



Telecom Notice of Consultation CRTC 2012-557

**Proceeding to Establish a Mandatory Code for
Mobile Wireless Services**

CRTC Reference No.: 8665-C12-201212448

**Oral of the Samuelson-Glushko Canadian Internet Policy & Public
Interest clinic (CIPPIC) & OpenMedia.ca**

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Good morning.

1. Mr. Chairman, Commissioners, my name is Tamir Israel, and I am staff lawyer with CIPPIC, the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic. Here with me today is Lindsey Pinto who is the Communications Manager at OpenMedia.ca.

2. I wanted to thank you for giving us the opportunity to come here today to participate in this proceeding. It touches on issues that are very important to OpenMedia.ca and to CIPPIC, so we are grateful for this opportunity.

3. To start off this morning, Lindsey is going to talk a bit in general terms about some concerns voiced by Canadians on the general nature of wireless services in Canada. After that, I will provide some specific comments on the Draft Code provided by the Commission, and then we will be happy to take your questions.

4. Thank you for having me here today. I applaud the CRTC for taking the initiative to develop this national code of conduct.

5. I appear before you as the Communications Manager of OpenMedia.ca. OpenMedia.ca is a grassroots organization that works towards informed and participatory digital policy.

6. Over the last few months, 2,859 Canadians visited OpenMedia.ca's website to submit their "Cell Phone Horror Stories" and inform this hearing. Their comments were also used to inform our submission to this proceeding. The Canadians who commented are customers in the wireless market, and have experienced trouble with providers.

7. Acting on behalf of citizens, OpenMedia.ca and CIPPIC have put forward a submission that is grounded in the lived realities of Canadians. Their concerns are valid, and there is clear evidence to support them: Canada's digital future will thrive through more choice and stronger incentives for innovation.

8. With so much at stake for millions of individuals and the industry as a whole, the outcome of this hearing should be a Code of Conduct that facilitates choice and innovation, that safeguards against price-gouging, and that is evidence-based and grounded in the lived realities of Canadians.

9. Firstly, we feel it's crucial to facilitate choice and innovation in the wireless market because, as Chair Blais stated before the Heritage Committee in October,

"The future of the communications sector rests mostly on the rapidly changing technology, the dynamism and innovation of the industry, and the creativity of Canadians."

10. Canada simply cannot afford a wireless market that is anti-technology. Every Canadian should enjoy real choice and diverse options for wireless service. Fostering real options in the wireless market will help lower prices and increase connection speeds, strengthening Canada's digital future.

11. The comment from Chris Rogers of Guelph, Ontario, provides an excellent summation of how punitive contract termination fees—an issue within the CRTC's proposed scope for the Code—act to impede choice in the cell phone market. He writes,

"I find it despicable that some carriers continue their archaic contract cancellation policies, which keep customers afraid to leave their carrier if they want to try a new one. The companies know that these inflated fees scare their customers [...]. This behavior and policy is terrible and we need less of a stranglehold on our activities and options as customers. Let's do something about this [...]"

12. As this citizen points out, high termination fees and automatic renewals, to name only two issues, are symptomatic of a situation where only a few incumbents control a vast majority of the market. Those large players, as such, have little incentive to innovate or to provide competitive service offerings, but only to retain their dominant positions.

13. The vast majority of the cell phone market is controlled by just three companies; Canadians want to be empowered to freely switch between providers, including to independent operators.

14. The Code must also safeguard against price-gouging. In order to have real choice, Canadians must be able to make informed decisions about the carriers they choose, the prices they pay, and the contracts they sign. We cannot allow these decisions to be clouded by unclear or inaccurate representations of communications services or of their prices.

15. Toronto's Jowi Taylor, for example, felt misled by Rogers' marketing tactics after she attempted to plan ahead for a trip. She writes,

"On a weekend trip to Chicago last year, I planned ahead and bought that \$30 Month Pass in spite of the fact I was going for only 3 days but I wanted to be safe. [...] I arrived home to a bill for over \$400 for data roaming charges. When I called to complain, I was advised that the iPhone uses lots of data for background location services and that kind of thing, which is why my data charges were so high. Well, isn't that kind of what a smartphone is all about? Isn't that the purpose of having that phone in the first place? How can they advertise that you can stay connected on your travels and 'Roam Free'? Why call the package a Month Pass when it's clear that even the most basic smartphone use is going to chew up the data limit in a matter of hours?"

16. The CRTC should protect Canadians from exploitation when they enter into cell phone contracts. This includes practices such as unclear fees including excessive termination fees, lack of advertising or contract clarity, and changes to agreements without customers' consent.

17. You must hold carriers accountable for the promises they make to citizens and ensure that carriers compete fairly.

18. Finally, the Code must be evidence-based. This means that it must be grounded in the lived realities of Canadians, as a broken wireless market has real human consequences.

