

For \$ale to the Highest Bidder: Telecom Policy in Canada

Edited by Marita Moll and
Leslie Regan Shade



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Library and Archives Canada Cataloguing in Publication
For sale to the highest bidder : telecom policy in Canada / edited by Marita Moll and Leslie Regan Shade.
Includes bibliographical references.
ISBN 978-0-88627-591-4

1. Telecommunication policy--Canada. I. Moll, Marita II. Shade, Leslie Regan, 1957- III. Canadian Centre for Policy Alternatives

HE7815.F67 2008

384.0971

C2008-900279-2

Printed and bound in Canada.
Layout by Nancy Reid (NR Grafix)
Cover design by Crys Moll (distinct)



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Foreward

Maude Barlow

On March 23, 2005, U.S. President George W. Bush, then Mexican President Vicente Fox, and then Canadian Prime Minister Paul Martin signed the Security and Prosperity Partnership of North America, launching a process to create a continental powerhouse by eventually harmonizing the security, defence, immigration, economic, trade, and resource policies of the three countries.

The SPP was the brainchild of the Canadian Council of Chief Executives, who feared that post-9/11 American security concerns would harm cross-border trade and who set out to convince first the Martin Liberals, and then the Harper Conservatives, that Canada had to make some sovereignty-compromising offers in order to preserve the export gains big business had achieved through NAFTA. From now on, Canada's prosperity comes at a price: assuring our U.S. neighbour that we have "secured" our border and perimeter in a way that satisfies American authorities of our good faith in building a new continental model served by common values and approaches, especially the "war on terror."

A key component of this SPP commitment is the harmonization of policies, practices and standards in areas as diverse as security, immigration, defence operations, food, health and safety standards, energy, and the environment. Dozens of cross-border working groups are busy streamlining this process with no public input and no parliamentary oversight. Already, news of the SPP working group process is leaking out with reports of lowered pesticide stan-

dards and a fivefold increase in tar sands production. New domestic regulatory measures must be reviewed and approved by these cross-border committees and existing rules harmonized to the low standards put in place across the board by the Bush administration. Deregulation will, in effect, become permanent and irreversible because it will be part of a contractual obligation to the United States. Furthermore, the process will be next to impossible for ordinary people to follow, as bilateral or trilateral committees working out of the public spotlight will implement the process.

To date, little attention has been paid to the ramifications of the SPP process as they affect the critical areas of culture, communications, and telecommunications. However, a look back at the importance of these policy areas to various U.S. administrations should warn us that they would once again be vital to these negotiations. Canadian culture and telecommunications policy were key irritants in both the Canada-U.S. Free Trade Agreement and NAFTA, and Canada's cultural "exemption" was a farce, usable only if Canada was prepared to accept retaliation in other sectors of the economy.

Canada's magazine polices were an early target of the new WTO rules, and the U.S. has never given up its fight against rules to protect Canadian newspapers or telecom industries. The SPP, with its commitment to inexorable harmonization of all policy areas, is a prime vehicle of attack against what is left of Canadian cultural protections. To truly promote the North American vision held by George Bush and Stephen Harper, a convergence of media and media ownership is highly desirable.

So this volume could not be timelier. Leslie Regan Shade and Marita Moll have assembled a formidable team to tell a story every Canadian should know. To control the corporate ownership of the media is to control its content. Take heed. This is an important book.

Maude Barlow is National Chairperson of the Council of Canadians and a recipient of the 2005 "Right Livelihood Award."

Introduction

Marita Moll and Leslie Regan Shade

Trade and investment policies should not be examined and evaluated in isolation as they are part of a broader set of neoliberal policies aimed at economic restructuring and societal transformation.

(WHOSE CANADA? CONTINENTAL INTEGRATION, FORTRESS NORTH AMERICA AND THE CORPORATE AGENDA, 2007)¹

The articles in this collection cast a critical perspective on telecommunications policy currently wrapped in the “free market” blanket of re-regulation, de-regulation, and “smart regulation.” They are meant to inform a general audience about evolving telecommunications policy and its potential impacts on the ability of Canadians to communicate freely and openly.

