



PUBLIC INTEREST ADVOCACY CENTRE  
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

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**BY EMAIL TO:** [telecomsubmission-soumissiontelecom@ised-isde.gc.ca](mailto:telecomsubmission-soumissiontelecom@ised-isde.gc.ca)

**Re: PIAC Comments on *Canada Gazette*, Part I, July 24, 2021, Notice No. TIPB-001-2021 – Petition to the Governor in Council concerning Telecom Regulatory Policy CRTC 2021-130**

Dear Ms. Charette,

Please find attached the submission of the Public Interest Advocacy Centre's submission on the above-noted Petition to the Governor in Council.

Sincerely,

John Lawford  
Executive Director and General Counsel

1. The Public Interest Advocacy Centre (“PIAC”) makes this submission in support of Data On Tap Inc.’s (“DoT” or “dotmobile”) petition to the Governor in Council to review Telecom Regulatory Policy CRTC 2021-130 (“CRTC 2021-130” or the “MVNO Decision”) and issue an Order in Council remedying the misinterpretation of the policy directive SOR/2019-227. PIAC is aligned with DoT in urging the Governor in Council to send CRTC 2021-130 back to the Canadian Radio-television and Telecommunications Commission (“CRTC” or “Commission”) to review the MVNO Decision, in light of the proposed Rogers-Shaw merger, which fundamentally changes the conditions of the wireless market that the Commission relied upon in CRTC 2021-130.
2. PIAC is a national not-for-profit organization and registered charity that protects consumer interests – particularly those of vulnerable consumers – in regulated industries such as telecommunications, banking, transportation and privacy. PIAC has been active before the Commission for over thirty years and has participated in key telecommunications proceedings impacting wireless retail services, wholesale rates and access, and related matters.
3. In supporting DoT’s petition, PIAC brings to Cabinet a consumer-focused perspective that we trust will help the Government protect the public interest and help to achieve the policy objectives of the *Telecommunications Act*, all having regard to the Governor in Council’s Policy Directions to the Commission.

#### **MVNO Decision Destroys Both Sources of Potential Wireless Competition**

4. PIAC’s instant reaction to CRTC 2021-130 was generally positive,<sup>1</sup> particularly regarding the Commission’s expressed “expectation” on the wireless industry to offer “low-cost [wireless] plans”.
5. In the rush to publish a media release, PIAC erred in assuming the definition of “MVNO” used in CRTC 2021-130 corresponded to that previously understood by the Commission and all other parties to the proceeding. In fact, the CRTC fundamentally redefined “MVNO” to encompass its exact opposite, namely, facilities-based wireless competition. As a result, PIAC’s press release was misleading and now is contrary to our position on CRTC 2021-130.
6. After a careful reading of CRTC 2021-130 in full, PIAC now agrees that CRTC 2021-130 is critically flawed, both in its erroneous definition of “MVNO” and also, crucially, in light of the Commission’s failure to address the changed competitive circumstances resulting from the announced acquisition by Rogers Communications Inc. (“Rogers”) of Shaw Communications Inc. (“Shaw”).
7. The Rogers-Shaw announcement occurred **after the oral hearing** but one month **before the issuance of CRTC 2021-130**. The Commission therefore was **aware of the proposed merger and had**

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<sup>1</sup> PIAC, “Consumer Groups welcome ‘MVNO’ Wireless Competition in Canada”, (12 April 2021), online: <https://www.piac.ca/2021/04/15/consumer-groups-welcome-mvno-wireless-competition-in-canada/>

time to change the decision to address it, but in fact the Commission did not factor the proposed merger into CRTC 2021-130. The Commission only mentioned this development in one paragraph of CRTC 2021-130 and stated it would not consider the effect of this seismic change in the wireless market structure:

16. The Commission notes that, subsequent to the close of record of the proceeding, and prior to the publication of this decision, RCCI announced that it had reached an agreement in principle to purchase Shaw Communications Inc. (Shaw), which owns and operates Freedom Mobile. As of the time of publication of this decision, the purchase of Shaw has not been concluded and remains subject to various approvals. The determinations in this decision have been made solely on the basis of the record of the proceeding.<sup>2</sup>
8. Given the huge potential effect on the retail wireless market of this development, the Commission was wrong not to revise CRTC 2021-130 prior to its release. This is especially so given the structure of CRTC 2021-130 as written, which clearly was based on the assumption that Shaw would be uniquely placed to leverage the Commission’s doublespeak definition of “MVNO” to further strengthen Shaw’s position as a fourth quasi-national wireless carrier in additional provincial and regional wireless markets where Shaw did not yet possess network facilities.
9. CRTC 2021-130 was therefore no longer supportable, even accepting the Commission’s clear effort to shape the wireless market, once the Rogers-Shaw merger announcement was made. It was and is dead on arrival.
10. The result of CRTC 2021-130 for consumers, in particular, vulnerable consumers such as many seniors on fixed incomes, will be that there are no “true” MVNO entrants (service-based competitors) with any innovative ability to disrupt the retail wireless market, coupled with no sufficiently strong facilities-based competitor to lower consumer wireless prices. CRTC 2021-130 thus condemns consumers in Canada to continue to pay high wireless prices for the foreseeable future, and likely for at least the next decade.
11. The result of CRTC 2021-130, therefore, is to destroy the basis of the Government’s extensive efforts since 2015 to increase competition in the Canadian retail wireless market and any real prospect of lowering Canadians’ wireless prices for the foreseeable future.
12. CRTC 2021-130 therefore should be reversed in part by Cabinet. Granting dotmobile’s requested relief would create at least one competitive option – namely true MVNO competition – and would preserve one branch of the Government of Canada’s efforts to lower wireless prices for Canadians while efforts to add facilities-based competition are given time to slowly appear.

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<sup>2</sup> TRP CRTC 2021-130, at para. 16.

