



October 1, 2007

Secretary-General  
Canadian Radio-Television and  
Telecommunications Commission  
Ottawa, ON  
K1A 0N2

Dear Sir/Madam:

**Re: CRTC Telecom Public Notice 2007-16: Commissioner for Complaints for  
Telecommunications Services**

1. The Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) is a legal clinic based at the University of Ottawa, Faculty of Law. CIPPIC’s mandate includes intervening on issues arising from the use of new technologies the outcomes of which have broad public interest implications. Our goal is to ensure that important public interest voices are heard in the policy-making process, so that results reflect more than vested interests.
2. CIPPIC is intervening in this proceeding because of its importance in establishing an effective recourse mechanism for consumers of internet, voice, and other telecommunications services in an increasingly deregulated marketplace. As the Telecommunications Policy Review Panel (“TPRP”) stated in its report last year, a Canadian Telecommunications Consumer Agency (“TCA”) is needed given the increasing pervasiveness and complexity of telecommunications services, and the fact that market redress options (e.g., switching providers, suing in courts) are inadequate.<sup>1</sup>
3. Further to the recommendations of the TPRP, the Governor in Council issued *Order requiring the CRTC to report to the Governor in Council on consumer complaints*, requiring the Commission to report annually, beginning in April 2008, on consumer complaints, consumer issues and trends warranting attention, and “progress made toward the establishment of a Consumer Agency”, until such an Agency has been established.<sup>2</sup> In line with Recommendations 6-2<sup>3</sup> and 6-3<sup>4</sup> of the TPRP Report, the Order sought to make

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<sup>1</sup> See Chapter 6, “The Telecommunications Consumer Agency,” of the *Telecommunications Policy Review Panel 2006 Final Report*, online: <[http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/h\\_rx00100e.html](http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/h_rx00100e.html)>

<sup>2</sup> Order in Council P.C. 2007-533.

<sup>3</sup> “A new Telecommunications Consumer Agency should be established with authority to resolve complaints from individual and small business retail customers of any telecommunications service provider.”

Canada's telecommunications service providers ("TSPs") come together and participate in the formulation and financing of a CRTC-approved independent Telecommunications Consumer Agency for the resolution of complaints from individuals and small businesses.<sup>5</sup> In the increasingly deregulated telecommunications industry, this Order was an important step in ensuring consumers would be protected from abuse, and as such, any Consumer Agency proposed by the TSPs should be scrutinized carefully by public interest and consumer protection organizations to ensure that it will be an effective consumer complaints body.

4. In July 2007, in response to the Order-in-Council and of their own accord, a group of TSPs ("the TSPs") established a body they have called the Commissioner for Complaints for Telecommunications Services ("CCTS"). They immediately requested the CRTC's approval of the CCTS as meeting the expectations of the Order.
5. Accordingly, and in line with Telecom Decision 2006-15,<sup>6</sup> the CRTC has initiated a proceeding inviting comments on the appropriate structure and mandate of a new Telecommunications Consumer Agency ("TCA"), and on whether the industry-established CCTS meets the requirements of the Order.
6. The following are CIPPIC's comments. Failure to address any particular aspect of the CCTS proposal should not be construed as agreement with or acceptance of such issue where to do so would be contrary to the interests of telecommunications consumers. CIPPIC intends to participate in the November 14<sup>th</sup> public consultation and to file reply comments after the consultation.
7. In our comments below, we address the following issues:
  - Mandate
  - Powers
  - Procedures
  - Membership
  - Governance Structure
  - Unsolicited Telecommunications Investigative Powers (PN 2007-15)

## **A) Mandate**

8. Current avenues for handling consumer complaints about telecommunications services are unsatisfactory for a number of reasons, including the inadequacy of legal and market redress mechanisms, the failure of government agencies to act on consumer complaints about illegal conduct (e.g., misleading advertising), the confusing array of federal and

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<sup>4</sup> "The proposed Telecommunications Consumer Agency should be a self-funding, independent, industry-established agency. The agency's structure and functions should be determined by the CRTC."