Telecommunications has always had a special place in the Canadian policy landscape. From very early days, it was recognized as a vital part of Canada’s social, political and economic framework. This relationship is formally expressed in Section 7 of the Telecommunications Act, 1993:

It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty and that the Canadian telecommunications policy has as its objectives:

a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions...²

But these broad objectives are now under attack from internal and external forces that privilege competition and the “free market” over all other policy considerations. Among the early manifestations of this trend are several documents negotiated under the umbrella of the General Agreement on Trade in Services (GATS)—the *GATS Annex on Telecommunications* (1994) and the *Telecommunications Reference Paper* (1997) which are reproduced in Appendices 1 and 2 of this collection. In their detailed analysis of the possible impacts of these GATS agreements on postal and other public services, Scott Sinclair and Jim Grieshaber-Otto conclude that “‘pro-competitive’” regulation represents a radical reorientation of government regulation in support of international commercial interests.”³ Despite the 2006 (temporary time-out) suspension of WTO negotiations, including negotiations around various GATS processes, these documents remain a common benchmark for the liberalization of telecom and other service sectors.

Deregulation Fast Forward

Policy reviews, consultation processes, and trade negotiations over the last 20 years have made competition (or pro-competitive regulation) one of the overriding principles in telecom and other policy areas. This push has been so concerted that, by 2006, the final report of the Telecommunications Policy Review Panel (TPRP) felt confident enough to dispense with the past, noting that “much of the detailed economic regulatory framework developed in the past is no longer required, since competitive market forces now are at the stage where they provide the means of achieving the core objectives of telecommunications policy.”⁴ That, of course, depends on the nature of those core objectives.

Currently, the *Telecommunications Act* contains some core objectives about maintaining national identity and sovereignty that present barriers to pro-competitive regulation. So, as Philippa Lawson, Director of the Canadian Internet Policy and Public Interest Clinic (CIPPIC) at the University of Ottawa, explains in her contribution to this collection, the TPRP Report recommended that Section 7 be completely re-structured in a way that ensures that it will not stand in the way of an accelerated rate of deregulation.

In their contribution, public policy researchers Graham Longford, Marita Moll, and Leslie Regan Shade compare the TPRP process with past telecom reviews and find it narrowly focused to support market forces and lacking in public input. The TPRP Report did acknowledge some of the concerns of the few public interest advocates that appeared before it, but social recommendations that were included have not been on the quick-uptake list. On the other hand, the ink had barely dried when the Harper-led Conservative minority government used the Report to support a directive to the CRTC to rely on market forces and keep regulation to an absolute minimum.

Bruce Campbell, Executive Director, and Marita Moll, research associate with the Canadian Centre for Policy Alternatives, show how these recent changes in the telecom regulatory environment interact with the Security and Prosperity Partnership of North America (SPP), whose overarching goals are to integrate trade, security, defence, environmental, and cultural policies.

One of the goals of the *Regulatory Cooperation Framework Agreement* (see Appendix 3) recently negotiated under the SPP is “to encourage compatibility of regulations, promote the use or adoption of relevant international standards, as well as domestic and voluntary consensus standards in regulations, and eliminate redundant testing and certification requirements, **consistent with our WTO requirements** (bold-face added).” This is practically a repeat of one of the features of the GATS documents described by Scott and Grieshaber-Otto as “promotion of international standards and global standards-setting organizations.”⁵ Though not specifically targeting telecommunications, the SPP agreement is broad-based, making it easily applicable to diverse sectors of the economy.

It is important that Canadians begin to make the connections between the various agendas currently in play in the telecommunications industry. The recommendations of the TPRP, the GATS agreements, and the behind-the-scenes work of various SPP working committees are mutually reinforcing. Their agendas, working in parallel, are slowly moving us towards policy harmonization in telecom as well as other policy areas.

