right alongside Turkey and Mexico in terms of wireless adoption.[29]"

Despite cellular technology being introduced as a premium service catering to high-end business clients by Bell Canada and other regional competitors nearly a decade earlier, the consumer wireless telephone market did not debut widely across Canada until the mid-1980s. Cellular telephones "debuted in Canada with a call between Art Eggleton and Jean Drapeau, then mayors of Toronto and Montreal respectively, on July 1, 1985.[30]"

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[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid*.
[27] Competition Bureau (Canada), "Competition Bureau statement regarding Bell's acquisition of MTS" (15 Feb 2017), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>. [Competition Bureau]
[28] *Ibid*.
[29] Aaron Saltzman, "Proposed new CRTC rule changes could lead to cheaper wireless plans, upstarts say" (28 Feb 2019), CBC News (online), online: <https://www.cbc.ca/news/business/crtc-mandate-wireless-1.5037382?fbclid=IwAR3afQuknl4IdMtmZglUzYtUvxz9rB0drhtQLPBjD6ilwOcXsjiO8c8M9GQ>. [Saltzman]
[30] Henderson *supra* note 1.

In the intervening decades between the Bell Charter and the establishment of the consumer wireless market in Canada, Bell's effective monopoly over telecommunications in Canada has splintered into a number of regional monopolies. Those regional monopolies "that dominated the telephone industry in the early 1980s were concerned that mobile phones would disrupt their grip on nearly aspect of the market.[31]"

Establishing the first private national wireless network was not without significant consideration of what the impact of that decision would ultimately be. The administration of Ronald Reagan – then, President of the USA – pressured the federal government to choose a bid from an American company,[32] which, in hindsight, would have vastly changed the landscape of the retail wireless market in Canada. Instead, the federal government shrugged off the pressure from the Reagan administration and "awarded the rights to the first private cellphone network to an upstart company that later became one of the three dominant players in Canada's wireless sector:" CANTel, later, Rogers Communications.[33]

The "Big 3" Telecommunications Providers (Rogers, TELUS, Bell)

Rogers Communications of Canada Inc. ("Rogers"), Telus Corporation ("TELUS"), and BCE Inc. ("Bell") are the largest wireless services providers in Canada. Collectively, they are referred to as the "Big 3." The three providers and their subsidiaries account for more than 91% of the wireless telephone market in Canada,[34] and effectively control the vast majority of the wireless telephone infrastructure in Canada. While these companies operate as carriers under their "flagship" names, each of them operates alternative "low-cost" subsidiaries in Canada (e.g. Rogers owns Chatr, Fido, and Cityfone; TELUS owns Koodo and Public Mobile; Bell owns Virgin Mobile and Lucky Mobile).[35]

In spite of their domination of the retail wireless market in Canada, the Big 3 repeatedly contend that there are "no dominant wireless carrier[s] in Canada.[36]" This argument is consistently advanced despite the fact that, in 2017, the respective retail mobile revenue market shares of the Big 3 were as follows: Rogers at 33.3%; TELUS at 27.8%; Bell at 30.7%; and *all others combined* at 8.2%.[37] Competition in the retail wireless market, despite the presence of a number of different "brands" of wireless services, is an illusion; the market is dominated almost exclusively by the Big 3.

Wireless Services in Canada (vs. the World)

According to data contained in Statistics Canada's 2017 Survey of Household Spending and CRTC sources, mobile telephone services have an adoption rate of about 88%, an increase of 2.1% over the 2015-16 period.[38] Expenditures by household for wireless services have reached an average of $92.08,

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[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.
[34] Canada Radio-television and Telecommunications Commission, "Communications Monitoring Report 2018", online: < https://crtc.gc.ca/pubs/cmr2018-en.pdf> at 109. [CMR 2018]
[35] "List of Canadian mobile phone companies", Wikipedia (website), online: <https://en.wikipedia.org/wiki/List_of_Canadian_mobile_phone_companies>.
[36] CRTC, *Telecom Regulatory Policy CRTC 2015-177*, Regulatory framework for wholesale mobile wireless services. [CRTC 2015-177]
[37] CMR 2018 *supra* note 34 at 109.
[38] *Ibid* at 18.

