CRTC PN 2007-16:
Consumer Telecommunications Agency Proceeding

Oral Comments of CIPPIC
The Canadian Internet Policy and Public Interest Clinic, University of Ottawa
November 14, 2007

Mr. Chairman, Commissioners:

Thank you for the opportunity to comment on the design of the new Canadian telecommunications consumer agency. My name is Philippa Lawson. I am the Director of CIPPIC, the Canadian Internet Policy and Public Interest Clinic at the University of Ottawa, Faculty of Law. With me today is CIPPIC intern Michael de Santis. I would like to thank both him and CIPPIC articling student Jocelyn Cleary (who could not be here today) for their assistance in preparing CIPPIC's submissions.

Mr. Chairman, you have an opportunity through this proceeding to create an effective body for resolving consumer complaints and marketplace issues an increasingly deregulated telecommunications market. The effectiveness of the body that you create will depend on a number of factors, most importantly its mandate, its powers, and its independence from industry.

We have clear marching orders from Cabinet calling for an independent agency in which all telecom service providers participate, with a mandate to look into systemic issues as well as individual complaints.

We also have a model already in operation – the industry-created Commissioner for Complaints for Telecommunications Services (CCTS).

The industry model goes some way toward establishing the independent and effective agency envisaged in Cabinet's Order-in-Council. However, in CIPPIC's view, a number of changes are critical if it is to meet Cabinet's direction and to be truly effective. These changes include the following seven:

1. It should cover all telecommunications service providers, not just those who wish to join;

2. It should be truly independent of industry, especially with respect to matters such as reporting to the public and to the CRTC;

3. It should have an explicit mandate to deal with systemic issues as well as individual complaints;

4. It must be able to deal with the full range of issues that telecom consumers typically have with their providers, including such issues as customer service, unfair contract terms sales tactics, misleading advertising, and hidden fees;

5. It should publish statistics on all complaints by company, not just those that escalate to the final decision stage;

6. It should be empowered to order appropriate levels of compensation, regardless of liability limitations that companies purport to impose on their customers by contract; and

7. It should be named and actively promoted in such a way that consumers across Canada are aware of it, can easily find it when looking, and are referred to it in all appropriate cases.

I will now address issues in the order requested.

Membership

The Order-in-Council states "…all telecommunications service providers should participate in and contribute to the financing of an effective Consumer Agency." The Telecommunications Policy Review Panal ("TPRP") as well recommended a mandatory model, backed up with new CRTC enforcement powers.

While that should be the end of the debate on this issue, my friends from the companies are putting up strong opposition. They would like a voluntary model, under which companies are free to set up alternative complaints resolution bodies or not to offer consumers any recourse beyond their own complaints handling. Indeed, a number of key players have chosen not to join.

The companies claim that market forces are sufficient to ensure that the CCTS continues to operate. This argument may seem attractive at first blush. But recall that the CCTS was not a voluntary initiative – the industry was effectively ordered to set it up. Market forces are not driving this initiative and are unlikely to drive it in the future. This is because consumers don't generally think about dispute resolution when they sign up for service – unlike price and fancy service features, it's not something that companies advertise.

So if voluntary, it is likely never to be comprehensive, and indeed may well leave consumers in certain geographic areas without recourse beyond their service provider.

If voluntary, there would be no guarantee that the agency will continue operations into the future. Like the Cable Television Standards Council and the Ombudsman for Long Distance Telephone Services, both of which were voluntary industry initiatives, it could well die a quiet death.

Making it mandatory will have the added benefit of creating a barrier to entry by bad actors – if they are less likely to get away with poor service in Canada, they may decide to stay away.

It will also ensure that consumers have a single point of contact for resolving telecom disputes. This is more efficient than allowing two or more schemes to operate at the same time.

> The Broadcast Standards Council does a fine job as a voluntary body – but it is an entirely distinguishable enterprise on numerous counts, most notably that complainants always have recourse to the CRTC, since the matters in question are regulated.
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> Moreover, billing disputes are of an entirely different nature than offensive content complaints:
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> - they are persistent, while offensive content is ephemeral;
> - they involve money, not opinions;
> - complaints are about the service provider itself, not third party content;
> - remedies involve compensation, not just apologies;
> - changing service providers is much more onerous than simply changing the channel.

With great respect for Mr. Cohen and the CBSC, its relevance to this proceeding is limited.

Governance Structure

Cabinet's Order is clear that "the governance structure of an effective Consumer Agency should be designed to ensure its independence from the telecommunications industry..."

The CCTS model gives industry too much power over the agency and therefore does not, in our view, meet Cabinet's requirement of independence.

First, although this is an agency designed to serve consumers, only one of the 7 board spots is reserved for a consumer representative. In contrast, industry reserves 3 seats for itself. There should be at least as many seats on the board for informed consumer representatives as for industry, in order to ensure balance the competing interests. One tie-breaking seat can be given to an independent director.