Protecting Canadian Control and Culture

The negotiations around SPP do not, so far, target telecom specifically. But, if this partnership is about security, telecom has to be a key player. *Instant World*, the 1970 Telecommission Report, and one of the most detailed studies Canada has ever produced on

telecommunications, noted that “Governments are naturally concerned with telecommunications as an instrument essential to national defence, to the provision of safety services and to the handling of emergencies.”⁶ Clearly, the Canadian government cannot abandon its obligations on the security front. Foreign ownership restrictions in the telecom sector are crucial to this obligation.

Security obligations are intimately connected with telecommunications and access to telecom records. Maureen Webb, in her detailed analysis of the increasingly interconnected surveillance

If foreign ownership restrictions are dropped, our cultural industries will increasingly be in the hands of American owners and under the influence of the U.S. government.

environment, notes that “American telephone companies appear to have given the [National Security Agency] direct access to their systems.”⁷ Recently, a B.C. court ordered Hush Communications, a Vancouver-based provider

of encrypted e-mail services, to decrypt e-mails and send them to U.S. law enforcement officials seeking to retrieve evidence in a drug sting operation. Internet lawyer, Michael Geist, points out that, through the U.S.-Canada Mutual Legal Assistance Treaty (MLAT), “U.S. law enforcement [already] wields a wide range of investigative tools to compel disclosure of private information held in Canada.”⁸ In addition, Canadian privacy advocates are very concerned about the fact that the U.S. *Patriot Act* allows the FBI to gain access to Canadian medical and financial records which have been outsourced to U.S. based firms and their foreign subsidiaries.⁹ The post-9/11 security environment has provided us with many more reasons to retain foreign ownership restrictions.

One of the core objectives of the current *Telecommunications Act* is “to promote the ownership and control of Canadian carriers by Canadians.”¹⁰ The TPRP Report has dropped this objective in its recommended rewrite of Section 7. However, the panelists, in their Afterword to the Report, handled this issue delicately, indicating that they favour a phased-in and flexible approach to foreign investment liberalization and acknowledging that “telecommunications plays a vital role in every country’s national security.”¹¹ The Report also notes that the U.S., U.K., France, Germany and Japan maintain explicit or implicit controls on foreign investment in their telecommunications carriers.¹² The U.S. makes a clear connection between foreign investment and national security in the key sectors of defence, energy, infrastructure, technology, and telecommu-

nications. In June 2007, the U.S. *Foreign Investment and National Security Act* made it more difficult for foreigners to invest in these sectors. One has to ask how the TPRP's message got this confused—on the one hand, suggesting foreign ownership restrictions be dropped and, on the other hand, advocating a cautious approach on this issue.

In her paper, Julie White, researcher with the Communications, Energy, and Paperworkers Union of Canada, makes a clear link between telephone companies, Canadian sovereignty, and national security. She puts cultural identity high on the list of items at risk in the current discussions over foreign ownership restrictions, pointing out that telecom and media can no longer be treated as separate entities. Bell Canada Enterprises (BCE), Canada's largest telephone company, is also the leading provider of wireless communications and internet access. It also provides satellite television services through Bell ExpressVu with more than 500 all-digital video and audio channels. Vidéotron, Quebec's largest cable company, provides cable and telephone services, and includes among its holdings Sun Media (newspapers), Canoe Inc. (internet service), television stations, magazines, Select (CD and video distribution) and Archambault (music stores). If foreign ownership restrictions are dropped, says White, our cultural industries will increasingly be in the hands of American owners and under the influence of the U.S. government.

Mel Watkins, research associate for the Canadian Centre for Policy Alternatives and chief author of the 1968 federal Task Force on Foreign Ownership and the Structure of Canadian Industry, presents an analysis of the recent BCE takeover by the Ontario Teachers' Pension Fund and several U.S. private equity funds. He asks where the real control lies in this partnership—given that private equity funds are in the business of restructuring and selling their acquisitions, then moving on. "We have a bizarre situation where teachers...find their pension funds used to further foreign ownership which they likely oppose," he says. Maintaining ownership controls over our "collective nervous system" makes more sense now than ever before as security concerns are heightened and the tenets of globalization seem to be under increasing strain.