## I. The Commission failed to factor in a crucial competitive development: Rogers' acquisition of Shaw

13. PIAC cannot overstate the materiality of the Rogers-Shaw merger to the utility and effect of CRTC 2021-130. CRTC 2021-130 was clearly written to support Shaw's further expansion in the wireless market. Shaw is now likely to be acquired and will not be able to leverage the advantages of facilities-based regional wireless carriers.
14. The Commission achieved this unfortunate result by mis-defining the term for and category of wireless service provider at issue, namely the "mobile virtual network operator" (MVNO). MVNOs were meant to provide much needed, nationwide competition for major wireless providers, namely the "Big 3" – Bell Mobility, Rogers Wireless and TELUS Mobility, in most parts of Canada.
15. MVNO competitors' access to the Big 3's spectrum and radio access network ("RAN") facilities (cellphone towers, radios, certain network switches) is required for these new entrants to operate "virtually" - that is, based on network software – this is why they are named "mobile **virtual** network operators". These MVNO competitors (including dotmobile) are what PIAC refers to in this submission as "true MVNOs".
16. The Commission's MVNO decision instead was written with a tortured definition of "MVNO" that effectively achieves the exact opposite effect to approving true MVNO access. CRTC 2021-130 in effect enables only competitors that are **facilities-based mobile network operators** (that is, "**MNOs**", not true "MVNOs") to expand their own minor or regional facilities-based services to new areas, not to support or even to create the conditions for true MVNOs that would serve customers in all parts of Canada.
17. Specifically, the Commission in CRTC 2021-130 restricted wholesale competitor access to MNO spectrum, RAN, and facilities only to regional competitor MNOs – locking out true MVNOs who would be expected to bring innovative services to Canadians nationwide via virtual access to the Big 3's wireless networks.
18. The Commission effected this bizarre result by only permitting what it defined as "eligible wireless carriers" to access the "MVNO" regime it designed (as detailed in para. 296 *et seq.* of the decision). To access the Big 3's spectrum and facilities, therefore, this regime required these newly defined "eligible wireless carriers" to:
  - a. already own spectrum or acquire spectrum in future (and limiting MVNO expansion only to areas where the eligible carrier has "spectrum at the tier 4 level or above");
  - b. commit to building facilities in areas where the eligible carrier owns spectrum used for "MVNO" access; and
  - c. removing this mandated "MVNO" network access after a 7 year sunset period.

19. Note that due to these “MVNO” access eligibility conditions, mandated access to the Big 3 networks required to offer wireless service “virtually” is limited, counterintuitively, to competitor facilities-based operators. There is therefore a short list of “eligible” candidates for “MVNO” access: Shaw (unavailable after Rogers’ acquisition); Videotron; Eastlink; Cogeco; Xplornet; Iristel; Ice Wireless; TBayTel; Sogetel; Ecotel; Valley Fibre; Comcentric; SSI Canada; Vianet.
20. The Governor-in-Council should note that some of these potential MNO-based competitors are very small in numbers of subscribers, coverage area, working capital and of course market share. Most do not have now and could not reasonably in the future acquire enough spectrum outside their home territories to be able to realistically offer service based on the CRTC’s “MVNO” access regime. Of these, only Videotron and possibly Cogeco in some limited areas are considered even remotely able to undertake a major investment to expand a wireless network based on these new conditions.
21. This list is made effectively much shorter by the “geographic eligibility” limitation imposed in CRTC 2021-130 regarding the use of MVNO access and spectrum ownership:

The Commission therefore determines that in order to be eligible to access the mandated facilities-based wholesale MVNO access service, wireless carriers must possess a mobile spectrum licence at the tier 4 level or higher in a given tier 4 area. The Commission also determines that the national wireless carriers and their affiliates are not eligible.<sup>3</sup>

22. CRTC 2021-130 therefore:
  - a. only allows the few facilities-based and regionally-limited MNOs (like Shaw) to compete – and only where they can afford to acquire spectrum outside their home territory;
  - b. provides a mandated temporary service extension in these spectrum areas only with regulatory certainty that is time-limited to 7 years – meaning those competitors who wish to continue service after 7 years must find financing that will accept this short-timeline for repayment and the high risk that the competitor can build its own facilities in this time.
23. This is a ridiculously limited regulatory benefit that only can be leveraged by the largest regional MNOs and even then, only at high cost (to acquire out of territory spectrum) and at high financing and business risk.
24. A true MVNO access regime would have allowed both true MVNOs (without its own spectrum or MNO access) as well as existing MNOs to use the networks (spectrum, RAN and some facilities) of the Big 3 (plus Sasktel in Saskatchewan and only Bell Mobility in the three territories) and to offer service in **all areas** where the Big 3 offer service (effectively covering the entire country). There

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<sup>3</sup> TRP CRTC 2021-130, at para. 316.

would be no “sunset” date for MVNO access to preserve the value of sunk costs and significant investments, whether in software or any accompanying facilities. Such a ‘normal’ MVNO regime would incent new, innovative competitive entry, reduce financing risk and provide rapid offering of new services to all Canadians, not just those in areas where MNO-based regional competitors decided it was worth the risk to expand.

25. The CRTC’s “MVNO” regime is therefore limited to existing regional carriers who own spectrum, operate their own RAN, and can sustain operations after mandated access is cut off after 7 years. Considering that Freedom Mobile took almost 12 years since its 2009 launch as Wind Mobile to achieve its current 8% subscriber share, the new policy was evidently designed for established regional carriers that have existing capital, wireless market share, and intentions to expand beyond provincial borders. Only Shaw realistically fits this bill. The Commission seems to have sacrificed any form of mandated MVNO access in a wager to grant Shaw a clear runway to expedite wireless expansion. Both options are now off the table. For political leadership to do nothing at this point would send a clear message to consumers that either leaders have not truly grasped the impending competitive regression or simply do not care.
26. In TRP CRTC 2021-130, the Commission strongly hints to the fact that the policy was *tailor-made for Shaw*, that is, the record shows the extent to which Shaw’s Freedom Mobile is featured as a critical wireless disruptor to the national carriers’ market power.<sup>4</sup> Considering Shaw’s pending exit as the 4<sup>th</sup> MNO, a policy based on a record in which Shaw argued that “Freedom and the other new regional competitors need more time in a stable policy and regulatory environment to get the job done” is no longer relevant policy.<sup>5</sup>
27. Besides Shaw’s own submissions expounding on its commitment to grow and expand, the Competition Bureau also provided supporting comments on Shaw’s then-apparent push to gain market share. In its Further Comments submitted November 22, 2019, the Bureau showed that Shaw’s capital intensity is “higher than any of the other carriers measured, likely due to their recent network upgrade and expansion.”<sup>6</sup> The Bureau repeatedly highlighted Shaw’s Freedom Mobile as an important wireless disruptor, expressing concerns that “the introduction of MVNOs would disproportionately affect these wireless disruptors, putting at risk the positive effects that they have had on pricing, and may impact long-term incentives to invest in high-quality networks in Canada.”<sup>7</sup> At the time, Freedom Mobile was indeed on its way to achieving a higher market share that would yield significant competitive benefits for consumers. The Bureau specifically stated that a facilities-focused policy “could accelerate Freedom’s planned entry and expansion as Freedom would be able to gain a base of subscribers before entering a market.”<sup>8</sup>
28. The Bureau expressed similar hopes for Xplornet, Eastlink, Tbaytel, and Iristel, but Freedom’s competitive potential was certainly the strongest of the lot, given its proven history of driving down