which represents a 5.5% increase over the 2015-16 period.[39] Overall, total retail mobile revenues reached $24.5 billion, up 5.3% from 2017.[40] As a percentage of total mobile revenues, mobile data revenues are surging – data revenues account for 48.3% of all revenues in 2017, up 7.8% from just the year prior.[41] The vast majority of revenues in the retail wireless market came from post-paid plans, accounting for 95.5% of total revenues in 2017,[42] with 88% of total subscribers subscribing to these types of plans.[43] In Canada, ARPU (average revenue per user) in 2017 stood at $65.33 per month (a 2.1% increase over 2016), with the highest average provincial ARPU being in Alberta ($73.60) and the lowest in Quebec ($56.07).[44] APRU is steadily rising on a year-over-year average, rising from $59.97 in 2013.[45]

Consumer appetites in Canada for data plans, as mentioned above, are on the rise. Since 2013, the percentage of mobile subscribers with a data plan rose from 62% to 83%.[46] In 2017, more than 60% of all data subscribers subscribed to a data plan of *at least* 2GB.[47] In fact, in 2017, of those mobile subscribers with data plans, 17% had data plans ranging from 3-4GB, and 31% had plans with 5GB or more.[48] Curiously, non-Big 3 providers tended to have a majority (56%) of their data plan subscribers fall in the highest (5GB+) category.[49]

The costs of Canadian wireless services are consistently among the highest in the world for all manner of "baskets" of wireless services, but in particular, as it relates to cellular data.[50] The total revenue per GB of data in Canada is thirty-five times that in India, and twenty times that in Finland, which results in data usage rates that are relatively very low compared to the rest of the world.[51] While "[l]ow data usage does not necessarily means that ARPU is low … Canadian consumers should be particularly unsatisfied [in light of Canada having among the highest ARPUs in the world] … given how few [GBs] they can consume for that ARPU.[52]" Given that low total revenue per GB is a prerequisite for continued data usage growth,[53] it should come as no surprise that Canada has among the lowest growth rates in data usage in the world, owing primarily to the high operator revenues per GB.[54]

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39 *Ibid*.
40 *Ibid* at 154.
41 *Ibid*.
42 *Ibid*.
43 *Ibid* at 160.
44 *Ibid* at 167.
45 *Ibid* at 168.
46 *Ibid* at 162.
47 *Ibid* at 161.
48 *Ibid* at 162.
49 *Ibid* at 166.
50 Wall Communications Inc., "Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions" (2018 ed.), prepared for: Innovation, Science and Economic Development Canada at iii. [ISED 2018]
51 Tefficient, "Industry analysis #1 2018 – Mobile data – full year 2017: Unlimited moves the needle – but it's when mobile addresses slow fixed internet that something happens", Tefficient (website), online: <https://tefficient.com/wp-content/uploads/2018/07/tefficient-industry-analysis-1-2018-mobile-data-usage-and-revenue-FY-2017-per-country-18-July-2018.pdf> at 21. [Tefficient]
52 *Ibid*.
53 *Ibid* at 1.
54 *Ibid* at 8

Obstruction to Competition and Corporate Collusion

The Canadian wireless telephone market(s) possess a "number of factors which make them susceptible to coordination," namely: (1) the high concentration of mobile wireless markets; (2) high barriers to entry and expansion; (3) transparent pricing, which is closely monitored by competitors; and that (4) "…the threat of retaliation from competitors is a significant factor in pricing decisions.[55]"