A shifting policy agenda in the CRTC under Commissioner Konrad von Finckenstein is the subject of Marc Raboy and Geneviève Bonin's article. Raboy, Beaverbrook Chair in Ethics, Media and Communications, and Bonin, doctoral candidate in Communication Studies, both at McGill University, also look closely at the commissioned Dunbar-Leblanc report on the existing broadcasting

regulatory framework and the “Diversity of Voices” hearing on media concentration and cross-ownership. Given innovations in digitization and media abundance, they argue that, while broadcast regulations need to be renewed given these structural changes, the goals of ensuring Canadian cultural content and diversity are now needed more than ever.

Net Neutrality

Net neutrality, a hot-button issue in the U.S and Canada, is addressed from both sides of the border. While it is an easy concept to grasp, it remains contested and can be technically difficult to explain. Net neutrality focuses on how internet infrastructure is built,

Net neutrality ensures that the internet contains no centralized control mechanisms and that those who own the networks do not also control the content that runs over them.

who pays for it, and who benefits from it. From a public interest perspective, net neutrality ensures that the internet contains no centralized control mechanisms and that those who own the networks do not also con-

control the content that runs over them. Net neutrality debates thus concern restrictions to free speech and access to information represented by the actions of some internet service providers to control traffic flow on their services.

The Canadian perspective from Michael Geist, Canada Research Chair of Internet and E-commerce Law, University of Ottawa, provides a brief overview of international net neutrality debates, and explains how the issue is being debated in Canada, with actions by internet service providers Telus, Vidéotron, Shaw, and Rogers abrogating net neutrality principles. Geist argues that current policy conditions are ripe for a consideration of net neutrality in the public interest, but that the political will, swayed by the powers of the telecom firms, is not yet forthcoming.

Public education is needed, and, as Ben Scott, Policy Director of Free Press in the U.S., describes in his chapter, it can unite strange bedfellows for a common cause. Free Press brought together a consortium of activists, academics, policy wonks, tech firms, and the public to fight Congressional actions that would abolish net neutrality. The SaveTheInternet.com coalition involved over 800 individuals and organizations from the right, left, and centre, in an “inside-outside” campaign that included both interpersonal and governmental lobbying, alongside a grassroots public education

campaign. Scott argues that tenacity and passion can create winning battles, and that the debates over net neutrality and the future of the internet in the U.S. are cautious examples of the spillover of free-market policies to countries like Canada. Canadians need to stand on guard for the public interest in the wake of proposed telecom reforms.

Spectrum and Community Ownership

The little known area of spectrum management is addressed by Graham Longford, who provides a primer on spectrum technology, allocation and regulation. Longford argues that the public interest, i.e., the preservation and allocation of spectrum as a public commons, should be a key concern in the upcoming 700MHz spectrum auction. Unlicensed spectrum is being used for innovative community-based applications, such as free or municipally-owned WiFi networks, where the public can participate on non-commercial platforms, emphasizing the creation of local content and enabling a wider public to participate.

Ways in which communities are taking control of communications environments are discussed by Andrew Clement, from the Faculty of Information Studies at the University of Toronto, and internet researcher Amelia Bryne Potter. Arguing that internet access is necessary and vital for effective democratic participation, they sketch an overview of current Canadian municipal and community WiFi projects, focusing on the different models afforded by the cities of Fredericton and Toronto. The myth of market forces is at best a chimera that does little to ensure affordable access to the public, but innovative uptake of municipally provisioned access could offset these access barriers.

Who is Steering This Policy Ship?