Second, even if board membership is balanced, industry has created a structure that ties the hands of the Commissioner, in at least three ways:

1) The Commissioner cannot report on systemic issues or initiate the development of industry codes of practice without being requested to do so by TSP members (Bylaws, s.86). Yet these are important functions that Cabinet explicitly set out for the new Agency.

2) The Commissioner must get Board approval in order to conduct research into complaint trends (TSPs July para.13), or to work on industry codes of conduct or standards. Again, it's unclear what this achieves other than to keep the Agency from doing the work it should be doing.

3) Board approval of the Annual Report requires a 2/3 majority, which equates to 5 of 7 board votes, and thus allows TSPs an effective veto over reporting that may put them in a bad light.

It is hardly a "safeguard" to give the very industry that is being disciplined by a supposedly independent Commissioner the power to prevent that Commissioner from reporting and working on issues he or she considers worthy of attention.

In no case should industry have the right to interfere with, let alone have a veto over, Commissioner publications, activities or determinations regarding complaints or marketplace issues.

The TSPs have set up their Bylaws so that the Procedural Code and Bylaws cannot be changed without an Extraordinary Resolution, which requires approval by 2/3 of industry members. Given the novel nature of this initiative, and the fact that the very industry subject to Agency orders has been tasked with designing it, there is a strong likelihood that changes to the Code and Bylaws will be needed in the future to better serve the public. But there is an equally strong likelihood that the TSPs' self-interest will cause them to block such changes.

We note, in this respect, that a recent review of the Ombudsman for Banking Services and Investments recommended enlarging the Ombudsman's mandate to include systemic issues. We also note that the OBSI Board is composed of seven independent members and three industry members.

<u>Mandate</u>

(a) Systemic Issues

Quoting again from the Order in Council, "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,
- publishing an annual report on the nature, number and resolution of complaints received for each telecommunications service provider, and
- as appropriate, identifying issues or trends that may warrant further attention by the Commission and the government."

In spite of this clear direction from Cabinet, the industry model focuses almost exclusively on individual complaints, providing the Commissioner with potentially no leeway to pursue these other, equally important activities. As already mentioned, industry has given itself the right to block publication of reports that it doesn't like, indeed to prevent the Commissioner from looking into systemic issues in the first place.

The Letters Patent of the industry corporation limit its objects to individual complaints resolution and the publishing of annual reports. The Procedural Code deals only with complaints resolution, And the Bylaws give the Commissioner no powers to report on

systemic issues or to develop industry codes of conduct except upon request by TSP members.

Yet the Agency's most valuable function may be its ability to deal with and resolve recurring or broad-based marketplace problems.

In CIPPIC's view, the Agency is going to be of very limited effectiveness if all it does is resolve individual consumer complaints. Many of the issues coming before the Agency will be of a systemic nature, requiring action on a company or even industry-wide basis. For reasons of efficiency and effectiveness, the Agency should be given explicit powers – indeed duties - to investigate and report on such issues.

We agree with the TPRP that the Agency should be empowered "to conduct research and analysis into significant or recurring consumer problems", and to refer such matters to the CRTC, with a requirement for the CRTC to respond within six months.

(b) Eligible Complaints

Scope

An effective Consumer Agency should be empowered to deal with all consumer complaints involving telecommunications services other than those:

a) that involve non-telecommunications services or services beyond the TSP's control;
b) that <u>are being</u> or <u>will be</u> resolved by another body (including the CRTC), or
c) that have to do with content, the *setting of* prices, or general telecommunications policy more properly handled by the CRTC.

In particular, the Agency should be empowered to deal with complaints about contract terms, customer service, misleading advertising, sales tactics, and other operating practices – all matters that the CCTS currently treats as outside its scope.

Interestingly, complaints about customer service and contract terms account for close to half of all complaints to the Australian TIO. Common customer service complaints include failing to act on a customer's request, giving incorrect or inadequate advice, or not being able to be contacted. Common contract complaints include high termination fees, changing terms in mid-contract, and providing inadequate or misleading advice at point of sale.

I've heard no good reason why the Canadian body shouldn't be likewise empowered to deal with these kinds of issues.

Overlapping jurisdiction

Issues such as misleading advertising and privacy should not be treated as outside the Agency's scope simply because another agency has jurisdiction over them. Consumers must be assured of recourse from that other agency before they are abandoned.

We all know that individual complaints about misleading advertising are rarely if ever acted upon by the Competition Bureau. The Bureau is not a consumer protection agency, and does not pretend to offer consumers recourse. To pretend that consumers have effective avenues of recourse against companies for this kind of activity is to deny reality.