Exercises of market power refer to "the ability to profitably sustain a material price increase … without effective discipline from competitive responses by rivals.[56]" Unilateral effects occur when mergers eliminate competition between two firms that allow the merged firms to exercise that market power.[57] Coordinated effects involve the interaction between a group of firms, including merged firms, that is "profitable for each firm, because of the firms' accommodating reactions to the conduct of the others.[58]" Firms regularly competing in the same market develop unspoken understandings over time that "each firm will respond cooperatively to the behaviour of the other firms," facilitating higher market prices even when "firms may not explicitly communicate with each other.[59]" Firms raise prices expecting its competitors to follow, even when doing so independently would not have otherwise produced profitable results. For the majority of the markets in which the Big 3 operate, this is the prevailing condition, resulting in a price-fixing regime that enables the continued squeezing of value from Canadian consumers (via ever-increasing ARPUs) while permitting the incumbent telecom companies to offer some of the worst value-for-service in the world.

The Big 3 incumbent telecommunications carriers "possess and have exercised market power.[60]" Prices for comparable plans in peer countries are significantly lower, resulting in relative affordability challenges for Canadians subscribing to wireless services, particularly for "low-income Canadian families, with financial constraints.[61]" Canadian incumbents have been found definitively to coordinate their activities, which have the effect of higher prices for Canadian consumers.[62]

An investigation by the Canadian Competition Bureau in 2017 revealed the coordination efforts of the Big 3 telecommunications companies. The Competition Bureau made an inquiry into the business practices of the Big 3 telecommunications companies in markets where they do, and do not, face regional competition. The inquiry came about as a result of Bell's (ultimately, mostly successful) $3.9 billion acquisition and absorption of Manitoba Telecom Services (MTS, now Bell MTS Inc.), a regional telco operating in Manitoba.

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[55] Competition Bureau *supra* note 27.
[56] *Ibid*.
[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.
[60] Department of Industry (Canada), "Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation" (9 Mar 2019), Canada Gazette Part I, Vol 153, No 10, 853 at 854-855. [CRTC Directive 2019]
[61] *Ibid*.
[62] *Ibid*, citing Competition Bureau *supra* note 27.

After analyzing information collected during the inquiry, the Competition Bureau "…concluded that as a result of coordinated behaviour among Bell, TELUS and Rogers, mobile wireless prices in Canada are higher in regions where Bell, TELUS and Rogers do not face competition from a strong regional competitor.[63]" At the same time, the Competition Bureau "…concluded that where Bell, TELUS and Rogers face competition from a strong regional competitor, prices are substantially lower.[64]" The lower prices in regions where a strong regional competitor persists is due to the disruptive effects that the regional competitor has on the coordination efforts of the Big 3. This was the case with MTS' role as a strong regional carrier – it was "found to play a disruptive role in the market by spurring Bell, TELUS and Rogers to compete vigorously.[65]"

The Competition Bureau's findings in terms of price differentials where the Big 3 face *actual* competition are staggering:

> *"A simple review of the Bell, TELUS and Rogers websites demonstrates the magnitude of these price differences. To illustrate, as of February 14, 2017, Bell's website offered a 5GB plan in Ontario for $105 but that same plan was offered for $60 in Manitoba. The same pattern is apparent when considering "flanker" brands. For example, as of February 14, 2017, Bell's flanker brand, Virgin, offered on its website a 5GB plan in Ontario for $75 and offered that same plan in Manitoba for $48."*

The Competition Bureau found no "consistent relationship between any measure of quality, coverage, demographic or geographic characteristics that could explain the price differences.[66]" Instead, the Competition Bureau concluded that the significant price disparities across regions in Canada owed to the existence or non-existence of a strong regional competitor, and consequently, to the extent to which the Big 3 were permitted to exercise market power and coordinate their activities.[67] Interestingly, the Competition Bureau also found that in areas where a strong regional competitor exists, mobile data usage is significantly higher than in areas where one does not persist.[68]

While Bell was ultimately able to acquire MTS, the Competition Bureau ordered that Bell divest one-third of their subscribers to TELUS, and to divest a significant proportion of its subscribers, a number of retail locations, and wireless spectrum to Xplornet in order to allow its entry into the market.[69]