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<sup>4</sup> TRP CRTC 2021-130, at para. 16.

<sup>5</sup> See Shaw’s initial intervention of May 15, 2019, at para. 22.

<sup>6</sup> TNC CRTC 2019-57, Further Comments of the Competition Bureau, (November 22, 2019), see Figures 2 to 4.

<sup>7</sup> *Ibid*, at para. 8.

<sup>8</sup> TRP CRTC 2021-130, at para. 269.

retail prices of the national carriers and amassing approximately, over a decade, 1.5 million customers. Of the wireless carriers that remain in the wake of Shaw’s acquisition, PIAC does not believe any facilities-based provider will reach the scale of Freedom Mobile even in the medium to long-term. Even when competitors actually put their ambitions into action, the Big 3 will work to delay and hinder efforts the entire way.<sup>9</sup> Consumers are rightfully worried that this decision is the final nail in the coffin for wireless competition. The government must act now, to at least send the decision back and direct the Commission to properly assess the implications of the merger on mandated access.

29. PIAC is aligned with dotmobile in the view that Rogers’ acquisition of Shaw is proof that facilities-based competition is not a viable approach to achieving the 2019 Policy Direction. If facilities-based competition were working, Shaw and other regional carriers would have steadily growing market shares. However, the Commission has indicated that “[d]espite the fact that most regional wireless carriers have grown their subscriber bases over the last five years, the market shares in terms of both revenues and subscribers of these carriers has not changed significantly over that period in the provinces/territories in which they operate.”<sup>10</sup> Wireless competition has therefore apparently deteriorated to the point that the only viable long-term business model for smaller carriers is to build up to critical mass and then seek consolidation with a dominant carrier.
30. PIAC submits that the merger has exposed one of two possible realities of Canadian wireless competition. The first is that the merger is the culmination of years of maneuvering by Shaw to play itself up as an up-and-coming 4<sup>th</sup> MNO to coax accommodations from policy-makers, while fully intending to cash in through a big-ticket acquisition by a dominant carrier. It bears mentioning that before the Rogers-Shaw acquisition was finalized, Shaw entertained an offer from BCE.<sup>11</sup> If Shaw were truly intent on carving out its own piece of the wireless market, an acquisition presumably would never have been in the cards.
31. The result of CRTC 2021-130, when viewed in light of the Rogers-Shaw merger, at best will be few additional competitors from weak regional competitors who are starting essentially from zero customers and competitive presence, and will be likely to launch, if at all, only in large, highly populated areas (major cities) or areas where there is low risk and spectrum was obtainable at reasonable cost (largely areas adjacent to small regional providers or very rural and remote areas).
32. This likely market presence is exactly what has played out in the recent 3.5 GHz auction led by ISED. This spectrum band is highly sought after as a key component of offering the newest “5G” wireless

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<sup>9</sup> Most recently, Bell and TELUS asked the Federal Court to block Videotron’s purchase of set-aside 5G spectrum licenses from the 3500 MHz spectrum auction, even though ISED deemed Videotron eligible to bid based on activities of its affiliate Fibrenoire Inc in several provinces outside Quebec. See: Alexandra Posadzki, “Bell, Telus ask Federal Court to block Quebecor’s purchase of 5G airwaves in Western Canada”, *The Globe and Mail* (28 August 2021), online: <https://www.theglobeandmail.com/business/article-bell-and-telus-ask-federal-court-to-block-quebecor-incs-purchase-of-5g/>

<sup>10</sup> TRP CRTC 2021-130, at para. 65.

<sup>11</sup> “Bell offered to buy Shaw but backed out, opening door for Rogers to finalize \$26B takeover”, *CBC News* (26 April 2021), online: <https://www.cbc.ca/news/business/bell-shaw-rogers-1.6002042>

service. It is therefore a true litmus test of how potential “MVNO” competition (as designed by the CRTC with CRTC 2021-130) will really play out.

33. The provisional results of the 3.5 GHz spectrum auction, most recently updated on 12 August 2021, show that only Videotron, and additionally Xplornet, Eastlink, Cogeco to a much more limited extent, have acquired enough spectrum to possibly expand service nationally in the next 7 years, the mandated access period.<sup>12</sup> Even then, Xplornet largely serves rural communities and Manitoba, and Videotron has only recently declared intentions to expand past its main serving territory of Quebec. Furthermore, Videotron currently faces a potential court case, initiated by Bell and TELUS, that could force it to relinquish their newly acquired spectrum licenses.<sup>13</sup> Even if these regional carriers do begin building out as national wireless service providers, it could take them 5-10 years or longer to be viable, considering the roadblocks they would face from the Big 3. Unsurprisingly, the Big 3 spent the most in spectrum license costs, with Rogers spending the most by a large margin, at \$3.3 billion. Rogers’ significant spectrum acquisitions in all key regions, with a population coverage of almost 35 million, further concentrates the market by enabling it to hold significant control nationally.
34. These results show that Shaw is now functionally removed as a competitor (Shaw chose not to bid as an independent entity given the Rogers-Shaw deal); that Videotron (Quebecor Media Inc.) is now the only potential quasi-nationwide “MVNO” based competitor and that Videotron is concentrating on extensions of its home territory along major highways in Ontario to Toronto and southern Ontario, in major cities in western Canada in Manitoba, Alberta and British Columbia (and along highways leading to them and small incremental areas adjacent to its home territory of Quebec). As previously noted, even this acquisition of “set-aside” spectrum appears to be existentially threatening to Bell and TELUS, who have filed lawsuits to challenge Videotron’s spectrum acquisitions.<sup>14</sup> Others such as Eastlink acquired incremental spectrum in the Maritimes and Newfoundland and Labrador adjacent to its serving territory in Nova Scotia and New Brunswick. Cogeco obtained spectrum coincident with its landline territory in parts of Quebec and Ontario, adding in only Canada’s largest metropolitan area, namely metro Toronto, which is already well-served. Xplornet is attempting to cover rural areas and to serve its present Manitoba customers, so service to more users across Canada will take time.
35. This is not a recipe for providing millions of Canadians with innovative wireless choices at much lower than Big 3 prices. It is instead a recipe for the *status quo* with extremely slow, incremental,