<sup>5</sup> The Order specifically states that "the Governor in Council considers that an independent agency with a mandate to resolve complaints from individual and small business retail customers ("Consumer Agency") should be an integral component of a deregulated telecommunications market,"

<sup>6</sup> The decision, *Forbearance from the regulation of retail local exchange services*, notes that an appropriate system would be one designed in consultation with groups representing customers.

provincial bodies with responsibility for consumer protection and lack of clarity as to which agency is responsible for which issues, and the growing category of services for which consumers have no recourse other than switching providers and/or suing in court, both of which are often unrealistic.

### *Eligible Complaints*

9. The TCA's mandate should therefore be broad, covering consumer issues arising from the provision of telecommunications services other than those that are beyond the control of TSPs or that fall under another agency's jurisdiction and will be effectively resolved by that agency upon complaint by a consumer. In particular,
  - **The Agency should have jurisdiction to resolve complaints about both forborne and non-forborne services.** From a consumer perspective, there is no difference: both are telecommunications services delivered by the same companies in the same marketplace. Having two separate agencies with similar mandates over similar services merely adds to consumer confusion, duplicates effort, creates inefficiencies, and risks inconsistency. This is particularly so given that services are moving between categories and will likely continue to do so.
  - **The Agency should be empowered to resolve disputes over misleading advertising and related complaints.** This is one of the most common type of complaint we receive about internet services. To say that consumers can get redress through the Competition Bureau, provincial consumer protection agencies, or the courts is deny the reality that none of these recourse mechanisms is in fact effective in other than extraordinary cases. The Competition Bureau's mandate is to promote competition, not to protect consumers; it tends to leave consumer protection issues to the provinces. It has neither the mandate nor the resources to resolve individual consumer complaints, nor to deal with the quantity and kinds of complaints we are referring to here. Provincial consumer affairs bodies face similar mandate and resource constraints, such that consumers are required to pursue remedies in the courts for the most part. And court actions, for their part, are too costly, difficult, time-consuming and risky for most consumers to pursue.
  - **The Agency should have jurisdiction to resolve disputes over the provision of non-voice applications.** While issues of content should be outside the scope of the TCA, there is no reason to exempt non-voice applications provided by TSPs, such as instant messaging, from the scope of the TCA.
  - **Privacy issues not covered by the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") should fall within TCA jurisdiction.** Most privacy issues that telecommunications consumers encounter will fall within the jurisdiction of the Privacy Commissioner of Canada, and should be referred to that office for resolution. However, the Privacy Commissioner's jurisdiction extends only to those issues covered by federal data protection legislation.

Should a consumer privacy issue arise that is not covered by PIPEDA but that does involve one or more TSPs, the TCA should be empowered to deal with it.

- **The TCA should have jurisdiction to deal resolve complaints where the other empowered agency is not required to address the particular complaint or issue.** In general, where other bodies have jurisdiction to deal with a particular complaint, the TCA should be required to refer the matter to the other agency only if the other body will in fact act on the specific complaint.
  - Consideration should be given to including television services within the scope of the TCA. For several years, the cable television industry operated a consumer complaints body, the Cable Television Standards Council, that received, resolved and acted upon complaints about cable television service. Disbanded some years ago when the industry began to face competition, it is worth assessing whether there is sufficient consumer demand for such a service to warrant its inclusion in the scope of the TCA's mandate.
10. Matters over which TSPs do not have control or in which they compete with non-TSPs should be outside the scope of the TCA's order-making powers. Such matters include content issues, 911 service, equipment, yellow pages and business directories. However, the TCA should be permitted to comment on such issues in its annual report.
  11. Court actions should be available to consumers when a satisfactory resolution cannot be reached by the TCA, but the TCA should still have jurisdiction to deal with matters that could otherwise be taken to court, for the reasons stated above.
  12. Eligible complainants should include small businesses, defined, for example, as businesses with 20 employees or less. We do not object to the CCTS proposal for small business eligibility to be based on net monthly telecommunications services of less than \$2500.