The "Big 3" Rationale for Oligopoly

The Big 3 telecommunications incumbents often advance arguments in favour of their continued domination of the industry. Of those, three arguments support the idea that telecoms are unable to sustain a competitive industry structure: (1) economies of scale; (2) the need for systems-wide cross-subsidies to bring about universal service; and (3) systems integrity.[70]

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[63] Competition Bureau *supra* note 27.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.
[69] Christine Dobby, "BCE-MTS deal creates new wireless player" (15 Feb 2017, updated 14 Apr 2017), Globe and Mail (online), online: <https://www.theglobeandmail.com/report-on-business/bce-mts-deal-wins-federal-approval/article34026683/>. [Dobby]
[70] Winseck 2 *supra* note 12.

Economies of Scale and Universal Service

Constructing universal telecommunications networks comes with a tremendously high cost, which creates economic barriers to entry into the market. In order to reach ever more subscribers and bring about the universal service that is the aim of telecommunications legislation and policy, the incumbents argue that extending existing networks is cheaper – owning to economies of scale – than reaching prospective subscribers via the construction of competing telecommunications networks.[71] According to the Big 3, single networks serve the public interest, "as the declining cost of serving additional subscribers meant that average costs for all subscribes would decline[72]" (though, this has been demonstrated to be false, in light of ever-increasing ARPUs despite network expansion). As a framework for harmonizing divergent interests, the Big 3 hold that having a single, monopolized network enhances the value of the telecommunications network for all of its users, "since additional subscribers [are] potential communicative partners for everyone else connected to the network.[73]"

Systems Integrity

The Big 3 further defend their incumbency on systems integrity grounds. For them, "the complexity of the technologies used and the importance of uninterrupted telecoms services to the public [requires] unified, end-to-end control of the network by one company.[74]" Bell Canada made this argument specifically in a 1967 submission before the Standing Committee on Transport and Communications, House of Commons:

> *"[t]he company feels very strongly that it should have complete control over the system, firstly in order to protect the equipment . . . , and, secondly, in order to make sure that the fringe operations, which sometimes can become the most lucrative operations, are not taken away from it to the detriment of the subscriber ...[75]"*

Arguments such as that above have been advanced by Bell Canada since at least 1905.[76] Using technological "necessity" as a justification for their singular control of the telecommunications network, Bell Canada in particular has "cloaked the monopolistic structure of the telecoms industry.[77]" The telcos further present themselves as victims of smaller carriers, presenting "competition as unfair in the sense that competitors would only enter the most profitable areas – a process known as "cream-skimming" – thereby undercutting the telcos' ability to use revenues from these areas to subsidize unprofitable rural and remote areas.[78]" Of course, such a position fails to acknowledge the past presence of independent

[71] *Ibid*.
[72] *Ibid.*
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid.*
[76] *Ibid*, citing Mulock Committee, 1905.
[77] *Ibid*.
[78] *Ibid*.

telecommunications providers "who drew their existence from the failure of Bell and the other large telcos to serve remote areas.[79]"

WIRELESS REGULATION, THE *TELECOMMUNICATIONS ACT* AND "CANADIAN OWNERSHIP"

Canadian telecommunications policy objectives are established within the *Telecommunications Act*, while the Canadian Radio-television and Telecommunications Commission (CRTC), "…which operates at arm's length of government, is charged with the implementation of those objectives.[80]" Section 8 of the *Telecommunications Act* provides the federal government with the authority to issue directions to the CRTC with respect to advancing the government's policy initiatives.