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<sup>12</sup> 3500 MHz Auction – Provisional Results (29 July 2021), online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11722.html>

<sup>13</sup> A. Posadzki, “Bell, Telus ask Federal Court to block Quebecor’s purchase of 5G airwaves in Western Canada” *Globe and Mail* (28 August 2021). Online: <https://www.theglobeandmail.com/business/article-bell-and-telus-ask-federal-court-to-block-quebecor-incs-purchase-of-5g/>

<sup>14</sup> A. Hathout, “Bell asks court to review Quebecor’s eligibility for 3.5 GHz set-aside spectrum (updated)” *CARTT* (30/31 August 2021). Online: <https://cartt.ca/bell-asks-court-to-review-quebecors-eligibility-for-3-5-ghz-set-aside-spectrum/> and M. Lee-Murphy, “Bell seeks to block Quebecor set-aside 3,500 MHz purchases” *The Wire Report* (27 August 2021). Online: <https://www.thewirereport.ca/2021/08/27/bell-seeks-to-block-quebecor-set-aside-3500-mhz-purchases/>



risky and limited expansion to a very few Canadians. That is why PIAC believes CRTC 2021-130 dooms Canadians to at least a decade of competitive stasis and high wireless prices.

36. Quebecor cannot be acquired but can retreat to Quebec – as it has in the past and in a profitable manner by selling its set-aside spectrum licenses after the blackout period of five years (in tiers that contain at least one large population centre) or seven years (in tiers without at least one large population centre) for resale to set-aside-ineligible entities.<sup>15</sup> PIAC expect that Cogeco is setting up to be acquired in the future at a higher cost, just as Shaw has done. TBayTel, Ice Wireless, Iristel are too small and too localized to have any appreciable effect on national wireless prices.
37. The real problem to all of this is the Big 3’s size, scope and ability to wait (with 90% market share) for an opportunity to acquire any potential 4<sup>th</sup> player at an opportune moment. This cycle must be broken in some way. MVNOs are one way to try to do this.

## **II. Revising CRTC 2021-130 to a policy compatible with the 2019 Policy Direction begins with mandating access for true MVNOs**

38. Competitor access to MNOs’ spectrum and radio access network (“RAN”) facilities (cellphone towers, network switches) is required for “true” or “virtual” – that is, network software-based – MVNO access. These competitors (including dotmobile) are what PIAC refers to in this submission as “true MVNOs”. PIAC submits that an access policy can only be described as a “wholesale MVNO access service” if wholesale access is mandated for these true MVNOs. CRTC 2021-130 is in essence a facilities-based policy masquerading as an MVNO policy solely on the basis that a select few regional, facilities-based carriers would be granted access outside their geographic footprint where they do not yet own facilities.
39. Even the Competition Bureau, itself, knew what “MVNO” really meant, that is, it recognized that “true” MVNOs are defined precisely by their lack of facilities (spectrum, towers and switches, etc.), and their need to have wholesale access to MNO facilities (including spectrum). In a definitional footnote from the Competition Bureau’s commissioned Matrix Economics study submitted in the Wireless Review proceeding leading to CRTC 2021-130, MVNOs are described as such:

“MVNOs are resellers ‘that rely mainly on the large, facilities-based operators to package, market, bill, and deliver their mobile services’ and today include: (a) PC Mobile; (b) Petro-Canada Mobility; and (c) 7-Eleven SpeakOut. CMR 2017, p. 303; and NGL Nordicity Group Ltd, Prepared for the CRTC, ‘2016 Price Comparison Study of Telecommunications Services in Canada and Select Foreign Jurisdictions,’ August 11, 2016, available at

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<sup>15</sup> See Decision D3 of the Policy and Licensing Framework for Spectrum in the 3500 MHz Band (March 2020, updated 26 April 2021), online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11584.html>

<https://crtc.gc.ca/eng/publications/reports/compar/compar2016.htm>, site visited November 20, 2019, p. 33.”<sup>16</sup>

40. Likewise, the Commission knew perfectly well what a true “MVNO” was, and defined it, in the Notice of Consultation (NoC) announcing the Wireless Review proceeding (at footnote 8):

**“An MVNO is a wireless service provider that does not own spectrum or operate its own radio-access network (RAN); instead, it relies on the spectrum and RAN of a wireless carrier and, in some cases, other facilities and/or services, to provide mobile wireless services to consumers. MVNOs encompass a variety of service-based providers that rely on wholesale services to varying degrees to support their retail businesses.”** [Emphasis added.]

41. In footnote 18 of the NoC, the Commission does establish that there are different types of such MVNOs: “A full MVNO owns all of its own facilities except for the RAN and local backhaul. Partial MVNOs vary in terms of the amount of facilities owned, and can range from carriers that own no facilities themselves (resellers) to carriers that own a significant amount of core network facilities.” Even so, an MVNO that owns some of its own facilities (fibre communications lines and switches on the wireline backhaul network) still does not own spectrum nor necessarily all or any parts of a RAN. An MVNO who owns spectrum and runs its own RAN is by definition no longer an MVNO, but an MNO.
42. The Commission’s preliminary position was that these “true” MVNOs, as defined above, were necessary to add much needed competition to the market, even given the potential effect of some reduction of network investment by incumbents at that time, and even with Shaw as a facilities-based, separate, quasi-nationwide wireless service provider that would likewise potentially reduce its own (facilities-based) network investment (NoC at paragraph 39):

**“In light of the above, it is the Commission’s preliminary view that it would be appropriate to mandate that the national wireless carriers provide wholesale MVNO access as an outcome of this proceeding.** The Commission considers that, on balance, it is likely that the benefits that a well-developed MVNO market would deliver to Canadians are now more likely to outweigh any negative impacts that a policy of mandated wholesale MVNO access might have on wireless carriers’ network investments, particularly given the extensive investments that have been made in recent years. Further, properly structured rates, terms, and conditions should further mitigate potential negative impacts on future investments.” [Emphasis added.]