Wendy Sol, Administrative Vice-President of the Communications, Energy and Paperworkers Union of Canada, addressing the Standing Committee on Industry, Science and Technology, said:

If everyday operation decisions are made in New York instead of Winnipeg, and if long-term investment plans for network expansion or maintenance are made in Miami instead of Montreal, Canadian social and economic priorities will fall by the wayside. This industry is more than a mechanism to return dividends to shareholders. It has historically been and should continue to be a tool to ensure universal, affordable access to all services to all Canadians and communities.¹³

The articles in this collection show that the “hands-off” attitude of the current Conservative government and its Liberal predecessors leaves Canadians wide open to policy-making by stealth. The loss of autonomy in such a critical area would preclude any “made in Canada” policy directions in telecommunications, no matter how clearly they might be aligned with the public interest.

Funding for this collection was provided by the Social Sciences and Humanities Research Council through its Initiative on the New Economy Public Outreach Grant in support of the Canadian Research Alliance for Community Innovation and Networking (CRACIN) Citizens’ Telecommunications Policy Forum, which was held in Ottawa, October 19-21, 2006 as the Alt.Telecom Forum. Thanks to Gordana Krcevinac, Senior Policy Analyst at SSHRC, for her immense help and humour in working with us. We would also like to thank CRACIN colleagues for their support of this project: Andrew Clement, Michael Gurstein, Graham Longford, Diane Dechief, and Adam Fiser. Students at Concordia University’s MA in Media Studies and Joint PhD in Communication also lent support to the Alt.Telecom Forum: Neil Barratt, Fabiana da Camara G. Pereira, Rachel Miles, Alison Powell, and Craig Stewart.

Thanks as well to the Canadian Centre for Policy Alternatives (CCPA) for its ongoing support of our work on the public interest in our Canadian mediasphere.

Marita Moll and Leslie Regan Shade

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¹ Grinspun, Ricardo and Yasmine Shamsie. (2007). “Canada, free trade, and ‘deep integration’ in North America: Context, problems, and challenges.” in Grinspun, Ricardo and Yasmine Shamsie. *Whose Canada? Continental Integration, Fortress North America and the Corporate Agenda*. Ottawa: Canadian Centre for Policy Alternatives and McGill-Queen’s University Press. P.4.

² Canada. Houses of Parliament. *Telecommunication Act*, 1993.

³ Sinclair, Scott and Jim Grieshaber-Otto. *Return to Sender: The Impact of GATS “Pro-competitive Regulations” on Postal and Other Public Services*. Ottawa, Canadian Centre for Policy Alternatives, 2004. p.83-84.

⁴ Industry Canada. (2006). *Telecommunications Policy Review Panel. Final Report*. Ottawa: Public Works and Government Services Canada. p. 3-4. <http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/Home>

⁵ Canada/United States/Mexico. (2007). SPP Regulatory Cooperation Framework Agreement. http://www.spp.gov/pdf/spp_reg_coop_final.pdf. As of the time of writing, this agreement could not be located on the Canadian government SPP web site.

⁶ Canada. Department of Communications. Telecommision. (1971). *Instant World; A Report on Telecommunications in Canada*. Canada. Information Canada: p.4.

⁷ Webb, Maureen. (2007) *Illusions of Security; Global Surveillance and Democracy in the Post 9-11 World*. San Francisco: City Lights. P.88.

⁸ Geist, Michael. (2007). "E-mail site not always hush hush if right procedures allowed." *Ottawa Citizen*, Nov. 27. D-1.

⁹ Information and Privacy Commissioner for British Columbia. (2004). *Privacy and the USA Patriot Act; Implications for British Columbia Public Sector Outsourcing*. October. http://www.oipcbc.org/sector_public/archives/usa_patriot_act/pdfs/report/privacy-final.pdf

¹⁰ *Telecommunication Act*, 1993. Section 7 (d)

¹¹ Industry Canada. (2006) *TPRP Final Report*. p.11-23

¹² *ibid*.

¹³ Sol, Wendy. (2007). In Proceedings of the Standing Committee on Industry, Science the Technology. Monday, February 27. <http://cmte.parl.gc.ca/Content/HOC/Committee/391/INDU/Evidence/EV2421563/INDUEV21-E.PDF>