Telecommunications policy is "more than just another aspect of industrial policy," however – it "…has a significance which goes beyond the economic because of the historical relationship between communication and democracy," and is meant to build "…on these values to bring about goals thought socially desirable.[81]" Telecommunications policy governs the evolution of telecommunications providers, and has "traceable consequences for … who pays what for monthly telephone service, the structure of the communications industries, … rates of economic accumulation in the telecoms industry and in sectors of the economy dependent on telecoms networks and services … [and] the rate of technological innovation and implementation…[82]"

In the last decade, the federal government and the CRTC have enacted various telecommunications policy measures which "…have included relaxing foreign investment restrictions in the Act, reserving wireless spectrum in auctions for smaller regional wireless carriers to support competition, implementing regulatory frameworks that support retail competition through the provision of wholesale services and creating the Commission for Complaints for Telecom-television Services (CCTS) as a body to administer consumer codes of conduct and assist consumers in the resolution of their complaints with service providers.[83]"

Telecommunications (Telecom) Act

Section 7 of the *Telecommunications Act* states the objectives of telecommunications policy in Canada, and uses language reminiscent of the nation-building rhetoric found in the *Railway Act*, which governed telecommunications prior to the coming into force of the *Telecom Act* in 1993. The provision states that telecommunications in Canada "performs an essential role in the maintenance of Canada's identity and sovereignty,[84]" and that the underlying purpose of telecommunications policy is "to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada…[85]" The *Act* is clear about its "hands-off" regulatory approach regarding the development of the telecommunications industry, holding that

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[79] *Ibid*.
[80] CRTC Directive 2019 *supra* note 60 at 853.
[81] Winseck 2 *supra* note 12.
[82] *Ibid*.
[83] CRTC Directive 2019 *supra* note 60 at 854.
[84] *Telecommunications Act*, s 7.
[85] *Ibid* at s 7(a).

"increased reliance on market forces for the provision of telecommunications services" and "efficient and effective" regulations where required are primary focuses of the legislative scheme.[86]

"Telecommunications common carriers" under the *Act* are defined as persons "who [own] or [operate] a transmission facility used by that person or another person to provide telecommunications services to the public for compensation.[87]" In considering the market power and dominance of the "Big 3" telecommunications providers in Canada, perhaps the most salient part of the *Act* is Part II – Eligibility to Operate. This part sets out the requirements upon telecommunications providers in order to provide telecom services in Canada. A key component of eligibility is ultimately tied to the nationalistic aims of the legislation – namely, Canadian ownership and control.[88]

Canadian Ownership Requirements Under the Telecom Act

Section 7(b) of the *Telecommunications Act* explicitly asserts that Canadian telecommunications policy has as one of its objectives "to promote the ownership and control of Canadian carriers by Canadians." Part II of the *Telecommunications Act* defines the parameters under which telecommunications companies are permitted to operate.

Perhaps the most salient feature of the *Telecommunications Act* in understanding how the Big 3 maintain their market power when so many low-cost carriers exist in the world is the "Canadian ownership and control" requirement, which remains as a legacy of the protectionist, "nation-building" ethos of the *Railway Act*. Whereas, surely, any number of international carriers would relish the opportunity to gain access to the Canadian retail wireless arena, they are effectively barred from making any significant impact in the marketplace due to the statute stating that "…not less than 80% of the members of the board of directors [of a wireless carrier must be] individual Canadians,[89]" or that "Canadians [must] beneficially own … not less than 80% of the entity's voting interests.[90]" Further, eligibility to operate as a Canadian carrier for carriers originating outside of Canada is severely restricted – any annual revenues generated from the provision of telecommunications services in Canada cannot exceed 10% of the total annual revenues of the telecommunications industry as a whole.[91] These restrictions on access to the market effectively shut out strong international competitors that may challenge the oligopoly of the Big 3.