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<sup>16</sup> Tasneem Chipty, Matrix Economics, *Report Studying the State of Competition in the Retail Wireless Marketplace and the Benefits of Additional Competition among Wireless Service Providers*, prepared on behalf of the Competition Bureau of Canada For CRTC 2019-57: Review of Mobile Wireless Services, (22 November 2019), at footnote 27.

43. When Minister Navdeep Bains issued the proposed 2019 policy direction on 26 February 2019 (in force 18 June 2019), just two days before the Wireless Review was announced, the new goals clearly denoted a shift away from prioritizing facilities-based competition.<sup>17</sup> The proposed policy direction conveniently set the stage for an MVNO access framework to arise from the Wireless Review, as a way to facilitate competition, affordability, consumer interests and innovation. The finalized 2019 Policy Direction even pre-empted the final report of the Broadcasting and Telecommunications Legislative Review Panel by more than six months, coming out ahead of any panel recommendations that might place focus on facilities-based competition. Unfortunately, the actual result of the Wireless Review is a far cry from what the Minister intended in the finalized 2019 Policy Direction that directs the Commission to consider how its decisions “encourage all forms of competition and investment”<sup>18</sup> including, presumably and even principally, MVNO access.
44. The Commission’s failure to implement a true MVNO access policy is the latest disappointment in series of decisions sidestepping the Minister’s and GIC’s past directives to consider an MVNO access model. Earlier, in 2017, the Minister directed the Commission to reconsider its decision to shut down Ice Wireless’ Sugar Mobile, an MVNO, for improperly providing low-cost retail service through its reciprocal roaming arrangement with Rogers. Minister Bains, at the 2017 Canadian Telecom Summit, expressed clear support for MVNO access, stating that the Commission’s decision to block access “effectively prevents Wi-Fi-based providers from offering their lost-cost plans to consumers,” further directing the Commission to “rethink its decision and reconsider the Wi-Fi-first model.”<sup>19</sup> The Order in Council, issued on June 1, 2017, stated that on reconsideration, the Commission must consider whether “the evidence demonstrates in a sufficiently clear manner that the potential negative impact on investment in wireless infrastructure from the inclusion of Wi-Fi connectivity in the definition of ‘home network’ outweighs the potential positive impact on the affordability of retail mobile wireless services to consumers from that inclusion.”<sup>20</sup>
45. The Commission ultimately rejected this directive, instead concluding in Telecom Decision CRTC 2018-97 that “there is a gap in the market for lower-cost data-only plans,” then requesting the national carriers to submit proposals for such entry-level plans.<sup>21</sup> Unsurprisingly, these proposed plans, with their low data caps, missed the mark on usability and even affordability when compared to prices in other countries.<sup>22</sup> Commission also concluded, rather impotently, that “[a]ll things

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<sup>17</sup> Christine Dobby, “Navdeep Bains says CRTC policy change was needed to increase competition, lower prices,” *The Globe and Mail* (27 February 2019), online: <https://www.theglobeandmail.com/business/article-navdeep-bains-says-crtc-policy-change-was-needed-to-increase/>

<sup>18</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, s 1(a)(i).

<sup>19</sup> See transcript of Navdeep Bain’s speech at 2017 Canadian Telecom Summit, (June 5, 2017), online: [https://www.canada.ca/en/innovation-science-economic-development/news/2017/06/2017\\_canadian\\_telecomsummit.html](https://www.canada.ca/en/innovation-science-economic-development/news/2017/06/2017_canadian_telecomsummit.html)

<sup>20</sup> PC 2017-0557, (1 June 2017), online: <https://orders-in-council.canada.ca/attachment.php?attach=34464>

<sup>21</sup> News Release: “CRTC continues to foster investment, innovation and affordable choice in the wireless market, (March 22, 2018), online: <https://www.canada.ca/en/radio-television-telecommunications/news/2018/03/crtc-continues-to-foster-investment-innovation-and-affordable-choice-in-the-wireless-market.html>

<sup>22</sup> Erica Alini, “Canada’s new low-cost cell phone plans? ‘A joke,’ expert says”, *Global News* (16 February 2019), online: <https://globalnews.ca/news/4956323/canadas-new-lower-data-only-plans/>

considered, the overall potential impact on affordability is uncertain and cannot be properly assessed until such competition has been introduced into the market and pricing data is analyzed over a period of time.”<sup>23</sup> PIAC points out that the Commission itself has kept the doors shut even on a Wi-Fi-first service, as a “lite” alternative to proper MVNO access in the wireless market.