Regulated Services

We agree with the TPRP that regulated as well as unregulated services should be covered by the Agency. There are a number of reasons why this makes sense:

- from the consumer perspective, there is no difference – telecom service is telecom service, and the same recourse should be available for poor service whether it's regulated or not;
- the category of regulated services is a moving target as deregulation proceeds;
- it's more efficient for one agency to deal with consumer complaints about all telecom services.

In fact, having two agencies dealing with similar kinds of complaints risks far more "wasteful duplication" of resources than that which the companies claim would result if complainants have recourse to the CRTC should they not be happy with the Agency's decision.

Mixed Issues

Services and matters that are outside the Agency's mandate should be more clearly defined than they are now. Even so, some issues will undoubtedly involve matters that can be seen as either within or outside the scope of the Agency's mandate. The constating documents should state that wherever an issue can reasonably be interpreted as within scope, it should be treated as such.

Remedies

The TPRP recommended a maximum compensation limit of $10,000, and so do we. Similar limits are applied in both Australia and the UK.

While the vast bulk of complaints are likely to involve losses of less than $1,000, there will realistically be at least some for which a higher level of compensation is justified. It is not clear why the Agency should be restricted from ordering awards of higher than $1,000 in deserving cases.

More importantly, however, TSPs should not be able to undermine the regime by inserting into their terms of service clauses that limit their liability for precisely the kind of behaviour that the new Agency is meant to address. If contractual restrictions are allowed

to take precedence over the Agency's powers to order compensation, it won't matter what the limit on awards is – companies will simply (as they do now) ensure that their terms of service relieve them of any meaningful liability.

We did a quick review of some of the CCTS member terms of service, and found that they all contain liability limitation clauses that would, under the CCTS approach, neutralize the Agency's ability to award compensation in a wide range of cases. Many deny any liability whatsoever; others limit it to $20.

It's important to note that these terms are not legally enforceable simply by virtue of being in the contract. Indeed, we would argue that they are invalid under both provincial consumer protection legislation and the common law doctrine of unconscionability. We are unaware of any caselaw in Canada upholding, for example, Bell's $20 liability limitation for breach of contract and we doubt that any court would uphold such limitations on consumer remedies.

The law does not prohibit companies from putting outrageously unfair terms into contracts. And so of course they do, knowing full well that the terms will not be enforced but hoping that they might at least deter some consumers.

So, unless confirmed by the courts as fair and enforceable, these clauses should be given no weight in the determination of appropriate remedies by the new Agency.

With respect to other contractual clauses such as time periods for bringing complaints, we recommend that the Agency rules take precedence over any conflicting contractual provisions.

Operations

For the most part, the CCTS procedures for complaint handling are fine. However, we believe that a few changes are necessary:

1. Email complaints should be accepted.
2. Webforms should not be used unless they automatically send a copy of the complaint to the complainant, so that the complainant has a record of what she sent in.
3. Complaints should be accepted over the phone, as they are in Australia.
4. Complaints should not be rejected simply because complainants fail to specify the result they would like to see, or their consent to be bound by the Agency's rules. (Proc.Code 6.1)
5. Complaints should not be rejected simply because they are filed by several Complainants (Proc. Code 6.14).
6. 20 business days is too long for the initial company response to a complaint from the Agency; timelines should be shortened.

Other Matters:

Confidentiality: As already noted, the Order in Council calls for the Agency to publish "an Annual Report on the nature, number and resolution of complaints received for each telecom service provider". Clearly, it contemplates publication of reports identifying complaints by TSP.

Yet, the CCTS Bylaws (s.86) require that any reports on industry issues "shall maintain the confidentiality of the TSP Members", completely contradicting Cabinet's direction.

Publicity is a powerful compliance tool, and can be used to encourage early stage complaint resolution. However, it is also important for general transparency and accountability purposes, key components of an effective marketplace. If the anonymity of TSPs is protected except with respect to the few matters that reach a binding decision stage, the Order in Council will not, in our view, have been fulfilled, the Agency will be severely frustrated in its ability to inform the public and the CRTC, and the potential for this process to affect marketplace behaviour will be limited.

The Agency should be empowered to name TSPs in all general statistics reporting by issue and complaint level (as is done in Australia). I have copies of the most recent Australian complaints reports for your review, so that you can see how this is being done, without any ill effect on the industry.

Promotion

In order for the Agency to be effective, it must be well-known among consumers, and individual consumers must be referred to it in all appropriate cases. The CRTC should therefore ensure that all TSP members clearly and prominently advertise the agency on their websites, in their promotional literature, and on all bill statements. And efforts should be made to ensure search engine optimization and placement.

Consideration should also be given to a new name for the Agency – while it's obvious that a lot of lawyers worked on this initiative, it doesn't seem that the companies put their considerable marketing resources to work on this.

Conclusion

In short, consumers, Cabinet and an expert panel established by the government are calling for an independent, effective agency with sufficient powers to influence market behaviour in the telecommunications industry, as well as to resolve individual complaints. The CCTS is not yet that Agency.

Thank you