THE CRTC AND ITS ROLE IN WIRELESS REGULATION

The CRTC

The Canadian Radio-television and Telecommunications Commission (CRTC) is an administrative tribunal that regulates and supervises telecommunications in the "public interest." The stated mandate of the CRTC is to achieve "policy objectives established in the … *Telecommunications Act*.[92]" With respect to wireless service providers, the CRTC licenses telecommunications companies to operate in Canada, and

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[86] *Ibid* at s 7(f).
[87] *Ibid* at s 2.
[88] *Ibid* at s 16(3).
[89] *Ibid* at s 16(3)(a).
[90] *Ibid* at s 16(3)(b).
[91] *Ibid* at s 16(2).
[92] CRTC, "Our Mandate, Mission and What We Do", CRTC (website), online: <https://crtc.gc.ca/eng/acrtc/acrtc.htm>. [CRTC]

issues "…licenses for international telecommunications services whose networks allow telephone users to make and receive calls outside of Canada.[93]"

The CRTC claims its mission is to "ensure Canadians can connect to quality and innovative communication services at affordable prices," yet, it seeks to do so without intervening "…in … the retail rates for most communication services.[94]" Classically, the CRTC has sought to "encourage competition in telecommunications markets" via a hands-off, "free-market"-based approach. In 2006, the Governor-in-Council issued a directive to the CRTC "to rely on market-based solutions to the maximum extent feasible as a means of achieving … policy objectives, and regulate, where there is still a need to do so, in a manner that interferes with market forces to the minimum extent necessary[95]" (CRTC Directive 2006).

Is the CRTC Afraid of the "Big 3"?

The 2006 directive above was used as a rationale behind another CRTC regulatory policy – *CRTC Telecom Regulatory Policy CRTC 2015-177*, Regulatory framework for wholesale mobile wireless services (CRTC 2015-177). The CRTC recommended that section 27.1 of the *Telecommunications Act* be repealed. The removal of this section of the *Telecommunications Act* removed caps on roaming fees for wireless voice calls, wireless data, and text messages that "secondary" carriers accessing the Big 3's networks had to pay. Further, the removal of this section eliminated the bar on the Big 3 network providers of charging secondary carriers more than the prescribed formulas in the section allowed. Ironically, under the guise of protecting the "free-market" of wireless services, the CRTC in effect consolidated more power over the telecommunications industry in the hands of the Big 3 providers.

CRTC 2015-177 was cited as the reasoning behind the 2017 decision of the CRTC to deny Ice Wireless Inc. – a Mobile Virtual Network Operator (MVNO) operating under the "Sugar Mobile" brand – relief against Rogers Communications.[96] Sugar Mobile, which offered low-cost plans, was attempting to obtain permanent access to Rogers' cellular network, and was effectively forced to cease its operations as a result of the decision.[97] The CRTC justified its decision on the grounds that "one of the objectives … [of CRTC 2015-177] … was to promote facilities-based competition.[98]"

THE FUTURE OF THE WIRELESS MARKET IN CANADA?

Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation (2019)[99]

A shift may be occurring in terms of telecommunications policy in light of substantial concerns "…regarding the sales practices used by large by large telecommunications carriers… [and allegations] that those carriers have used misleading and aggressive sales practices and abuse information

[93] *Ibid*.
[94] *Ibid*.
[95] CRTC Directive 2019 at 855, citing CRTC, *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 [CRTC Directive 2006].
[96] CRTC, Telecom Decision CRTC 2017-57 (1 Mar 2017), Ice Wireless Inc. – Application regarding roaming on Rogers Communications Canada Inc.'s network by customers of Ice Wireless Inc. and Sugar Mobile Inc. [CRTC 2017-57]
[97] Saltzman *supra* note 29.
[98] CRTC 2017-57 *supra* note 93.
[99] CRTC Directive 2019 *supra* note 60.