46. PIAC submits that the time has come for the Governor in Council (GIC), in accordance with its powers under section 12 of the *Telecommunications Act*, to more prescriptively guide the Commission’s wireless policies, beginning with a re-writing of CRTC 2021-130 to include true MVNOs under a mandated wholesale access framework. Just as the GIC specifically ordered the Commission to forebear from regulating retail local access-independent VoIP services in the Order Varying Telecom Decision CRTC 2005-28, the GIC can amend CRTC 2021-281 to specifically mandate true MVNO access.<sup>24</sup>
47. There is a baffling disconnect between the Commission’s critique of the wireless market and the Commission’s ultimate policy decision, which does very little to improve competition. In addition to high entry barriers, the Commission unequivocally concluded that “market shares in the retail market are highly concentrated in every province and territory;”<sup>25</sup> “there remains a significant number of retail mobile wireless service customers who has limited access to economically feasible and practical substitutes if faced with rising prices,”<sup>26</sup> and; that “barriers to entry into the retail market remain high and adversely impact new market entry or market expansion by regional wireless carriers and others.”<sup>27</sup>
48. The Commission’s decision to permit only spectrum-owning regional carriers to benefit from mandated wholesale access is non-sensical based on the Commission’s own acknowledgement that spectrum ownership is a high barrier to entry, and that generally entry into the retail market is extremely difficult. On spectrum as a barrier to entry, the Commission acknowledged that “[s]pectrum is scarce resource and, while set-asides may have improved access for competitors, it can still prove to be relatively expensive to acquire,” and “[s]pectrum auctions may also take place well before wireless carriers are ready to use spectrum.”<sup>28</sup>
49. As dotmobile has pointed out, regional carriers like Videotron have divested some of its spectrum holdings in various geographical areas. These carriers would have to re-acquire spectrum to benefit from mandated access, thus further delaying entry of even strong regional carriers to certain areas, if these carriers even intend to expand. The policy’s requirement to own RAN also maintains and contributes to the high barrier of entry under this new policy.
50. The spectrum requirement, in combination with the fixed phase-out period, is a strong disincentive for any prospective MVNOs to contemplate entering the market. CRTC 2021-130 set a fixed phase-

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<sup>23</sup> TD CRTC 2018-97, at para. 75.

<sup>24</sup> <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-288/FullText.html?wbdisable=true#>

<sup>25</sup> TRP CRTC 2021-130, at para. 69.

<sup>26</sup> TRP CRTC 2021-130, at para. 80.

<sup>27</sup> TRP CRTC 2021-130, at para. 100.

<sup>28</sup> TRP CRTC 2021-130, at paras. 96-97.

out period of 7 years “from the date the tariffed terms and conditions are finalized.”<sup>29</sup> That is, no matter whether carriers already have spectrum or are waiting for the next auction to obtain spectrum, the term begins when the Commission approves each of the national wireless carriers’ and SaskTel’s tariff pages, which must be submitted within 90 days of the decision. Though the Commission provides that additional time may be added “if delays occur as a result of prolonged regulatory processes or other impediments to the timely implementation of the service,” this does not provide for newer entrants who must wait for a spectrum auction they can feasibly participate in, which may occur several years into the 7-year term.

51. Overall, the Commission concluded that Canada’s slow decline of retail wireless prices as compared to other jurisdictions “suggest[s] that competition is not currently sufficient to discipline the market and protect the interests of consumers.”<sup>30</sup> The Commission also patently rejected the argument that the high prices and profit levels in the Canadian market are reflective of the high capital intensity of the mobile wireless industry in Canada, pointing out that “when put in relation to revenue per subscriber, that ratio for Canadian national wireless carriers over the same period is actually one of the lowest.”<sup>31</sup> Unfortunately, the Commission’s unflinching, clear-minded criticism of wireless competition is followed by an impotent regulatory response that only paralyzes competition in its current state rather than break down barriers.

52. If eligibility for mandated access is to encompass true MVNOs, as it should, then PIAC submits that all paragraphs in CRTC 2021-130 that are dependent on this fact must be rewritten or struck out. Specifically, paragraphs 167 to 390 would require a complete overhaul to instead detail a wholesale access policy that is compatible with both the 2019 Policy Direction and the preceding paragraphs of the decision addressing the dire state of retail wireless competition. Below, PIAC directs the GIC’s attention to specific issues within these paragraphs.

**i. Clarity on the definition of MVNO is critical to the wholesale access policy**

53. Paragraphs 173 to 176 must be re-written to align with the Commission’s existing definition of an MVNO. This passage seems to further confuse the established definition of MVNO by describing a “full MVNO model” as one that grants permanent mandated access to the host carrier’s RAN, consisting of spectrum, towers, and related facilities and equipment at tower sites.<sup>32</sup> Yet, the Commission’s ultimate “mandated facilities-based wholesale MVNO access service,” as described in paragraph 390, requires eligible wireless carriers to already own spectrum in a tier 4 area. Therefore, the policy cannot be accurately described as any variation of “MVNO model” or “MVNO access service.”

54. PIAC submits that resolving the confusion in nomenclature in CRTC 2021-130 is a simple task. Once the policy is amended to allow true MVNOs to seek mandated access, that is, without any

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<sup>29</sup> TRP CRTC 2021-130, at para. 376.

<sup>30</sup> TRP CRTC 2021-130, at para. 125.

<sup>31</sup> TRP CRTC 2021-130, at para. 128.

<sup>32</sup> TRP CRTC 2021-130, at para. 173.

requirement to own spectrum licenses or elements of a RAN, the policy may appropriately be characterized as an MVNO access service. This simple correction would finally bring CRTC 2021-130 in line with the 2019 Policy Direction, as true MVNOs would then enter the market as a viable new form of competition that promotes affordability, consumer interests and innovation. As it stands, CRTC 2021-130 merely supports the *status quo* of existing regional, facilities-based carriers struggling against the Big 3, to the exclusion of other forms of competition that continue to be blocked by high barriers to entry.

**ii. The relevant geographic market for wholesale MVNO access is national, not tier 4 areas.**

55. PIAC submits that the Commission has fundamentally erred in concluding that the geographic market for wholesale MVNO access is localized rather than national. PIAC disagrees that “an entrant would not necessarily require a wholesale MVNO access service on a national level in order to be able to develop a viable business.”<sup>33</sup> Limiting the geographic market to localized tier 4 areas would indeed be appropriate for existing regional carriers seeking to incrementally grow its facilities and service footprint on a regional basis. The capital demands of such an approach are not suited to a wider national market. However, the same considerations do not apply to true MVNOs, which should not require facilities or spectrum to enter the market.
56. The Commission posited that an entrant could “enter in one city or province and negotiate to use a combination of the host carrier’s network and roaming arrangements to offer its customer in that local area a viable service, which would include national coverage.”<sup>34</sup> However, PIAC submits that the whole point of MVNO providers is to **not** require national roaming in order to serve customers nationally. While it is true that the incremental approach to expansion is “similar to how regional carriers have entered the market, that is, by targeting select areas for entry and using wholesale roaming service to supplement their serving territories and enable their customers to have national coverage,” true MVNOs have an entirely different business model, that is, expedited market entry on a national scale. This is the “novel form of competition” or “innovation” as contemplated under the 2019 Policy Direction.
57. PIAC also points out that the Commission, in Telecom Regulatory Policy CRTC 2015-177, already defined the relevant geographic market as national in scope for both wholesale roaming service and wholesale MVNO access service. Notably, and in stark contrast to the Commission’s competitive outlook for MVNOs in CRTC 2021-130, the Commission in CRTC 2015-177 concluded that “to compete in the retail market and offer services similar to other wireless carriers, MVNOs would need to provide broad or national network coverage.”<sup>35</sup> The Commission provides no overriding explanation for the change, beyond the fact that the Commission looked “more closely at the likelihood of entry into the market and the geographic basis on which that entry might occur.”<sup>36</sup> However, the Commission itself determined that since CRTC 2015-177, there have been

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<sup>33</sup> TRP CRTC 2021-130, at para. 183.