### *Systemic Issues*

13. As stated by the Governor in Council in its Order, "the mandate of an effective Consumer Agency should include (in addition to resolving complaints) the development or approval of related industry codes of conduct and standards;... and, as appropriate, identifying issues or trends that may warrant further attention by the Commission or the government".
14. **The TCA should therefore have powers to inquire into and report on issues such as contract terms, prices, unsolicited marketing, general operating practices, industry-wide practices, and other policy matters, even where such issues do not qualify as eligible complaints.** This is a critical component of the TCA's mandate, in CIPPIC's view. Without such powers, the Agency may be effective in resolving individual complaints, but will have little if any value in identifying and resolving systemic issues so as to ensure a fair and effective telecommunications marketplace.

*Duties in addition to complaints resolution*

15. One of the current problems in the telecommunications marketplace is the surfeit of unclear, confusing, and biased marketing information with which consumers are relentlessly bombarded. A TCA has the potential to correct this market failure by providing clear, relevant and neutral information about telecommunications services and service providers to the public. **A key role of the TCA should therefore be to provide accurate and impartial information to the public about the Canadian telecommunications marketplace, through its annual report and otherwise as it sees fit.**
16. In particular, as stated by the Governor-in-Council in its Order to the CRTC, the Consumer Agency should produce annual reports that include, among other things:
  - “statistical information, for each telecommunications service provider and in total, on the nature and number of complaints received and the standing of these complaints when the report was compiled,” and
  - “an identification of issues or trends that may warrant further attention by the Commission or by the government, such as the availability of consumer choice, the impact of marketing strategies and practices, consumer billing and contracts”.
17. As noted above, **the TCA should be empowered to inquire into, report on, and make recommendations to the industry and to the CRTC on issues of consumer concern involving the telecommunications industry, even where such issues may not qualify as eligible consumer complaints.**
18. Another important role of the TCA, as noted by the Governor-in-Council, is “the development or approval of related industry codes of conduct and standards”. **The TCA should therefore be specifically empowered to initiate and participate in such cooperative efforts.**
19. The CCTS proposal is undesirable from a consumer and public interest perspective insofar as it would not consider as eligible complaints about non-forborne services, false or misleading advertising, privacy issues not covered by PIPEDA, non-voice applications (service issues only), policy matters, or general operating practices.
20. Moreover, under the CCTS proposal, the Commissioner would have no power to inquire into, report on, and make recommendations regarding systemic issues such as unfair contract terms, pricing practices, and policy matters even where it does not have the mandate to resolve individual complaints about such issues. For example, the CCTS currently has no mandate examine issues like modem hijacking or unnecessarily high early-termination fees, both of which are issues of great consumer concern and deserving of attention. As stated above, the Commissioner will be in a position to provide extremely

valuable input to the CRTC and government on systemic issues such as these. He or she should not be limited in the ability to do so.

21. The CCTS proposal is further deficient insofar as the Commissioner would have no power to assist in the development of industry codes of conduct and to identify issues or trends that may warrant further attention by the Commission or government *unless requested by a TSP*.<sup>7</sup> We see no reason to limit the Commissioner's powers in this respect, and consider such limitation to be contrary to the clear direction of the Governor-in-Council.
22. The TCA should be protected from liability for anything done, reported or said in good faith as a result of his or her performance or exercise of any duty or power, and all statements and reports made in good faith should be considered privileged for the purposes of libel law. The CCTS proposal in this respect is acceptable.<sup>8</sup>