19. A lack of choice in the cell phone market leads not only to stagnation, not only to dead weight on our digital economy, but also to poor quality of service and continual disregard for citizens' needs. In her Cell Phone Horror Story, Ontario resident Leah Nielson described the difficulty her mother experienced dealing with Bell representatives after the death of Leah's father:

"a few days after the funeral [...] I had to start helping my mom take care of various business items, such as cancelling the cell phone that my dad had. I will never forget my mom calling the cell phone company. The operator at Bell was unbelievable. My mom explained that her husband had just died and that she needed to cancel his cell phone, but she would be keeping her phone. The operator didn't even have the courtesy to express her condolences and then proceeded to tell her that there would be a \$200 + early cancellation fee."

20. The CRTC has taken great strides forward in realizing that citizens are key stakeholders in the telecommunications market. I encourage the CRTC to continue acting in a way that demonstrates it is not simply an industry regulator, but also a Canadian institution uniquely positioned to champion the public interest.

21. The telecommunications industry is very complex. To fully understand it one needs to understand engineering and technology, contract law and policy, customers' rights, the role of communications in democracy and culture, and more. Citizens can be incredibly intelligent and still miss a detail in a contract, or still be uninformed about a policy that ought to protect them. They can have foresight but still be hit with unexpected life changes. They can be sceptical but still be fooled by misleading advertising. That is what the writers of this Code must acknowledge. This is about equipping Canadians to participate, to make informed decisions, and to exercise real choice. To do this, the CRTC must act upon citizen input—their stories—above all else. This proceeding has the potential to lay the groundwork for citizens to become masters of their own digital future.

22. My colleague will now discuss in more detail some elements of the draft Code you have presented. Canadians await your Code and in the hope that based on the frame outlined you will make it one that paves the way for a brighter chapter in our country's digital history.

23. As Lindsey noted, I hope to address a few specific concerns relating to the Commissions' Draft Code. We would be happy to address other elements in more detail either during the question period or in our written reply.

24. Globally, we note that there are many great things in the Draft Code, and it forms a solid basis for a finite consumer protection Code. However, some adjustments are necessary if it is to provide an adequate level of protection for Canadians. Specifically, our comments here are designed to ensure that the proposed national Code: does not reduce protections already offered by Provincial legislation; b.) levelling the playing field by empowering customers and placing them on equal footing with providers; and c.) takes steps to reduce customer lock-in.

Preserve Provincial Protections

25. The Code should not operate to defeat protections already available to customers through provincial effort. Specifically, the scope of available enforcement mechanisms should not be undermined.

26. **Systemic Enforcement.** Current provincial protections offer a mechanism for both systemic and ombudsman-like enforcement of the protections they offer. Most provincial

consumer protection statutes allow for private rights of actions, statutory damages and, critically, class actions.

27. The CCTS has proven effective at resolving disputes on an individual arbitration basis. However, CCTS decisions are not publicized unless there is a lack of resolution. Additionally, the CCTS lacks the powers to enforce judgments on an industry-wide basis, or the jurisdiction to hear broad-ranging public interest-based complaints. It also lacks the possibility for interventions. While the annual reports can form the basis of broader-ranging procedures before the Commission, there are no comparable enforcement mechanisms in the current Draft Code.

28. We therefore suggest, at minimum, section A4 of the Draft Code should be retained, so that provincially granted rights and remedies, where provided, should continue to be available to customers. Additionally, thought should be given to mandating service providers to include the Code as an over-arching set of contractual obligations to their customers. In the alternative, more comprehensive powers for the CCTS may address some of these issues.

Level the Playing Field

29. Elements of the Draft Code should be improved to help place customers on a level playing field.

30. **Cooling off periods.** CIPPIC and OpenMedia.ca support a cooling off period for mobile devices. The objective of a cooling off period is to let customers assess their handset 'in the field' before committing to an expensive device.

31. Cooling off periods are a regular hallmark of consumer protection legislation, and many technical devices, when purchased in-store, will provide cooling off periods. Such cooling off periods would not be problematic, and would likely be provided by device retailers by normal course of business. It is primarily the prevalence of fixed-term contracts that deters the use of cooling-off periods.

32. **Contract Renewal.** D3.4 allows for contractual renewals to default to month by month services. We have suggested a 'grace period' where customers are insulated from sudden changes to the terms of their services on the day their fixed term contract

terminates. Often, service providers will default customers to the most expensive available plan upon such expiry. A 30-60 day 'grace period' would help remedy this concern.

33. **Unilateral Changes.** The Code adopts measures to insulate customers against unilateral contract changes. These require some adjustment if they are to address customer concerns. Unilateral changes are one of the greatest sources of frustration for customers, and are inherently unfair. Customers sign up for what is all-too-frequently a three year contractual term, only to have the underlying conditions of the service change part way through. The Draft Code provides customers with the right to cancel any contract 'without penalty' if the service provider make changes.