<sup>34</sup> *Ibid.*

<sup>35</sup> TRP CRTC 2015-177, at para. 82.

<sup>36</sup> TRP CRTC 2021-130, at para. 183.

no appreciable improvements in barriers to entry, despite measures on the part of the Commission and ISED to address these barriers to entry and expansion.<sup>37</sup>

58. The Commission further identified in CRTC 2021-130 that “[f]ew MVNOs have been able to successfully negotiate RAN access with the national wireless carriers and, as indicated above, current MVNO arrangements tend to be highly restrictive.”<sup>38</sup> This seemingly has not changed since CRTC 2015-177, in which the Commission noted “there are few wholesale MVNO access arrangements in Canada, despite significant demand demonstrated on the record of this proceeding.”<sup>39</sup> PIAC seriously questions the logic of expecting MVNO entrants to negotiate access agreements on a regional basis when, according to the Commission’s record, these negotiations are already inefficient and prone to failure. With regard to the “geographic basis on which that entry might occur,” the Commission seems to have embraced Bell Mobility’s argument that “wholesale roaming service and wholesale MVNO access service do not need to have the same relevant geographic market,” despite parties in favour of mandated MVNO access, and who would actually use wholesale MVNO access service, generally supporting the previously established relevant geographic market.<sup>40</sup>

**iii. Mandated MVNO access service clearly meets the essentiality test.**

59. In CRTC 2015-177, the Commission already determined that wholesale MVNO access service met the three components of the Essentiality Test, yet the Commission elected to reassess whether MVNO access met the test “given the evolution of wireless service markets since 2015, and the new evidence and arguments that were raised in this proceeding.” The Commission does not specifically detail what evidence or arguments it relied upon in initiating the reassessment, therefore PIAC is left to infer the supporting factors from the Commission’s amended determinations under each of the test components.

60. Regarding the input component of the test, in CRTC 2015-177, the Commission determined that wholesale network access is a required input for competitors to enter the downstream retail market.<sup>41</sup> The Commission came to the same conclusion in CRTC 2021-130, that “[a]ny WSP – whether it is a facilities-based carrier or a virtual operator – requires access to a RAN to offer mobile wireless services, including retail services.”<sup>42</sup> However, to reflect the apparent change in the relevant geographic market, the Commission in the latter policy has framed this requirement as true “in any tier 4 area,” when PIAC contends it is in fact true everywhere, and that in CRTC 2015-177, the Commission determined that competitors “require broad or national network coverage to offer competitive retail mobile wireless services.”<sup>43</sup> Since the Commission did not directly address

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<sup>37</sup> TRP CRTC 2021-130, at para. 95, these measures include “mandated access to wholesale roaming service under regulated rates, terms, and conditions, as well as spectrum set-aside – that is, blocks of spectrum reserved for a particular type of bidder, typically new entrants.”

<sup>38</sup> TRP CRTC 2021-130, at para. 99.

<sup>39</sup> TRP CRTC 2015-177, at para. 105.

<sup>40</sup> TRP CRTC 2021-130, at para. 179.

<sup>41</sup> TRP CRTC 2015-177, at para. 101.

<sup>42</sup> TRP CRTC 2021-130, at para. 193.

<sup>43</sup> TRP CRTC 2015-177, at para. 101.

this change of opinion on geographic scale, we are unable to assess its reasoning. CRTC simply gave no reason for this fundamental change.

61. Regarding whether wholesale MVNO access is controlled by firms that possess upstream market power such that denying mandated access would likely result in a substantial lessening or prevention of competition in the downstream retail market, the Commission in CRTC 2015-177 determined that “denying competitors access to GSM-based wholesale network access services at a national level would likely result in a substantial lessening or prevention of competition in the downstream retail market.”<sup>44</sup> Though the Commission in CRTC 2021-130 determined that “collective upstream market power remains true for most tier 4 areas in the country,” on the competition component, the Commission concluded that though “it is reasonable to expect prices to decline further in the future as the regional wireless carriers grow their market shares, the potential beneficial impacts on retail competition resulting from the mandated provision of a broad MVNO access service are speculative at best.”<sup>45</sup> PIAC submits that this conclusion would have been much different had the Commission incorporated the Rogers-Shaw merger in the analysis. We also note, as we did above, that the Commission was aware of the deal, which was announced one month prior to the release of CRTC 2021-130.
62. Now that Shaw, and its proven competitive expansion, will no longer back Freedom Mobile as an independent 4<sup>th</sup> wireless carrier, there are no other regional wireless carriers that presently can replace Freedom or that realistically can grow their market shares in the near future to a point where they can meaningfully compete with the national wireless carriers.
63. MVNOs would not, as the Commission again speculates, “take a greater share of subscribers from the regional wireless carriers than from the national wireless carriers or Sasktel ... and therefore have a disproportionate impact on regional wireless carriers.”<sup>46</sup> First of all, if the appropriate, economically rational and practical geographic market for a competitive wireless launch is national, MVNOs would compete for subscribers directly with the national wireless carriers, not regional carriers. Second, with Shaw’s exit from the market, there are no regional carriers with a network footprint that is profitable, reliable, and large enough to make negotiating individual regional access worthwhile for MVNOs.
64. Regarding the duplicability component, in CRTC 2015-177, the Commission determined that “an MVNO would not be able to provision its own facilities to duplicate the scale and coverage of the national wireless carriers’ networks.”<sup>47</sup> In CRTC 2021-130, the Commission reversed course to conclude that “the functionality of wholesale MVNO access service can be practically and reasonably duplicated by reasonably efficient competitors.”<sup>48</sup> PIAC submits that the duplicability analysis has been muddied by the policy’s focus on facilities-based regional carriers rather than true MVNOs. PIAC agrees that a reasonably efficient **facilities-based regional wireless carrier** could

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<sup>44</sup> TRP CRTC 2015-177, at para. 106.