## B) Powers

23. The Agency's powers should include:
  - Dispute resolution (mediation/conciliation, non-binding recommendations, semi-binding arbitration);
  - Ordering of monetary compensation of up to \$10,000 (the limit for Small Claims Court actions in Ontario);
  - Ordering a TSP to do or cease doing specified activities with respect to the complainant;
  - Ordering a TSP to provide the complainant with an explanation or apology;
  - Inquiring into and reporting on systemic issues, on its own initiative;
  - Publishing complaint statistics, findings, recommendations, information about services and service providers, and other information about the industry, the publication of which it finds would be in the public interest.
24. Complainants should not be identified in any published reports. However, the TCA should be free to identify TSPs. As noted above, the TCA should be protected from liability for defamation or other alleged wrongs as a result of its public reports made in good faith.
25. The TCA should rely on industry cooperation for its investigations, and should report on any lack of cooperation in its annual report. Where a TSP is uncooperative, the TCA should have access to an expedited process by which to obtain a binding order from the CRTC requiring such cooperation.

## C) Procedures

26. The complaint process should be easily accessible by consumers in all parts of the country, both offline and online. **The CCTS proposal of accepting complaints by mail, fax, or webform is inadequate.** Email complaints should also be accepted. The TCA should also

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<sup>7</sup> TSP Proposal, Appendix 2, p.7.

<sup>8</sup> Procedural Code, s.16.

be empowered to accept complaints by telephone where the complainant is illiterate or has a disability that makes writing difficult.

27. The process should be free of charge to complainants, as proposed by the CCTS. It should be offered in both official languages.
28. Complainants should have at least one year from discovery of the issue to lodge their complaint with the Agency. In many cases, consumers will be initially unaware of the TCA; they should not be prejudiced by this lack of awareness. More likely, they will first spend months attempting to resolve the issue with the TSP, and only when resolution is clearly impossible will they resort to other avenues of recourse. This time limit should be subject to exceptions in appropriate cases.
29. Complainants should be able to appeal findings of ineligibility to the CRTC.
30. The process should be informal so as not to intimidate consumers. We agree with the CCTS approach of providing services in a non-legalistic manner that does not require legal counsel. All communications between the parties should be without prejudice to either party's rights in any subsequent proceedings.
31. Timelines should be as short as possible without prejudicing complainants. We are concerned that the CCTS process may be inordinately long for many types of complaints. Twenty (20) business days is the equivalent of one month. It is not clear that TSPs need a full month to respond to every complaint, especially when the matter has likely already been through the TSP's internal complaint procedures. Similarly, it is not clear why TSPs need a full month to consider the Commissioner's non-binding recommendation.
32. **We support the CCTS approach of attempting consensus resolution first, then a recommendation, and finally a decision that is binding on the TSP if accepted by the complainant. It is critical that the complainant be free to reject the decision and pursue redress elsewhere.**
33. However, **we oppose the proposal that failure on the part of the complainant to respond to the Commissioner's recommendation within 20 business days constitutes deemed acceptance of the recommendation.**<sup>9</sup> This may be an appropriate way to treat TSPs given their repeat involvement in the process, but it is patently unfair to individual complainants who may have given up on the CCTS process after months of waiting for a decision (given that there is no time limit on investigations). As long as investigations can run on for months, it is unfair to attribute anything to complainants without their express indication. Only when the recommendation is actually accepted should it be binding on the complainant.
34. It is also important that complainants be given the opportunity to reply to the TSP's response in the course of the investigation. The CCTS proposal does not indicate whether this will be the case; that is left up to the Commissioner.

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<sup>9</sup> Procedural Code, s.11.3.

35. The Commissioner should be required to investigate and make recommendations on all eligible complaints that have not been resolved by the TSP after an Agency-mediated attempt.
36. Worth considering is the Australian approach of classifying complaints into four levels depending on their complexity, amount of money in dispute, and expected time required to resolve. Timelines may differ depending on the level of complaint.

#### **D) Membership**

37. **All TSPs should be required to be members of the TCA, with all corresponding obligations.** This will ensure that all customers, not just those of those companies willing to participate, are protected. TSPs should not be permitted to set up a competing body.
38. The CRTC should use its powers under s. 24 or subs. 67(1)(d) to make membership in the Consumer Agency mandatory. If that is not possible, then the Act should be amended to specifically allow for such an order (as was done, for example, in s. 46.5).