34. Customers should have the option of refusing changes imposed on them during a fixed contractual term. Simply permitting them to leave 'without penalty' may not be sufficient. Mobile devices may not be compatible with other local service providers. Comparable service offerings may no longer be available. For this reason, a number of Provincial statutes grant customers the right to refuse changes while maintaining their service contracts. The Code should adopt this right of refusal.

35. Section D2.2 of the Draft Code categorically excludes fair use policies from this regime. The line between 'fair use policy' and 'key service component' is thin. Data usage is a primary example of this. Often, a fair use policy will impose additional usage restrictions, and even additional data usage fees. Changing these can substantially alter the nature of the service, and customers should not be saddled with such changes unilaterally in mid-service.

36. Finally, all significant changes should be covered, whether periodic or otherwise. This includes add-on services such as voice mail, which are integral to the service.

Recommendations:

Provisions in the Draft Code should be amended to ensure:

- › a right of refusal for substantial changes;
- › the inclusion of *any* substantial changes, whether classified as 'fair use policies' or otherwise; and
- › the inclusion of all integral service elements such as voice mail.

Locking Customers In

37. Canadians are highly concerned about being locked in to services that they are unable to leave. Concerns over lock-in and high switching costs have been voiced by regulators around the world, the competition bureau and an overwhelming number of individual participants in this proceeding. We agree. Lock-in problems are a source or contributing factor to much of the frustration and specific harms that customers have voiced in this proceeding. Faced with poor service offerings, bad customer service or life changes, customers are prevented from leaving their providers. This has direct impact on customer satisfaction, as well as on competition, as it can raise switching costs to significant levels.

38. While it is not clear the extent to which this practice occurs, it also provides current carriers with a unique opportunity, 80% into a fixed term contract, to waive outstanding termination fees for any customer who wishes to sign on for a new term with a

39. In addition, the mechanism by which Canadians are locked in causes additional problems. The intermingling of device costs with service offerings insulates both the device market and the service market from direct competitive pressures. While most Canadians would gladly accept a free smart phone every three years, it is not clear that they would willingly pay the added costs – currently built into their monthly fees – associated with a 2.5 year replacement cycle.

40. While the Code seeks to address this issue by means of an unlocking provision and limits on termination rates, greater steps must be taken to ensure it achieves these objectives.

41. **Unlocking.** The current Code provisions need to ensure that unlocking fees do not operate to unreasonably frustrate Canadians seeking to fully enjoy the use of their devices or to change providers. With respect to section D7.1 of the Draft Code, our preference is for Option 2. But, at minimum, Option 2 should be modified to remove fees for unlocking subsidized handsets as well as unsubsidized ones.

42. Moreover, a better understanding of the underlying costs and considerations associated with locked devices is needed. If it is viable – even at some cost to carriers –

adopting a 'no locked handset' rule should be considered. As noted by the Competition Bureau in its comments to the online consultation on the Draft Code:

Locked handsets are a powerful block to consumers who want to switch service providers. The Bureau believes that device locking should be prohibited in the marketplace, and that service providers should be required to unlock any previously locked devices free of charge. Therefore, the Bureau recommends that Option 1 in section D7.1 be adopted in the Wireless Code, but with no fee attached to the unlocking, as any such fees create switching costs that may harm competition.

43. **Device/Service Contract Bundling.** The termination fees adopted by the Code impose additional switching costs. These can be hundreds of dollars, depending on how much of the contractual term remains. Again, referring to the Competition Bureau's comments on this Draft Code:

...restrictive, long-term contracts have been found to raise concerns when they create switching costs that harm the ability of firms to enter into or expand in markets. In past cases, the Competition Tribunal has issued orders limiting such contracts, in one case limiting them to one year, and in another disallowing them entirely. The restrictive, long-term contracts used by existing service providers may impose switching costs on consumers. There is extensive economics literature on switching costs that demonstrates how these costs harm competition and reduce consumer welfare.

44. A number of solutions have been suggested to address this issue. Finland, for example, imposed an absolute ban on device subsidies for a period of time. While in effect, this led to increased churn rates, heightened competition, reduced service prices, but also longer handset replacement cycles. A number of other jurisdictions impose two year limits on service contracts. Each of these should be considered.

45. As an alternative to adopting one of these solutions, section D3.3 of the Code should be modified provide customers with the option of paying outstanding device indemnification fees in monthly installments. This will ensure that high handset prices do not translate into heavy one-time termination fees, operating as switching costs.

Conclusion

46. In sum, we congratulate the Commission in this Draft Code it has developed. With the modifications suggested herein, it will serve as a long and enduring basis for customer protection, and will leave Canadians with a vibrant and competitive marketplace.

Thank you, those are our submissions. We will be pleased to take your questions.