<sup>45</sup> TRP CRTC 2021-130, at para. 200.

<sup>46</sup> TRP CRTC 2021-130, at para. 199.

<sup>47</sup> TRP CRTC 2015-177, at para. 107.

<sup>48</sup> TRP CRTC 2021-130, at para. 207.



reasonably duplicate the national carriers' wireless networks, given the right competitive conditions. However, this is the same competitive format of facilities-based competition that has generally proven unsuccessful for decades. The 2019 Policy Direction permits new forms of competition, and the point of true MVNO wholesale access is to **not** require MVNOs to acquire spectrum and duplicate wireless networks in order to provide competitive retail service to consumers.

65. In conclusion, PIAC specifically highlights paragraphs 193 to 208 in CRTC 2021-130 for the GIC to revise based on an essentiality test premised on a national geographic market, and on mandated wholesale access for true MVNOs. In our view, MVNO access service meets the essentiality test and the CRTC's analysis of this issue is superficial and where structured, clearly contrived to support its chosen preference for facilities-based MNOs standing in for true MVNOs.

**iv. Preserve determinations relating to seamless roaming, applicability of mandated wholesale roaming to 5G networks, access to infrastructure, and retail level measures**

66. PIAC submits that while the mandated access policy in CRTC 2021-130 is fundamentally flawed and should be re-written, the subsequent range of determinations spanning paragraphs 391 to 600 is beneficial to consumers as-is and should not be discarded in the review process. Mandated seamless roaming is still beneficial for customers of facilities-based regional carriers using wholesale roaming to supplement their serving territories. Applicability of the wholesale roaming policy to 5G networks is necessary to level the future playing field for services using 5G networks. Continued scrutiny of issues pertaining to infrastructure access is critical to facilitate any new mandated access policy. Finally, the provision of mandated low-cost and occasional-use plans are especially helpful to ensure that consumer needs are met while the wholesale and retail wireless markets undergo this period of uncertainty.

**III. Canadian consumers now look to political leadership to take action**

67. The COVID-19 pandemic has reinforced the importance of telecommunications services for staying informed, connected, educated, and employed. Canadians have long been aware of the Commission and the government's lacklustre actions to drive down wireless prices, an issue magnified by the persisting gap between Canadian wireless costs and those of comparable nations. PIAC urges Cabinet to exercise the political will necessary to redirect wireless competition in the consumer interest.
68. PIAC reminds the GIC of the Liberal party's 2019 campaign promise of lowering cellphone bills by 25%. Although this promise is partially fulfilled, it was of very limited scope (only certain plans on incumbents' flanker brands) and that since, the electorate and Canadians instead have interpreted this promise more widely to include all wireless services. We note that the original promise was followed by the Prime Minister's directive to the Minister of ISI at the time that if the reduction target were not achieved within two years, ISI "can expand MVNO qualifying rules and the Canadian Radio-television and Telecommunications Commission mandate on affordable pricing."

The 2019 Liberal re-election platform promised overall to “[e]ncourage competition by expanding the entry of Canadian Mobile Virtual Network Operators (MVNO) in the market.”<sup>49</sup> The platform elaborates that if prices do not come down after two years, the government would consider expanding MVNO rules, like “[l]owering the entry and investment threshold for MVNOs,” or “[l]owering the rates at which MVNOs get access to networks.”<sup>50</sup>

69. Given the outcome of the election and these promises which were only lightly, if at all, repeated in the 2021 campaign, PIAC suggests that the Government may wish to return to the policy of bringing in MVNOs when wireless prices are not moving downwards. In PIAC’s view, they are not; not widely enough, not quickly enough, and the Rogers-Shaw deal will only create upward pricing pressure. Granting dotmobile’s petition and therefore in effect creating true MVNO access would be a clear and substantial first step to implementing this new wireless policy.

#### IV. Conclusion

70. For all the reasons above, PIAC supports dotmobile’s petition to the Governor in Council to review and vary TRP CRTC 2021-130, specifically to issue an Order in Council to amend the spectrum requirement, phase-out period, and RAN requirements. Preferably, PIAC requests the GIC to dictate an appropriate mandated MVNO access policy, as the Commission has time and time again failed to align with consumer interests and government directions. Alternatively, the GIC should refer the policy back to the Commission with specific direction to amend mandated access eligibility, including a directive to factor in Rogers’ acquisition of Shaw in reformulating a true MVNO access policy. If necessary, the GIC should take the steps of rewriting the paragraphs of TRP CRTC 2021-130 as indicated above.
71. PIAC takes no position on dotmobile’s proposed maximum wholesale rates. However, considering the Commission’s history of protracted rate-setting proceedings, any reconsideration of rates must ensure consumers are not made to suffer repeated delays. One possible mechanism could be for the GIC to set interim rates that allow carriers to offer competitive plans in its disposition of this petition. The Commission could be directed to apply a simple interim formula, similar to the one used to calculate roaming caps under the now repealed Section 27.1 of the *Telecommunications Act*, which remained in place until the Commission made final determinations on the national carriers’ proposed tariffs for wholesale roaming. Dotmobile’s submissions may be quite useful for this exercise. Regardless, consumers have waited long enough for the access, affordability, and choice that they have been promised for years. We ask that this petition be granted.

**\*\*\*End of Document\*\*\***

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<sup>49</sup> See the Liberal campaign platform re “More affordable cell phone bills,” online: [https://2019.liberal.ca/wp-content/uploads/sites/292/2019/09/BG\\_EN\\_Cell-Phone-Bills.pdf](https://2019.liberal.ca/wp-content/uploads/sites/292/2019/09/BG_EN_Cell-Phone-Bills.pdf)

<sup>50</sup> *Ibid.*