#### **E) Governance Structure:**

39. The governance structure of the TCA is critical insofar as it will determine both the effectiveness and the perceived independence of the body from the industry that funds it. In this respect, it is crucial that the Agency's operations be free of any interference from industry, and that direction be provided by a Board the membership of which ensures a preponderance of informed, effective consumer representation. This is particularly important in the context of a body that is wholly funded by industry.
40. **The CCTS proposal for governance does not meet basic requirements for independence.** TSPs are given far too much power over an Agency that is meant to hold them accountable. In particular,
  - Consumer groups should have as many spots on the governing body as do TSPs, and such spots should be open to consumer group employees just as industry spots are open to industry employees; and
  - TSPs should not elect "independent directors"; independent directors should be appointed by government or the CRTC.
41. **We recommend instead the governance model adopted by the Australian Telecommunications Industry Ombudsman.** This model has been successful in practice, and would translate well into the Canadian environment. According to the TIO website,

"The structure of the TIO is designed to ensure its independence. The TIO is governed by a Council and a Board of Directors, and is managed by an independent Ombudsman appointed by the Board on the recommendation of Council.

The Council is comprised of five TIO member representatives and five consumer representatives, with an independent Chairman. While the Ombudsman has responsibility for the day to day operations of the scheme, the Council provides advice to the Ombudsman on policy and procedural matters.

The Board has corporate governance responsibilities including financial management of the scheme and ensuring compliance with the Memorandum and Articles of Association and the Constitution. With the exception of the independent director, who is appointed by the Board itself, directors are appointed by the TIO membership.”<sup>10</sup>

42. Through the establishment of a Council composed of an equal number of consumer group and industry representatives, the Australian model ensures that the TIO is independent from the industry it is regulating. We strongly recommend this model for Canada.
43. **Regardless of whether one or two governing bodies are established, in no case should industry reps have a majority of seats on the governing body that hires the Commissioner and advises him or her on policy matters.**
44. **The Commissioner (Agency CEO) should be completely independent of industry. This includes having no past direct ties to industry.** The same should apply to all non-administrative staff. We note that the CCTS interim Commissioner appointed by industry has significant links to industry, having worked as a consultant for TELUS Communications Inc. for the past several years. Even if the individual in question is able to divorce himself from past loyalties and act independently, such ties raise a strong appearance of bias and constitute a conflict of interest, in our view. It is important that the Commissioner/CEO not only *be* independent, but *be seen to be* independent.

#### **E) Investigative Powers re: Unsolicited Telecommunications (PN 2007-15):**

45. It is our preliminary view that the CCTS is not an appropriate third party to which the CRTC should delegate its investigative powers regarding unsolicited communications. Such duties will require a different kind of expertise and focus, and should therefore be the responsibility of a separate body.

#### **Conclusion**

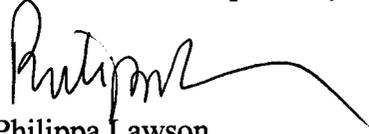
46. This proceeding holds great promise for Canadian consumers of telecommunications services. Whether that promise will be realized will depend on the mandate, powers, independence, and procedures of the new Telecommunications Consumer Agency. While the industry’s proposal includes many good components from a consumer and public interest perspective, it fails to meet the fundamental requirement of independence and unduly limits the Agency’s mandate and powers. While much of the industry proposal can

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<sup>10</sup> [http://www.tio.com.au/about\\_tio.htm#7](http://www.tio.com.au/about_tio.htm#7)

be retained, we recommend significant changes to its governance structure and its limits on the Agency's mandate and power.

All of which is respectfully submitted,

A handwritten signature in black ink, appearing to read 'Philippa', with a long, sweeping horizontal stroke extending to the right.

Philippa Lawson  
Director, CIPPIC

Cc: Interested Parties, PN 2007-16