asymmetries to their benefit … at the cost and harm of Canadian consumers.[100]" Recognizing that Canadians "…deserve a competitive marketplace where consumers have real choice and are treated fairly,[101]" and that "[a]ccess to … high quality telecommunications services [is] increasingly important for Canadians to participate and thrive in a digital economy and society,[102]" the federal government is appearing to make a commitment to reorient the Big 3's priorities away from network investment and towards affordability and consumer interest.[103] This reorientation does not replace CRTC Directive 2006; the order is to sit "atop" the previous directive. The policy direction lays out the government's priorities for telecommunications – namely, that competition, affordability, consumer interests, and innovation are to be the central concerns going forward, and that these concerns will govern CRTC decision-making.[104] The prospective Order would come into force on the day on which it is registered, and would be binding on the CRTC beginning on the day on which it comes into force.[105]

The stated purpose of the proposal is to release a policy direction that "…directs the CRTC to clearly consider how measures used in the implementation of … Canadian telecommunications policy … can promote competition, affordability, consumer interests and innovation, namely the extent to which they…[106]

> encourage all forms of competition[107]…
>
> foster affordability and lower prices, particularly where there is potential for telecommunications service providers to exercise market power[108]…
>
> ensure that affordable access to high quality telecommunications services is available[109]…
>
> enhance and protect the rights of consumers in their relationships with telecommunications service providers[110]…
>
> reduce barriers to entry and barrier to competition for new and smaller service providers[111]…
>
> enable innovation in telecommunications services, including new technologies and differentiated service offerings[112]…
>
> and… stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services.[113]"

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[100] *Ibid* at 855.
[101] *Ibid* at 853.
[102] *Ibid.*
[103] Saltzman *supra* note 29, quoting Dwayne Winseck, director of Canadian Media Concentration Research Project.
[104] CRTC Directive 2019 *supra* note 60 at 856.
[105] *Ibid* at 859.
[106] *Ibid* at 856.
[107] *Ibid* at 860, Direction (1)(a)(i).
[108] *Ibid* at 860, Direction (1)(a)(ii).
[109] *Ibid* at 861, Direction (1)(a)(iii).
[110] *Ibid* at 861, Direction (1)(a)(iv).
[111] *Ibid* at 861, Direction (1)(a)(v).
[112] *Ibid* at 861, Direction (1)(a)(vi).
[113] *Ibid* at 861, Direction (1)(a)(vii).

Consumer rights advocates, re-sellers, and Mobile Virtual Network Operators, such as Sugar Mobile have applauded the shift in direction, yet remain cautiously optimistic about the true impact of the decision on breaking apart the oligopoly of the Big 3.[114]

The Return of MVNOs?

Mobile Virtual Network Operators (MVNOs) do not own their own networks; rather, they buy (or lease) "…network space at wholesale rates and resell to consumers at retail prices.[115]" MVNOs have not been permitted to operate under Canadian telecommunications policy in the past, though they are common (and are encouraged) in other jurisdictions (e.g. USA, EU) where mobile data costs are often significantly lower than they are in Canada. MVNOs typically work on Wi-Fi, then switch to a larger carrier's cellular network when a Wi-Fi signal is not available.

As mentioned above, many MVNOs and consumer rights groups hold that the federal government's decision to focus on consumer protection in the wireless arena, over the long-held priority of network expansion, is long overdue. Advocates contend that allowing MVNOs in Canada will "open up the market to lower income Canadians who can't afford wireless access.[116]" MVNOs like Sugar Mobile eagerly anticipate their ability to re-enter the wireless marketplace.

CONCLUSION

The oligopoly enjoyed by the Big 3 wireless companies, and reinforced by governmental policy and CRTC decisions, is a long-standing feature of the Canadian telecommunications landscape. The consolidation of their power over consumers and market challengers has long been a sore point for many. However, the ground may be shifting as governments and regulatory bodies turn their focus away from infrastructure-building – classically spurred on by the "nation-building" aims of telecommunications policy – and towards consumer protection. Whether the federal government's proposed policy directives will make a dent in the dominance of the Big 3 remains to be seen, but there is promise yet that at least some power may be wrested away from the telco giants, and placed in the hands of consumers – perhaps for the very first time.

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[114] Saltzman *supra* note 29.
[115] *Ibid*.
[116] *Ibid.*

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